Chapter I – Introduction

In the early days of legal theory it was generally thought that law was an immutable part of human nature – notably in legal theory the accounts of Aquinas and Blackstone.[1] The consequence of this sort of thinking however was that it tends to insist that the laws of all peoples should tend towards the same structures and substance. Leaving little room for the wide variation of practices and legal rules that are found historically and by example, since for positive law to be compatible with natural law it must conform to 'right reason'.[2] Important in this connection is whether an immoral or unjust law is in fact a law, right reason holds that it is not. The existence and persistence of this kind of rational and natural thinking prevailed without substantial challenge until Bentham started the fully fledged legal positivist tradition criticising such ontological accounts of rights and laws as 'nonsense upon stilts'. Both Bentham and his student Austin found themselves closer to Hobbes after criticising these ontological notions, wedding themselves to the idea of a 'Sovereign' in order to explain how it is that there could be law without ontology or grandiose metaphysics.

While both Austin and Hobbes insisted that the Sovereign was legally unlimited, Bentham did not – although his account of a legally limited Sovereign has proved deficient like Hobbes' and Austin's accounts.[3]

1 References in this essay to 'naturalistic' or 'naturalism' and the like are references to natural law and natural law theorists works, not philosophical naturalism or anything else unless mentioned expressly.

2 Leslie Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) xviii.

3 HLA Hart, 'Bentham on Sovereignty' (1967) 2(2) Irish Jurist (ns) 327, 328–30. See also, HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) Ch IX.

Unfortunately Bentham's nuances were hidden for many years with his manuscripts on the subject only becoming recently known and so it was Austin's blunt account that became the most influential of the early positivist theories. In the last century positivists made a move to break from these early positivists, especially Austin, and their devotion to the Sovereign. Positivists like Kelsen were unsatisfied, for instance how can the Sovereign be said to be the origin of a contract between two private parties? Thus Kelsen orchestrated the beginning of contemporary thinking of law being composed of 'rules' and of there being a hierarchy of rules – important then is for there to be a rule at the top of the hierarchy, thus the rest of the rules will derive from it and that collection of rules is the legal order.[4] Hart, while inspired by Kelsen's move past the Sovereign, was unsatisfied with certain strands of Kelsen's theory. Hart broke away from Kelsen importantly because Kelsen stipulated that beyond a constitution there was the highest rule that is 'hypothetically postulated' called the *grundnorm* or *basic norm* – whereas Hart's highest rule is the rule of recognition, an empirical question of fact.[5] This has the other crucial benefit of helping distinguish legal rules from moral and social rules as different kinds of norms, which the *Grundnorm* struggles to do.[6]

Hart went much further than attempting to simply move past one or two limitations of his predecessors and considered a broader range of questions. This resulted from his entire approach being different to theirs.

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4 For instance, Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) 110–4.

5 HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 292–293. See also, HLA Hart, 'The New Challenge to Legal Positivism (1979)' Andrzej Grabowski (tr) (2016) 36(3) Oxford J of L Studies 459, 465.

6 For instance Kelsen says, 'a system of norms can only be valid if the validity of all other systems of norms with the same sphere of validity has been excluded', Kelsen, *General Theory of Law & State* (n. 4) 410. Thus according to Kelsen there cannot be a valid system of moral norms and legal norms which conflict, it would be the same as saying A and not A. For Kelsen if the legal norms are valid then no moral considerations may be heard. Hart seeks to distance himself from this view because Hart thinks that one can accept the validity of something as a law but withhold their obedience on moral grounds, this allows for better moral deliberations because one can consider what it means for something to be an 'evil law' which is something the Kelsenian view and natural law do not allow, see, Hart, *The Concept of Law* (n. 5) 207–12, 292–3.

Hart was concerned with how it is that the social world can progress to the legal world and to do this he paid special attention to the use of words and their underlying meaning.[7] Many writers, notably Hart's most persistent critic Dworkin, have displayed confusion and suspicion at Hart portraying his book as an essay in 'descriptive sociology',[8] however it is remiss to ignore that the first five chapters of *The Concept of Law* (hereafter "*CL*") are dedicated in essence to this question of legal and pre-legal, i.e. how a society without law develops into one with it. Sociologists are interested in understanding 'society' rather than the individual, that is, the motivations societies have for doing things and acting in the way they do rather than the factors at play in the minds or cognition of individuals. In this regard it would be quite difficult to understand modern societies whilst ignoring the existence of law, therefore there are obvious sociological interests in this question of what makes a society a legal or pre-legal one. Thus, Hart, following in the tradition of the early positivists, set out empirical conditions which have to be met which can be used for such sociological analyses, rather than metaphysical concepts and structures. In this way Hart set out the conditions that have to be met in order to say that there is a legal system and thus where there is a legal system there can be law.[9]

This difference in Hart's sense and use of the word 'law' has led to many confusions and mistakes regarding understanding and critiquing Hart.[10] Since Hart expressly rejected the idea that he was attempting to explain law *simpliciter*, as this would entail having to provide definitions and rules governing the use of words like 'law' or 'legal'.[11] Thus, according to Hart, his book is offered as *CL* rather than *The Definition of Law*.[12] For example, Hart holds that attempts to narrow valid laws only to rules which are morally acceptable is to narrow the concept

7 Hart, *The Concept of Law* (n. 5), Preface, 14.

8 See, Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 22(1) Oxford J of L Studies 1, 21.

9 Hart, *The Concept of Law* (n. 5) 100–101.

10 Others have also argued that not appreciating this distinction is an error in critiquing Hart, see for instance, Michael Payne, 'Hart's Concept of a Legal System' (1976) 18(2) William and Mary L Rev 287, 298–9.

11 Hart, *The Concept of Law* (n. 5) 17, 213.

12 ibid, 213.

too much and inconsistently with its usage, but does not seek himself to venture further and describe other conditions of valid laws.[13] But here rises another difficulty which has been expressed by others, which is that Hart's 'empirical project' is strange in that it does not use empirical methods.[14] Usually styled "why write a book about empirically identifying law but proceed to call it *CL*?" One answer could be to say that to assert that something is empirically testable cannot itself be an empirically testable or contingent thing, since then one could empirically discover that the original article is not empirically testable and the claim that it was testable was therefore false *ab initio*. This argument was advanced by Kant about Hume's empiricism as a reason for concluding that *a priori* statements are necessary and exist.[15] Thus Hart may have said that the conditions for law to exist must be empirically satisfied but the argument or theory itself cannot be (entirely) empirical – though he would probably just say he never described his project as empirical.

At some stage that answer may have been conclusive however contemporary philosophical debates doubt the neat divide between *a priori* and *a posteriori* statements.[16] There is now a multitude of theories attempting to show empiricism is better than rationalism or conceptualism and that they are misconceived or simply false without a shred of truth, then there is arguments attempting to show the reverse, while others attempt to find some middle ground.[17] Thus, it can be difficult to address criticisms of Hart's alleged conceptual or empirical short-

13 ibid, 214.

14 Or that if it is to be some sort of empirical generalisation it is bizarre, for instance, Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 8) 22; Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) 404.

15 Immanuel Kant, *The Critique of Pure Reason* (first edn published 1781, second edn published 1787, Cambridge edn, Cambridge UP 1998) B5.

16 See generally, Bruce Russell, '*A Priori* Justification and Knowledge' *The Stanford Encyclopedia of Philosophy* (Summer edn 2020) <https://plato.stanford.edu/archives/sum2020/entries/apriori/> accessed 11 May 2023.

17 See generally, Peter Markie and M Folescu, 'Rationalism vs. Empiricism' *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) <https://plato.stanford.edu/archives/spr2023/entries/rationalism-empiricism/> accessed 11 May 2023.

comings since each critic may have different supporting opinions from those philosophical debates, i.e., each objection may mean different things when it speaks of empiricism, rationalism, or conceptualism.[18] To get involved in those debates is not the purpose of this essay and so there will be no direct use of material from them for the same reason. Thus this essay is focused on objections stemming from analytic legal theory and should only be taken to have such intended scope.

Notwithstanding the ongoing philosophical inquiries there has been a collection of sustained objections and misconceptions about Hart's project that must be addressed for the sake of legal theory. The general character of these objections is that they dismiss the core of Hart's methods in order to dismiss his conclusions. Hart sought for his theory to be 'general' and 'descriptive' – to be general so as to account for a variety of *legal systems* and to be descriptive in that it does not justify or morally comment on any particular system, e.g., as good, bad, efficient, or impractical.[19] This was a lesson ushered in by Kelsen and Hart because the early positivist accounts based on the Sovereign cope at a basic level when accounting for legal systems like those historically of the United Kingdom or the Roman Republic, with legally unlimited monarchs and representatives, but cannot adequately cope with federal systems and other governmental configurations. By adopting this methodology Hart avoided being waylaid in these sorts of difficulties. Notice that Hart's argument, that laws come from legal systems, is present in these early accounts which reduce legal systems to the Sovereign.

Attempts to mitigate these significant explanatory deficiencies in legal theory by adopting these methods are often underappreciated by positivism's and Hart's critics. The objective of this essay therefore is to explore aspects from a specific set of unanswered objections from these criticisms that are directed at or relevant for Hart's theory, with a focus on Hart's methodology. The centre of this focus, and indeed this entire project, is to show that by elucidating legal systems rather than

18 Others share this concern in legal theory generally, see especially, Julie Dickson, *Elucidating Law* (Oxford UP 2022) 39–40.

19 Hart, *The Concept of Law* (n. 5) 239–40.

law *simpliciter* Hart's theory is defensible from these objections. This will allow for it to be used in other areas of legal theory.

Chapter II seeks to dispute Ronald Dworkin's criticisms of Hart on two fronts. The first front is the challenge posed by interpretivism and the alleged existence of objective moral facts later incorporated into interpretivism. Here the driving objection is the incompatibility of fixed moral facts with a non-fixed interpretive enterprise (which is supposed to allow for variation in social concepts). Following this, interpretivism, in the absence of any fixed concepts, appears to suffer from *peritrope* – a charge which, if true, disputes the viability of the entire project. Therefore criticisms based upon it against Hart similarly fall off. The second front of Dworkin's challenge is about the proper way to 'do legal theory' and which sense of speaking about law is correct, i.e. whether it is possible to do descriptive and therefore second-order legal theory. Here some of the flaws in the construction of Dworkin's argument are explicated such that a defence of descriptive legal theory is provided. The justification for choosing to discuss Dworkin should be plain enough – if Dworkin is correct in even one of his arguments, then the Hartian project has failed.

Chapter III seeks to consider Mark Greenberg's account that evaluative facts about what is right and wrong are determinates of 'what makes legal content the way it is'. Here Greenberg alleges there is an explanatory gap in current theories, and to show the importance of this Greenberg also aims to show that Hart's account is similarly victim to this gap and therefore inadequate. The core part of Hart's failure comes allegedly from the inability of Hart's 'practice theory' to explain the determinates of legal content. Thus an examination of this theory and its representation of Hart is due, considering also how this practice theory came to be since Hart did not construct this theory himself. Following this the chapter is dedicated to testing the crux of Greenberg's argument the 'rational relational requirement', which is a requirement that explanation of legal phenomena must respect a constraint of intelligibility. Theories of argumentation will be considered to explore whether they might offer a challenge to Greenberg. A vital line

of inquiry is also developed which is that Greenberg fails to provide any analysis of the place of legal systems and the effect this may have on legal content, thus failing to capture the thrust of Hart's project. The objections to Hart therefore miss their mark. Since this has not been clearly defended elsewhere, this account is deserving of attention.

Chapter IV is dedicated as a response to Hilary Nye's criticism of the 'concept-nature nexus'. While this criticism is directed at Raz's methodology it can, *mutatis mutandis*, be applied to Hart. Nye holds, *inter alia*, that there is an epistemic gap between the nature of a thing itself, the concept that corresponds to that nature, and the variety of concepts that each individual or group of individuals may have. Nye also adopts in this connection a criticism against the type of conceptual analysis regularly employed in legal theory. It stands to reason that if Nye is correct about this gap and conceptual analysis that much more of legal theory is in jeopardy than just Raz or Hart. Here a critique of Nye's arguments is mounted, along with a defence of Hart's search for definition in law. An interjection here stands to clear up some misunderstandings and provide a renewed discussion of definition in legal theory, which has been ignored and forgotten for far too long.