The Concept of Law Study Guide

The Concept of Law by H. L. A. Hart

BOOKRAGS

Contents

Plot Summary

The Concept of Law is one of the most important books in the philosophy of law. Its author, Herbert Lionel Adolphus (H.L.A.) Hart (1907-1992) was one of the most important social philosophers of the twentieth century. Hart spent most of his professional life as professor of jurisprudence at Oxford where he wrote a number of important books, The Concept of Law being the most famous.

The Concept of Law focuses on what law is and the difficulties defining it. In pursuing clarity about the concept of law, Hart addresses many issues, including the connection between law, coercion, morality and judicial decision-making. Hart's first important contribution to philosophy of law in the book is his criticism of John Austin's view that law is a command backed up by coercive force. Law is both more and law than this. Hart's set up of the major problems and his critique of Austin comprise the first four chapters.

Hart resists reducing the concept of law to one definition; instead, he distinguishes between two concepts of law: primary rules and second rules. Primary rules are rules of proper behavior that specify what actions are required by the law. Secondary rules confer powers to create, interpret and adjudicate primary rules. Developing secondary rules is an enormous social achievement that makes human civilization possible. Secondary rules help to clarify what primary rules mean but no rule can make language determinate enough to eliminate the need for interpretation. Instead, political and legal officials must use discretion to make determinate what would otherwise not be. These matters are taken up in chapter five.

In chapter six, Hart discusses how a legal system may be evaluated from both an 'external' point of view that describes what a society's laws are and the 'internal' point of view of those who accept the rules as standards. Both points of view are required to define a legal system. Legal systems require an ultimate rule of recognition which structures all the other primary and secondary rules. Private citizens must generally obey primary rules and public officials must accept secondary rules for these rules to exist.

In chapter seven, Hart rejects formalism and rule-skepticism as unnecessary extremes for making sense of legal systems; formalism treats all laws and rules as determinate, whereas rule-skepticism recognizes indeterminacy but does away with rules as a result. Hart thinks there is a middle ground.

In chapters eight and nine, Hart analyzes the relationship between justice, obligation and morality. He also denies that law and morality have any necessary connection; they also have important differences, such as that morality cannot be changed at will. Some justifications of laws may be largely independent of morality. Hart then contrasts legal positivism, the view that law and morality have no necessary connection, with natural law theory, which holds that legitimate laws are rooted in morality. Hart is a 'soft positivist' because he thinks that rules of recognition may include moral rules.

In chapter nine, Hart finds international law problematic because it often lacks secondary rules. In the postscript, Hart addresses a number of criticisms of his view advanced by legal theorist Ronald Dworkin.

Chapter 1, Persistent Questions

Chapter 1, Persistent Questions Summary and Analysis

Hart opens The Concept of Law noting that few questions have been asked so often by so many distinguished thinkers as the question, "What is law?" Most statements about law made by history's great minds have been both clearly true and deeply puzzling. The concept of law is simply hard to analyze. For one, it is how to find out whether something is law. A book of statutes is not necessarily comprehensive and neither is the set of ratified legislation or the set of judicial rulings. We have a general idea of the concept of law's role in various contexts: rules, say, forbid certain types of behavior under penalty; other rules specify how to make a will and legislatures sometimes pass laws. While we could simply rest with reminders about how we use the concept, it is best to try and acquire a deep understanding of the idea. The first step in figuring out what law is, in Hart's view, is to uncover what it is about law that has confounded so many.

Hart identifies three questions that combine into the question of what law is. First, there is the question of what makes a law obligatory. There are, first of all, many sorts of non-optional conduct which are not laws, such as moral rules. A second issue is how law and morality are related. Moral rules are imposed by society. They are taken to be obligatory and societies impose punishment when they are violated (say, in the form of blame or reprimand). But it may still be asked whether laws are moral. Conversely, are any moral rules legal rules? We speak of justice according to the law and of the justice and injustice of laws. Law is thus often seen as a branch of morality or justice; but the question remains whether it is.

The third issue is more general: laws are rules, but this leads one to ask what rules are. What does it mean to say that a rule exists? Do judges apply rules or just their own particular judgments? Sometimes rules are understood as norms habitually obeyed by a social group; others see rules as norms where violators can be expected to be punished. But we often think there is something more to rules; however, it is not clear what that could be. Some react with skepticism about rules themselves.

The definition of law can help provide a map for explaining the relationships between the concepts of law that we have. Yet definitions are not always available and there are obstacles in the way of forming them. Sometimes, on examination, a concept will dissolve into several related concepts; in other cases concepts might simply be vague.

Hart will begin his search for a definition by criticizing other views; he will focus on the views within English jurisprudence that define law as orders backed by threats.

Surprisingly, Hart's primary goal in the book is not to formally define law, but to advance legal theory by offering a superior analysis of what is distinctive about legal systems and about the relationship between law, coercion and morality.

Chapter 2, Laws, Commands, and Orders

Chapter 2, Laws, Commands, and Orders Summary and Analysis

The most serious attempt to analyze the concept of law is Austin's Province of Jurisprudence Determined. The object of criticism in this and the next two chapters is a position that is importantly similar to Austin's. On this view, law is understood as a command such as "Go home!" rather than a request, "Could you pass the salt?" or a warning like "Look out for the bus." Laws are orders or imperatives. And the imperatives are backed by coercion.

In modern societies, it is rare for individuals to explicitly order someone to do something in person; yet laws are coercive. Laws do not themselves coerce but they specify who may coerce and when. Legal control is thus in a sense general; it applies to a large group or classes of person. Making laws thus differs from giving orders to individuals. Laws are also "standing orders" that are not reissued every time they are relevant. Thus, laws require existing general social beliefs that laws are standing and that those who fail to follow them will be punished somehow and by someone. Further, unlike the cases of orders, most laws are characteristically obeyed rather than not because their enforcers are generally obeyed.

We may thus arrive at a general definition of Austin's concept of law: law is a general order backed by threats given by one generally obeyed. But in addition to these properties of laws, laws are also supreme within their territory and independent of other legal systems within countries and outside of them. The laws made by the Queen of England do not apply to Soviet citizens. Thus laws are "internally supreme" and "externally independent".

Chapter 3, The Variety of Laws

Chapter 3, The Variety of Laws Summary and Analysis

Hart argues that if we examine the many types of law, we will find many objections to Austin's basic definition of law. The objections fall into three categories: objections concerning the content of laws, their origin and their range of application.

First, the content of laws. The criminal law specifies duties we must follow. When we break the law we do wrong and commit offense. The point of such laws is to define and punish actions to prevent them from occurring. The law of torts, on the other hand, specifies conditions upon which individuals are compensated for harms produced by the conduct of others. And yet there are legal rules defining ways in which valid contracts are made that only require that individuals act conditionally.

What about laws that structure judicial practice? For instance, judges have powers to try certain types of cases. Other rules determine how judges are appointed or define a court's jurisdiction. The laws define powers, not violations. Other laws determine how disputes are resolved; thus, neither party to a dispute need have done any wrong. There are also statutes that transfer legislative power from larger to smaller legislative bodies. None of these laws are best understood as orders.

Hart continues to illustrate with further cases, arguing that these sorts of laws can only be understood as rules through distortion. Hart claims that all laws cannot be reduced to a particular type; some laws are orders, to be sure. But other laws, like those above, are not. They are, instead, rules that confer and define the ways in which power may be exercised.

Nonetheless, many try to reduce the two types of rules to a single type. For instance, one such approach focuses on the concept of "nullity" which arises when a condition for the exercise of power is unfulfilled. Nullities are sanctions on this view, but Hart thinks this identification is confused; those receiving nullities are not punished in any clear sense of the term, despite the fact that they may be upset by the outcome. The "nullity as sanction" view tries to produce a general definition of law by widening the concept of a sanction, but it fails because it does so implausibly.

Another view sees power-conferring rules as fragments of law. Kelsen, for instance, denies that there are true laws against murder; instead, laws are simply conditional orders to officials to apply sanctions. With elaborate restatements, all laws can be grouped in this conditional form. Hart points out that this conception of law does not see laws as orders backed by threats. All laws are thus reduced to the form, "If anything of a kind X is done or omitted or happens, then apply sanction of a kind Y."

But again, the price of uniformity is distortion. Hart points out that the criminal law first designates rules of behavior to guide society. It is only when these rules fail to be

followed that officials impose sanctions. Orders are issued but not like face-to-face orders are. Laws cannot be reduced to directives against officials if a definition of a law is supposed to capture the idea that a law applies to citizens prior to any action by officials. The uniformity proposed by Kelsen and others therefore obscures how rules operate and guide individuals.

Next the range of application of rules is analyzed. Penal status is closest to the Austin/coercive order model. But even these laws have ranges of application that depend on interpretation. Sometimes laws apply to those who make them, sometimes not, and sometimes they apply to lawmakers in their capacity as private citizens and others to lawmakers in their capacity as lawmakers. In many cases, laws simply modify the range of application of others laws. The legislator makes law but she does not really issue orders.

Hart next analyzes the origins of laws. One common myth about laws is that they are all public, that they can all be seen by anyone who inquires about them. In fact, many laws originate from custom. Custom is often law, though not all custom is law. Sometimes customs are simply given "legal recognition"; this may mean that customs are made law by the recognition of the sovereign, but he might do so explicitly or tacitly. In many cases, customs become law only when it is necessary to interpret a law already on the books. For example, customs often inform precedent and thereby become law. Further, many customs become law without any form of sovereign recognition but merely, say, through the operation of local courts.

In sum, Hart shows that to append all laws to Austin's definition the idea of a sanction must include nullities, legal rules must exclude rules that confer powers, and the notion of an order must be transformed from a verbal to a tacit expression of will that often merely means that superiors will not interfere with orders given by inferiors. Attempting a single definition obscures these fundamental elements of law.

Chapter 4, Sovereign and Subject

Chapter 4, Sovereign and Subject Summary and Analysis

In chapter four, Hart focuses on how orders given by political "sovereigns" constitute law. Typically when we speak of laws we assume that some sovereign is behind the law, either creating it or legitimating it. This sovereignty conception of law is held to be true in democracies as much as monarchies. Sovereigns are those whose orders and laws citizens habitually obey and whose laws and authority persist into the next administration or regime.

The habit of obedience is understood to apply to a limited group of people generally delimited by a geographical area. They obey by doing things they would not otherwise do. The system of obedience is, like other things, not perfectly captured by the direct order analogy as many obey without any direct interaction with the sovereign. Laws typically regulate succession in advance so that the laws of current administrations acquire the authority to persist. Thus, "title" or "office" is passed on and the laws made by that office.

How are rules accepted if not through the obedience of orders? The answer arises from the nature of rule-following as contrasted with merely acting according to habit. Rules are typically regarded as legitimate by most of the society and are thought to obligate, unlike habits, which are rules of thumb.

Rules thus have an "internal aspect" because they are recognized by society. Habits are often observable, but many may not realize this. Hart analogizes the internal aspect of a rule with the rules of a game. Rules require a critical reflective attitude about certain patterns of behavior; they must be thought to impose a common standard and a demand for conformity; real rules are those society believes "ought" to be obeyed. When sovereigns make laws, they are thought to make social rules that "ought" to be obeyed because the sovereign is thought to have authority. Rules of continuity give future individuals the right to assume the same power.

Just because a rule is accepted does not guarantee that it will continue to exist; a revolution may occur. Authority accepted as a social practice can fail to be recognized and thereby cease to exist. The populace also often accepts rules in general terms and accepts the authority of certain bodies, like courts, to determine what the law is in its specifics. While Austin is right that laws are sometimes habitually obeyed orders backed by threats, the model is unrealistic because it ignores the active acceptance of the normative power of the legal system.

Hart reemphasizes the importance of social rules and laws persisting long after the rule of the sovereign. Some philosophers have analyzed this persistence by arguing that the authority of laws made in past regimes is only made binding by current authorities. But

by so arguing, these philosophers collapse the distinction between power and authority as the current sovereign only has the power of enforcement; he did not make the law binding in the first place.

The doctrine of sovereignty often holds that the sovereign is above the law, making laws from outside of the law. If a law exists, on this view, a sovereign must exist and he has no legal limits. That said, there may be non-legal limits on the sovereign's power.

The sovereignty theory is attractive because it explains how laws are made manifest and how to divine them into primary and secondary rules. Constitutions may be sovereign in that they specify the domains over which sovereign power may be exercised. But constitutions only imply legal disabilities. The sovereign may make a rule in violation of the disability but the rule is an exercise of mere power, not authority. We can locate an independent legal system in association with the sovereign and identify its limits. We can also show that the sovereign is bound to obey no other; he is the highest legislating power.

Sovereignty theorists agree that rulings within the power of legislatures are laws. But sometimes the content of substantive limitations are disputed, such as in cases of separations of powers. The boundaries between branches of government may be subject to legal change. Austin's view was that the people were sovereign, not elected representatives; the people make laws through their representatives. In this case, the sovereign gives law to itself and is free from restriction.

But identifying the people as sovereign fundamentally changes the nature of the theory because the distinction between ruled and ruler collapses. In response, a distinction between the people as legislator and the people as subject is often defended. In these cases, rules are still more than habits of obedience; they are rules laid down by citizens in their official capacities for themselves in their private status. However, it is still hard to make sense of why the rules of the electorate are authoritative because their authority must be specified by rules, since they themselves are bound by their own rules. So making sense of authority in terms of a sovereign people is problematic. Rules must be authoritative prior to being made by a people bound by them.

In some cases, the rules are constitutive of the sovereign such as when we say that our societies have "the rule of law". But in this case, sovereign cannot be identified with any one person and so the theory is effectively rejected.

Chapter 5, Law as the Union of Primary and Secondary Rules

Chapter 5, Law as the Union of Primary and Secondary Rules Summary and Analysis

Hart begins the chapter by (famously and significantly) distinguishing between primary and second rules. Rules of the first sort impose duties; rules of the second confer public and private powers. Primary rules apply to actions that involve movement or change in the physical world. Secondary rules apply to operations that apply to both movement and change and the creation and variation of duties and obligations. This distinction, Hart will show, makes sense of many difficulties heretofore unsolved in the theory of law.

Hart wants to explain how laws make human conduct obligatory. Obligation is not merely about what individuals believe themselves to be obliged to do but what they in fact must do to avoid doing wrong. Austin and others understand obligatoriness in terms of the chance or likelihood that the obliged would be punished by others, but this makes obligations merely psychological, not binding. Austin's view also has the difficulty that if the disobedient person can keep the probability of punishment low, then no law applies to him.

The claim that someone has an obligation implies that a rule exists. However, rules do not always obligate (such as rules of speech). Rules obligate when the demand for conformity is insistent and social pressure accompanies those who deviate from it or threaten to. The social pressure is also serious because the rules are often thought important to maintain social life or some part of it. Breaking the rules may help some individual but it will hurt society as a whole; thus rules are thought to require sacrifice. Rules still have an 'internal aspect' in that they must be recognized by some as a binding standard but they can still have an 'external' element. Rules thereby have 'first-person' and 'third-person' parts. The rules from an external point of view become guides for claims, demands, criticism and the like.

Some primitive societies are ruled entirely by custom. These societies live by 'primary rules' alone; the rules will bar free uses of violence, theft, lying and so on. Those who wish to disobey the laws must be in the minority. Only small communities can live by these rules alone; larger societies will have members that do not know one another; as such, they will need a stable environment of impartial and recognized laws. Primary rules will need to be made certain. Customary societies will also have static rules, unable to adapt to changing circumstances. They will be inefficient because they will use social pressure always to maintain rules and this will lead to interminable social dispute.

The solution to these problems is to have secondary rules, rules about the primary rules that allow for recognition, modification, rejection and so on. Secondary rules are 'rules of recognition' and so allow laws to be identified. They identify how laws may be properly made or changed and help to unify social rules. Secondary rules confer powers on certain individuals to make, maintain and change laws. They also help to make rules determinate and resolve disputes through judges and executive enforcers. The relevant rules are called rules of adjudication.

Chapter 6, The Foundations of a Legal System

Chapter 6, The Foundations of a Legal System Summary and Analysis

When secondary rules of recognition are accepted, societies have authoritative methods of determining what law is. Unstated rules of recognition are often used, but they are subordinate to legal rules of recognition. The courts use the former to elaborate the latter. Statements of law can be made as internal statements and external statements, representing statements like "It is the law that . . ." and "In England they recognize law as . . ." respectively. Secondary rules track the internal aspect.

However, statements concerning internal aspects presuppose the truth of external statements. When judges state that a law is valid they make internal statements, but the statements are meant to indicate facts about the external point of view. Thus, the internal statement of the judge can be incorrect. Some rules of recognition are supreme criterion and follow ultimate rules; that is, they are the basic rules to which all other rules are subordinated. Questions of validity do not apply to the ultimate rules; instead, the ultimate rules are the final test of validity.

Hart's theory raises new questions. The first question is about classification: it is not always clear how to classify which rules are laws, which conventions, usages and the like. How can we show that, say, the articles of the constitution, which are obviously law, are law? Rules of recognition are not always laws. The ultimate rule of recognition can be recognized from two points of view: from internal and external statements.

The second question arises when we analyze the idea that a legal system can be said to exist in a country or social group. There is vagueness in this determination; laws are obeyed only to a degree; rules of recognition are not always perfect. Our legal standards are often indeterminate and so the extent to which a legal system exists is indeterminate.

Further, the relationships between officials and the laws which identify them as officials must be specified. The standard of general obedience is not enough. Obeying a rule need not involve thought about the rule when obeying it; officials may not see laws as "right", but instead merely something he must enforce.

Two conditions are necessary and sufficient to have a legal system: rules of behavior valid according to ultimate criteria must be generally obeyed and the rules of recognition specifying legal validity and valid adjudication and change must be accepted as common standards of official behavior by officials. Private citizens only need to satisfy the first condition.

Because of these two conditions, there are two sources of evidence for the existence of a legal system. It is easy to determine when the two conditions are obviously satisfied. But in some cases, the official sector may be in conflict with the private sector such that one group has ceased to do its part. In these cases, legal systems have pathology and only exist

'half-way". Difficult questions about what law is arise in these situations. Sometimes the question is raised as a matter of international law. But there is only a paradox if we think of the legal system's statement of law as rival to its real existence from an external point of view. Hart then discusses ambiguity during certain moments of transition between different regimes. In many cases, partial failure is simply a fact of life.

Chapter 7, Formalism and Rule-Skepticism

Chapter 7, Formalism and Rule-Skepticism Summary and Analysis

General rules, standards and principles are the primary forces of social control in any society; individual directions cannot be given for everything. The law, therefore, refers to classes of persons and classes of acts and things. Legislation tends to focus on maximal classes and precedent on minimal classes. Communication invariably involves class-terms of all shapes and sizes and these classes are often demonstrated with indeterminate examples.

The authoritative quality of general rules is sometimes exaggerated precisely because their contours and boundaries are hard to define; the boundaries are left up to interpretation, but interpretation cannot eliminate the uncertainty. We must ultimately make arbitrary selections of interpretations of rules. We are often ignorant of facts and have unclear aims. This is the vice of legal formalism or conceptualism; these philosophies of law minimize and obscure indeterminacy. Our aims and rigid classifications will therefore contradict one another. Rules and goals will always conflict.

We often try to employ a standard of :"reasonableness" which can be corrected by a court to weigh and balance various relevant values. An example includes the standard of due care in negligence cases. Our aim of securing people against harm is indeterminate as well. Often we supplement rules with rules of exception. And the communication of authoritative rules also involves indeterminacy. Acknowledging precedent means different things at different times.

These considerations often lead to rule-skepticism. Some believe that all rules are myths. On this view, real law is the decision of courts and predictions about those decisions; authoritative decisions are dictates of mere human will. The objections of rule-skeptics, in Hart's view, are significant. But they are insufficient to overrule the case for rules. Even indeterminate rules can perform many of the important functions of determinate rules. And indeterminate rules can be recognized from the internal perspective as much content is determinate. There is a difference between manageable and unmanageable indeterminacy. There is no pure dichotomy between determinate rules and rule-skepticism. Hart then discusses some related forms of rule-skepticism, such as skepticism about the creators of laws having determinate intentions leaving law to be interpreted however one likes.

Hart addresses issues raised by finality and infallibility in judicial decisions. When a society acquires secondary rules, it may then acquire a system of supremacy of these rules and of offices that are used to settle conflicts among these rules. The advantage of having judges that can render final rulings is efficient, but there are risks with making

anyone authoritative as they might get things wrong. Sometimes too much room for discretion is given. Sometimes rulings are final, but they need not be infallible. Often judicial systems are determinate enough to produce standards for good judicial decisions, allowing indeterminacy within a limited, manageable range. And rules can never be blocked from breach or repudiation. Humans can always break laws; if they do so enough, the laws will cease to exist.

Legal theory is caught between the poles of excessive formalism and excessive rule-skepticism. Neither is true in itself, but together form the truth. Together they produce a functional legal system. Hart analyzes how courts often fit into larger law-making systems and how they relate to, say, legislatures. Conflicts arise between institutions that want to always be all-powerful at every moment in time and those that want the power to bind their decision-making power in the future. Continuing sovereignty and persisting sovereignty conflict. Only choices can settle these matters. This will be true of courts as well. Not every step a court takes will be limited by some rule, and yet some will be. When courts settle unpredicted questions about constitutional rules, they acquire the authority to make such decisions after the decision has been given. Some claim the court always had this "inherent" power but this is a "pious fiction".

Hart ends the chapter by maintaining that rule-skepticism and formalism often supplement each other practically. By doing its best to be formal, courts acquire a kind of legitimacy to where society permits them to engage in the kind of decision-making required to render formal legal rules determinate.

Chapter 8, Justice and Morality

Chapter 8, Justice and Morality Summary and Analysis

The theme of The Concept of Law is that law operates in so many ways that two types of law must be distinguished and that only their union comprises the essence of law. Chapter 8 inquires into the relationship between law and morality. Many affirm a necessary connection between law and morality but they differ on what the connection is. Some see morality as a standard that renders laws unjust and others see law as something morality can never undermine. To illuminate the question, Hart will focus on the tie between justice and its intimate connection to law and what distinguishes moral rules from legal rules.

While we often equate the legal system with the justice system, what is legitimate law and what is just are not coextensive. The idea of justice has two parts: a requirement that all be treated equally, and a varying criterion about how to determine when cases are alike or different. Sometimes laws treat people unequally and so they are thought unjust. In other cases, it is only the application of the law that is unjust. Both complaints are subject to wide dispute. A principle of equality, at least at an abstract level, is deeply embedded within humanity. But the criteria of relevant differences often vary with the fundamental outlook of a society or individual. Thus different moralities will have different views on justice.

Outside the law there is a conviction that individuals have a right against being harmed and that this right is an equal one. The idea of justice and the idea of the social good are also connected. Sometimes justice demands the promotion of the common good; other times it prevents the promotion of the common good due to individual rights. Aiming at the common good seems at least a necessary condition for a just law.

Justice largely concerns how classes of individuals are treated but morality also includes rules related to law that are not rules of justice. Some moral rules make conduct obligatory. These moral rules must possess four qualities: 'importance', 'immunity from deliberate change', 'voluntary character of moral offences', and 'the form of moral pressure'. Moral rules are thought to be of great importance to maintain; they cannot be changed just because someone wants to change them. Laws possess neither feature necessarily. One can break the law without intending to do so, but moral offense seems to be inherently voluntary. To break a moral rule, one must do so when one 'should have known better', though there are some analogues to this condition in the law. Morality is also supported with a peculiar form of pressure due to its connection with the internal. Morality is not enforced with threats of physical punishment, though some moral rules are. Instead ostracism, praise and blame are used for enforcement.

'The morality' of a society is a description of the rules accepted by a society and these rules have the form described in Chapter 5. They are primary rules. There are many

non-moral social rules, however, such as rules of dress and rules of games. And there are many non-legal moral rules that are quite significant and that imply powerful obligations. Moral rules vary across societies and time periods.

In these and other ways, moral rules and legal rules of duty have similarities. Both are binding independent of the consent of the individual and are supported by social pressure; compliance with both is not a matter of praise but a minimum contribution to social life and both rules govern the behavior of individuals throughout life, not just on special occasions. The sense of difference between law and morals is connected to the 'externality' of one and the 'internality' of the other. Laws seem to govern external conduct whereas morality touches on intentions in a pervasive way that law does not.

Moral obligation and duty are at the root of social morality, but they do not comprise the whole. The fourfold criteria above that distinguishes moral rules from other social standards are merely formal and ignore the purposes that moral rules serve. Moral codes exist to promote the good of societies; morality should make life worthwhile. Some see that moral rules must be able to withstand rational criticism in terms of human interests but Hart has taken a broader view, as he does not think this latter element is included in the concept of a moral rule. But morality generally does include more than obligations and duties because morality also includes ideals. Morality has a private aspect that regulates the choice of ideal and adherence to it. In many cases, pursuing these ideals take the form of felt duty and so resemble moral rules.

Chapter 9, Laws and Morals

Chapter 9, Laws and Morals Summary and Analysis

There is no one relation between law and morals and there is at least some connection between them. But the question arises whether law must rest on morality or not. Hart divides the two answers to these questions into two camps: natural law and legal positivism. Legal positivism holds that it is not necessary that laws satisfy the demands of morality even if they happen to do so as a matter of fact. The most explicit rejection of this view is the natural law tradition, that man-made law, to be valid, must conform to certain principles of human conduct, discoverable by reason.

Positivists tend to see natural law as built on a fallacy: that it confuses what is law with what ought to be law. They also see natural law theory as part of an antiquated, pre-modern worldview. Natural law theorists tend to think that all things in nature have ends, or goals which they naturally seek. But modern "scientific" man sees the world governed according to the laws of physics and the objects within it as not preordained to any natural purpose necessarily.

Hart admits the natural law view seems strange but does his best to make it seem plausible. He argues that natural law can be understood as having a "minimum content" without the metaphysical extravagance of classical natural law theories. The minimum content holds that human beings have laws and morals that promote survival and well-being by helping men to associate with one another. In this way, natural facts about how human beings can cooperate effectively are tied to moral and legal rules.

The minimum content view does away with a universal "teleology" and instead focuses on the role of the law in promoting a real human good, such as protecting humans against important vulnerabilities (such as being hurt) and some kind of approximate equality. Third, the minimum content of natural law presumes that humans possess limited altruism; they will cooperate and largely avoid trying to exterminate each other, but they cannot be made perfect and beneficent and un-self-interested. Fourth, the contingent fact of limited resources means that morality must help human beings to cooperate so that they do not fight over these resources and so that they can produce more. Fifth, men are taken to have limited understanding, i.e., that they do not always reason well and often lack vital information and that they have limited strength of will, that they will often give in to temptation. From these conditions, natural law theorists of the minimal sort hold that reason demands voluntary cooperation in a coercive system.

Natural law theory of this sort encompasses a lot of good sense and helps to explain why purely formal conceptions of law are inadequate. Law need not be determined by 'the' meaning of the words or that legal systems 'just do' produce sanctions. We have a standard by which to judge the law by observing natural facts. The minimal natural law view also acknowledges a third class of facts: contingent but important facts about the constitutions of human beings.

However, these conditions of natural law can often be satisfied even when some members of society are excluded from equal treatment. Coercive power can still be established without the voluntary cooperation of all,. And yet whole societies still play a role in creating law by recognizing laws as standards from the internal point of view. When some are helpless victims of the law, legal standards are imposed by force or the threat of it. If a legal system is fair, it can often gain the allegiance of most people and will be stable, though not otherwise.

The gain to a society that adopts secondary rules is enormous but the centralized power that comes with it can always be abused in a way that a regime of primary rules cannot. One way to limit that power is to force law to conform to natural law, so the claims of natural law need scrutiny.

Hart ends the chapter by discussing six connections between law and morality that are taken to be necessary but are often confused: that law and morality are connected by (i) power and authority, (ii) the influence recognized morality has on the law, (iii) interpretation of law in terms of morality, (iv) criticism of the law in moral terms, (v) principles of legality and justice and (vi) legal validity and resistance to law. Each of these views is criticized for missing important features of the law.

Hart claims that legal positivism has some merits in that it recognizes law as a set of really existing social facts but that alone it cannot provide the grounds for criticizing the law in the rich way we typically think available. We need a concept of law that both includes the idea of law as really existing and capable of contravening morality but that is also subject to the demands of morality. Hart describes himself as a soft positivist because while he thinks law is essentially a really existing set of rules, moral rules can be employed within rules of recognition that help make laws determinate. In this way, some natural law theory comes in the back door to help criticize laws from an external perspective.

Chapter 10, International Law

Chapter 10, International Law Summary and Analysis

International law threatens the account of law Hart has heretofore developed. It has no legislature and no compulsory jurisdiction. The rules of states seem to only consist of primary rules and no secondary rules. International law seems to have no rules of recognition and so we must ask whether international law is really law. Two problems arise: first, attempts to analyze international law as ruled back by threats, and second, problems that arise from believing that states cannot be the subjects of international law.

The first question is whether international law can be obligating. It is not a question of applicability but a question of whether international law is law at all. The question is thus not analogous to the question of whether municipal law is really law. Hart denies that we can claim that international law is not binding because it has no organized sanctions because this is to accept Austin's view. But we might ground law in the need for such law to resolve international disputes, as international aggression is the most dangerous sort.

Under international law, many world nations have rights and duties and are subjects of the law. But what does it mean for a "sovereign" state to be "bound" by law? Some are skeptical that this can be meaningful. But sovereignty only denotes that someone is sovereign over a territory and those who live within it; the definition does not rule out sovereignty over it with respect to another set of matters. Another difficulty with this view is that we cannot define state sovereignty without first knowing what international laws they are subject to. Some may argue that real international obligations do not exist save by voluntary agreement, but Hart cites counterexamples.

International law and morality are tied in complex ways; since international law is like a system of primary rules, we might use moral rules of recognition to identify it since legal secondary rules do not exist. But Hart resists this view on the grounds that different states recognize different moralities and are often hypocritical in their advocacy of moral demands. Further, many rules of international law are not obviously moral but practical. International law also must specify details that are non-moral, such as how long a treaty is binding. Hart then argues that it is unclear whether international law, to exist, must rest on moral obligation.

In the next subsection, Hart resists some analogies of form and content between international law and other forms of legal rules. The rules of international law fit very different social situations and so it is hard to see that they can admit of a simple analysis or simple analogy with other forms of law. Hart encourages us to liberate ourselves from requiring that international law must contain a basic rule. Again, until basic rules of recognition are formulated, international law can be seen as at most a

system of transition to secondary rules, although it seems clear that it exists as a set of primary rules.

The only analogy between international law and other law is of content and in content the rules are closest to international law than any other form of law.

Postscript

Postscript Summary and Analysis

The Concept of Law was published in 1961; Hart long wanted to add a postscript responding to reactions to his work, but the postscript was unfinished when he died. The editors of the book published the most finished parts of the postscript but the drafts were not meant to be final.

In the postscript, Hart notes that he wants to focus in detail on the criticisms of his view advanced by Ronald Dworkin and in a second section addresses a number of other critics; the second section was too undeveloped at the time of Hart's death for the editors to include in the book; thus the postscript wholly focuses on Dworkin's views. The reader's purpose in studying the guide may not rely on the details of the Dworkin-Hart dispute; discussions of these debates have been reviewed in the secondary literature. These sources will help the reader to make sense of their dispute; reading Hart alone is insufficient to get a good sense for Dworkin's body of work.

In the first subsection, Hart reviews the major concepts introduced in the book and distinguishes his legal theory from Dworkin's. Dworkin thinks that jurists should look for principles, often moral, that best make sense of and render coherent settled law and legal practices. He rejects the sort of "descriptive" legal theory that is part of Hart's view. Hart claims to be largely unable to follow Dworkin's arguments.

In the second subsection, Hart reviews some of Dworkin's criticisms of how Hart handles the concept of legal positivism. Hart then reviews Dworkin's criticisms and denies Dworkin's classification of his view of law as a "semantic" theory. By and large, Hart thinks that Dworkin has misrepresented his view. He then reviews Dworkin's criticisms of other types of legal positivism and criticizes Dworkin's arguments.

In the third subsection, Hart recalls his distinction between the internal and external statements of law and then reviews Dworkin's extensive criticisms of the view. Again Hart reviews Dworkin's criticisms in detail. Generally speaking, Dworkin's criticism of Hart's view of law is that it represents law as consisting of "all-or-nothing" rules and ignores legal principles used in legal reasoning that have more grey area. Hart thinks that whatever is valid in the criticisms can be accommodated within his theory without abandoning it.

In section four, Hart covers Dworkin's arguments to the effect that legal principles cannot be identified by rules of recognition manifested in juridical practice because the principles are essential elements of the law. Dworkin conceives of the body of law holistically, interdefining itself and thus resists Hart's more dualistic theory of law but Hart, again, thinks there is little in Dworkin's criticisms.

The final two subsections are brief and concern the relationship between law and morality presented by Dworkin against Hart's view and how Dworkin's theory of law must sharply contradicts Hart's with respect to judicial discretion.

One major issue the reader should take notice of in subsection six is Dworkin's challenge to Hart's view that due to the indeterminacy of language, law will be indeterminate, and so judges must have discretion to make the law determinate. Dworkin thinks that there is always one correct answer as to what the law must be, though people can reasonably disagree about it. Dworkin thinks Hart's view commits him to thinking the content of law is determined in an ex post facto fashion and is fundamentally anti-democratic. Hart denies both claims on the grounds (a) that ex post facto laws are bad because they change expectations and judicial discretion of Hart's sort does not do this, and (b) that there is nothing anti-democratic about delegating some power of discretion to judges.

Characters

H. L. A. Hart

Herbert Lionel Adolphus Hart (1907-1992) was a professor of legal and moral philosophy at Oxford in the middle of the twentieth century. He wrote a number of important philosophical works, but the profession widely regards The Concept of Law as his finest contribution to philosophy and law. Hart went to Cheltenham College and New College for his education and became a Barrister (a British lawyer), practicing law between 1932 and 1940. During the Second World War, Hart worked for British intelligence and after the war took up a teaching position in philosophy at Oxford. In 1952 he was made Professor of Jurisprudence at Oxford and retired in 1969. Hart was also a major influence on a number of late twentieth century philosophers including Brian Barry, John Finnis, Kent Greeawalt, Joseph Raz, Ronald Dworkin and John Rawls.

Hart's approach to legal and moral philosophy was strongly influenced by John Austin (the twentieth century philosopher) and Ludwig Wittgenstein, two founders of "ordinary language philosophy" and major figures in the tradition of analytic philosophy. He combined this analytical, linguistically focused method with the careful, logical jurisprudential methodology of the great British legal and moral philosopher Jeremy Bentham. Hart will always be remembered for his critique of John Austin's (the nineteenth century jurist) theory of law that law is the command issued by the sovereign backed with the threat of coercion. His distinction between primary and secondary legal rules is of lasting importance. His division of moral and legal perspectives into internal and external and his concept of a rule of recognition are also key contributions of his.

Ronald Dworkin

Hart's successor to the Professorship of Jurisprudence at Oxford was his student Ronald Dworkin. Dworkin (born in 1931) is today one of the world's foremost philosophers of law and constitutional law scholars. He currently holds dual professorships at University College London and New York University. Dworkin's views stand in striking contrast to his teacher's, however. For instance, while Hart embraced a form of soft positivism, Dworkin rejects positivism in the law in nearly every way. Hart thinks that one can make sense of the existence of law largely independently of a moral theory, whereas Dworkin denies this. Dworkin thinks that law cannot even be identified without referring to its merits and he rejects the institutional focus of legal positivism.

For Dworkin, theories of law are not descriptive at all. Rather a legal theory ideally describes how cases should be decided and should start with abstract moral principles that explain when and how governments may coerce their subjects. For Dworkin, a law is that which follows from a moral reconstruction of a legal system's history. These

principles are discovered when jurists look to legal practice and uncover principles that harmonize those judgments.

Dworkin's views are explained in Hart's postscript, which was never quite finished for publication. In it, Hart explains Dworkin's criticisms of his positions at length and then responds to them in detail. As a result of the extensive treatment Hart gives Dworkin's views, he is arguably the second most important person associated with the book, despite the fact that he does not appear until the postscript.

John Austin

The nineteenth century British jurist whose theory of law as a command of the sovereign backed by a threat of punishment is famously critiqued by Hart.

Hans Kelsen

An Austrian American jurist and legal philosopher who influenced Hart. Kelsen was a legal positivist but of a stronger sort than Hart. Hart discusses Kelsen's views in the book.

Joseph Raz and Penelope Bulloch

The editors of Hart's postscript.

Peter Cane, Tony Honore, and Jane Stapleton

The editors of the book as a whole.

Private Citizens

Private citizens keep private rules in existence by following them and recognizing them from an internal perspective.

Judges

Hart believes that the law is full of "hard cases" that the law itself cannot solve itself; thus, in Hart's view, judges have discretion to make determinate what the law cannot.

Legal Officials

Legal officials help to create the legal system by following secondary rules.

Jurists

Hart often speaks of jurists and how they should approach certain issues given his legal theories and how they actually practice law.

Natural Law Theorists

Natural Law theorists believe that law is subject to moral rules and can be critiqued by them. They often believe that laws are only justified if they are compatible with morality.

Legal Positivists

Legal positivists see law primarily as a really existing set of socially recognized standards that bear no necessary connection to morality.

Objects/Places

Law

For Hart, law is the set of primary and secondary socially recognized rules.

Primary Rules

Primary rules are the social rules that regulate physical action and change in the world.

Secondary Rules

Secondary rules are rules of recognition and adjudication for primary rules and other secondary rules.

A Legal System

A legal system is composed of external and internal elements, which involve both the recognition of actual legal practices and the recognition of law as a standard from those to whom they apply.

Obligation

Hart raises the question of how the law obligates those to whom they apply.

Formalism

Formalism holds that law is a set of rules that have determinate content. Hart rejects legal formalism.

Rule-Skepticism

Rule-skepticism holds that rules are so indeterminate that we should be skeptics about rules.

Indeterminacy

Hart thinks that rules are indeterminate in their application and content and that judges must render them determinate through their own discretion.

Moral Rules

Hart distinguishes sharply between moral and legal rules. Moral rules, for instance, are not subject to deliberate change and are largely enforced by guilt and blame and ostracism rather than force.

Natural Law Theory

Natural law theory holds that law is held to an external standard of morality by which it can be critiqued and that justified law promotes the common good.

Legal Positivism

Legal positivism holds that law is a really existing social phenomenon that bears no necessary connection to morality.

International Law

Hart analyzes international law separately from domestic laws because it has few if any rules of recognition.

Themes

Primary and Secondary Rules

Perhaps the most important distinction that Hart draws in The Concept of Law is that between primary and secondary rules of obligation and law. Hart denies that the concept of law is monistic but instead sees the union of these two concepts as comprising an adequate analysis of the idea. Primary rules govern all physical movement and change made by human begins and objects associated with them. These rules include rules against murder, theft and fraud, and all societies have some form of them. They are required in order to have societies at all. However, societies that only have primary rules are at a great disadvantage because they have no way to analyze these rules and build on them. They cannot adjudicate claims efficiently or enforce rules of justice across large groups.

Thus, many societies develop secondary rules putting forth that all primary rules to be recognized, changed and adjudicated. These rules are required for legislators and judges to alter bad primary rules. They also enable courts to interpret and apply primary rules that are ambiguous.

Primary rules can only function well if they are clear to all persons who are taken to be obligated by them. Otherwise, the rules are uncertain and vague. Secondary rules require all primary rules to acquire the certainty they need. However, secondary rules can be vague as well, because they confer powers on officials to authorize, change and judge primary rules, and these officials must determine how secondary rules apply to primary rules. Thus, courts may disagree about many things, such as their jurisdictions. Hart employs these two concepts of rules to develop a conceptual analysis of a legal system and to explain the social and institutions factors required to maintain and develop law.

Formalism and Rule-Skepticism

Hart is also famous for recognizing that primary and secondary rules can be vague at their edges and cannot of themselves determine how they are to be applied and interpreted. Neither can other rules determine how they are to be applied. Language itself possesses sloppiness and ambiguity that always leaves room for reinterpretation. Hart thus says that law has an "open texture".

Hart's observation is supposed to contradict legal formalism (or conceptualism), a view common in the nineteenth century which holds that a set of sufficiently well defined and interrelated rules can be applied to solve any and all legal cases. No non-legal considerations need be brought to bear from morality and social institutions generally. Due to "hard cases" in the law, Hart claims, legal formalism ascribes too much

determinacy for law and forgets the importance of judicial discretion in rendering determinate what is of itself indeterminate.

But, claims Hart, some go too far in their rejection of legal formalism. Some are "rule-skeptics" or "legal realists" who think that there can be no legal rules whatsoever. In fact, rule-skeptics claim, indeterminacy in the law is so pervasive that the formulation of rules is at best loose guides to a well-functioning legal system. Instead, judges must impose their will upon indeterminate law and expand its reach as their wisdom dictates. Adjudication is essentially subjective and often generates incoherent results.

Hart carves out a middle ground, arguing that the indeterminacy of law is not unmanageable and that rules should be combined with judicial discretion, each limiting the other.

Natural Law and Legal Positivism

Hart is one of the first to reintroduce in explicit terms the contrast between natural law theories of law and legal positivism in modern philosophy of law. Legal positivism holds that laws, their existence and form, are based not in morality but on institutions and social facts. Whether a law exists and whether it is good or bad are separate questions. This is not to say that laws cannot be judged as good or bad, but only that their existence does not depend on whether they are good or bad. Law is what is positive and ordained. Hart was among the most prominent legal positivists of the twentieth century.

The natural law perspective, on the other hand, holds that all valid and authoritative law are those rules that promote the common good. Thus, what laws exist are simply determined by what is good and bad. The problem for legal positivism is to understand how it has authority. Just because something exists does not mean that it has authority. Hart sees law's authority as resting on social matters. Laws exist because they are practiced, recognized and accepted. Laws arise from custom and follow from rules of recognition.

However, Hart is only a "soft" legal positivist. Rules of recognition need not be wholly independent of morality and social, non-legal rules in order to exist. Instead, rules of recognition can come from socially recognized morality and thus social morality can play a role in helping a society figure out what its primary rules are.

Style

Perspective

H. L. A. Hart's perspective in The Concept of Law consists of two major elements: first, Hart is what is often called an "analytic" philosopher; second, Hart's perspective is constituted by his particular views as expressed in the book. An analytic philosopher typically refers to that group of (largely) Anglo-American philosophers heavily influenced by the concise, mathematical methodologies of mathematics and the natural sciences.

Many see analytic philosophy as focused primarily on the analysis of words, but this is not correct, tying analytic philosophy to a group of philosophers known as ordinary language philosophy. While it is true that Hart is influenced by ordinary language philosophers, he is perfectly comfortable talking about metaphysical and epistemological concepts beyond the terms that represent them and their meanings. Hart is also heavily influenced by a number of important historical jurists like Austin and Bentham that long predate analytic philosophy.

While there are many analytic philosophers that share Hart's methodological perspective, there are many aspects of Hart's perspective unique to him. For instance, Hart is skeptical about monistic analyses of social and political concepts where important concepts like law are given a single definition. He is sensitive to the indeterminacy involved in language and translates those issues into concerns about determinacy in the law. Finally, he embraces a form of soft legal positivism that is largely unique to him. Hart also criticizes a number of positions, such as Austin's definition of law, legal formalism and rule-skepticism, hard legal positivism and natural law theory and Dworkin's criticisms of his work.

Tone

As an analytic philosopher, Hart sees the job of the philosopher not as writing in a flowery fashion, moving his reader on a deep emotional level, or engaging in fierce forms of emotional expression of any kind. The analytic philosopher prizes writing in a clear, concise, impartial and focused manner, attacking the particular philosophical issue at hand with surgical precision. The tone reflects this method. Hart is not particularly dry, and he addresses a host of interesting problems and gives impressive and fascinating answers to these questions. But the text is devoid of any tone but that of an author concerned to shed as much light on his subject matter as possible.

There are some minor exceptions. For instance, Hart often expresses disapproval of the views of other philosophers and jurists. In some cases, his tone becomes a bit more colorful when criticizing these individuals. He also tends to explain historical matters and give cases in a particularly engaging fashion and so the tone changes in the passages as well. Hart's tone is at its most atypical perhaps when addressing Dworkin. While he is

undoubtedly still in analytical mode, he is defending himself and often expresses confusion and disapproval at Dworkin's criticisms of his positions.

But by and large, The Concept of Law is just an analysis of the concept of law. However fascinating the reader might find the analysis, the tone of the book will be the last aspect to grab her. And that is part of the point of the analytic philosopher's style: to do everything to focus the reader on the problems and the analysis the philosopher provides.

Structure

The Concept of Law contains ten chapters and a postscript. But as stated above, the book is highly structured. The structure is not exactly rigid but is crisp, logical and simple. Hart divides each chapter into sections and subsection in accord with his subject matter and always proceeds logically from section to section. There are no abrupt turns in the work; Hart transitions with finesse from section to section and chapter to chapter. To give one example, in Chapter III, The Variety of Laws, Hart discusses the different aspects of the concept of law that if analyzed will together provide an effective analysis of the concept of law. There are three sections: The Content of Laws, The Range of Application and Modes of Origin. In short, law has three conceptual parts: content, application and origin. The other chapters are similarly structured.

Each chapter addresses a related but distinct issue. Chapter one lays out the different questions and aspects of those questions that Hart will address and explains his choice of questions to answer. Chapter two explains some of the conceptual features of law identified by previous jurists and then in chapter three breaks down the concept of law further, surveying the variety of laws. Chapter four analyzes the relationship between sovereign power, subjects and legal rules.

In chapter five, Hart analyzes law as the union of primary and secondary rules, which are the central concepts of the book. Chapter six explains the ontological structure of a legal system and builds that ontology out of his system of primary and secondary rules. Chapter seven explains how his concept of law avoids both formalism and rule-skepticism, whereas in chapter eight, Hart focuses on clarifying the relationship between law and justice and law and morality. Chapter nine introduces the concepts of natural law and legal positivism and carves out Hart's own position of legal positivism. Chapter ten explains the unique problems posed by the system of international law. Finally, the postscript discusses Dworkin's criticisms of the book.

Quotes

"Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'"
Chap. 1, p. 1

"For [the book's] purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena."
Chap. 1, p. 17

"The concept of general orders backed by threats given by one generally obeyed ... plainly approximates closer to a penal statute enacted by the legislature of a modern state than to any other variety of law." (Chapter 2, 24)

"The originally simple idea of a threat of evil or 'sanction' has been stretched to include the nullity of a legal transaction; the notion of a legal rule has been narrowed so as to exclude rules which confer powers, as being mere fragments of law; ... [and] the notion of an order has been extended from a verbal to a 'tacit' expression of will."
Chap. 3, pp. 48-49

"If a social rule is to exist some at least must look upon the behavior in question as a general standard to be followed by the group as a whole."
Chap. 4, p. 56

"Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations."
Chap. 5, p. 81

"There are two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials."
Chap. 6, p. 116

"In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately."
Chap. 7, p. 124

"Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods."
Chap. 7. p. 128

"The main theme of this book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the 'essence' of law."
Chap. 8, p. 155

"The first is a question which may still be illuminatingly described as the issue between Natural Law and Legal Positivism, though each of these titles has come to be used for a range of different theses about law and morals." (Chapter 9, 185)

"The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not."
Chap. 9. p. 202

"The analogy [between international law and municipal law] is one of content not of form: secondly, that, in this analogy of content, no other social rules are so close to municipal law as those of international law."
Chap. 10, p. 237

"I would like to think that this book helped to stimulate this development even if among academic lawyers and philosophers, critics of its main doctrines have been at least as numerous to converts to them."
Postscript, p. 238

Topics for Discussion

What is Hart's distinction between primary and secondary rules? What are the advantages of secondary rules?

Explain in detail Hart's refutation of Austin's definition of law, the "law as coercive orders" view.

What is a legal system for Hart and what does it have to do with secondary rules?

What is formalism? What is rule-skepticism? What is Hart's compromise between the two views?

Explain three ways in which law and morality are related as described in the book. Which do you think is the most plausible? Which is the least? Be sure to include an explanation of Hart's account of the distinctiveness of moral rules in your answer.

What is legal positivism? What is natural law theory? What is the minimum content of natural law? (List at least five properties of it.) Which theory is most plausible to you?

Why is international law problematic?

What is Hart's concept of law?

Explain Hart's concept of judicial discretion. Name two of Dworkin's criticisms and give Hart's responses to both criticisms. Who do you think is right?