4

Modern legal positivism

Legal positivism is 'in'. Recent years have witnessed an explosion in the development and refinement of many of the ideas originally conceived, in particular, by HLA Hart. With its preoccupation with semantic and conceptual analysis, the source of authority, and objective reality, what was once considered to be rather conservative, dreary, and narrow has become sexy. In modern legal theory circles, it would seem that, in the words of the pop anthem of the nerd, 'it's hip to be square'.[1]

But though it may be trendy, the highly sophisticated and technical nature of most of this literature is slightly forbidding to all but the professional legal theorist, and even he or she may experience the occasional headache reading the incessant literature generated by its followers.[2] For the uninitiated, including the beleaguered jurisprudence student, it can be a disturbing phenomenon. This chapter is consequently rather long, but I hope it will escort you gently through the relentlessly enlarging thicket of contemporary positivism.

Dangers lie in wait for all but the energetic and industrious student; you are therefore advised to tread cautiously. Among the virtues of this remarkable development is that, if you are determined to master its particular intricacies, you will, willy-nilly have grasped several of the enduring and central ideas of jurisprudence. No mean feat.

4.1 The foundations

Twentieth-century legal positivism is associated with the work of two exceptional, but very different, legal philosophers: HLA Hart (1907–92) and Hans Kelsen (1881–1973). Though they do—as legal positivists—subscribe to the view that an analytical distinction must be maintained between law and morality, between 'is' and 'ought', their starting points, methodology, and conclusions bear little resemblance to each other. As Professor

[1] Indeed, our leading 'inclusive' positivist is flagrantly hip: 'I love rock, jazz, and blues music', and he flaunts his profound scholarship in respect of '"Acid Jazz" mavens Isotope 217 and Liquid Soul or blues unknowns like Honeybee Edwards, and rockers like the Chills and Yo La Tango…Good philosophy is like good blues…[it] penetrates the heart, touches the soul, turns pain into a form of pleasure…' He also confesses to being 'an avid, if by no means accomplished, blues guitarist', Jules Coleman, *The Practice of Principle: In Defence of A Pragmatic Approach to Legal Theory* (Oxford: Oxford University Press, 2001), ix–x. 'Hip to Be Square' is recorded by Huey Lewis and the News, composed by Bill Gibson, Sean Hopper, and Huey Lewis, and published by Cherry Lane Music Co. A philosophical question for you to ponder: is this song title a genuine paradox?

[2] It is hard to disagree with Ronald Dworkin's asseveration that many 'analytic positivists continue to treat their conceptual investigations of law as independent of both legal substance and political philosophy. But they talk mainly to one another and have become marginalized within the academy and the profession,' Ronald Dworkin, *Justice in Robes* (Cambridge, Mass: Belknap Press, 2006), 34. His conclusion as to their marginalization may, however, err on the side of sanguinity.

MacCormick pithily puts it, 'Hart is a Humean where Kelsen is a Kantian'.[3] The piquancy (and accuracy) of this observation ought to become clearer in the course of this chapter.

While these two theorists are generally acknowledged to be the fathers of modern legal positivism, their theories have been subjected to comprehensive and scrupulous analysis by a number of distinguished contemporary jurists. As a result, the form, character, and implications of legal positivism have undergone significant revision and refinement—with profound implications for legal theory in general. Among these scholars are Joseph Raz, Neil MacCormick, Jules Coleman, and Scott Shapiro.

Contemporary legal positivism includes the following main claims about the nature of law.[4] These may be summarized as follows:

- *The separability thesis*. It denies the existence of necessary moral constraints on the content of law.[5]
- *The pedigree thesis*. It articulates necessary and sufficient conditions for legal validity in respect of how or by whom law is promulgated.
- *The discretion thesis*. It asserts that judges decide hard cases by making new law.

The first thesis is, of course, a critical component of the positivist refutation of the classical naturalist account of legal validity. Positivism supplies a rival explanation in the form of the pedigree thesis, which founds legal validity on the manner, form, and source of promulgated norms. Thus for Austin a proposition is legally valid only if it is promulgated by a 'sovereign' who is habitually obeyed, but who is not in the habit of obeying any other person; and is backed up by the threat of a sanction (see 3.4.5). Hart, as will become evident, is less concerned with who promulgates the law than with the manner of its promulgation.

Though classical positivists such as Austin differ in several respects from Hart and his account of the pedigree thesis, both subscribe to the view that law is created by human beings through acts that may be described as 'official'. For Austin, they are official because they have been performed by the sovereign; for Hart, because they meet the procedural (and perhaps also the substantive) requirements of the rule of recognition. The third thesis appears to entail that when a judge decides a 'hard case' (ie, one to which no rule is immediately applicable) he exercises discretion in order to fill the 'gaps' in the law (see 5.2.3).

These three claims do not exhaust the principal features of modern legal positivism. As will be seen below (in 4.4.), Joseph Raz probes the quintessence of positivist theory before expounding his 'social thesis'.

4.2 HLA Hart

Almost single-handedly, HLA Hart staked out the borders of modern legal theory by brilliantly applying the techniques of analytical (and especially linguistic) philosophy to the study of law. His work (largely, but by no means exclusively, *The Concept of Law*, published in 1961) has illuminated the meaning of legal concepts, the manner in which we deploy

[3] N MacCormick, *HLA Hart* (Oxford: Oxford University Press, 2007), 26. Cf Alida Wilson, 'Is Kelsen really a Kantian?' in R Tur and W Twining (eds), *Essays on Kelsen* (Oxford: Clarendon Press, 1986).

[4] Kenneth Einar Himma, 'Judicial Discretion and the Concept of Law' (1999) 19 *Oxford Journal of Legal Studies* 72.

[5] This approximates to what is often called the 'social thesis': that law may be identified as a social fact, without reference to moral considerations. See J Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), 37 ff. For his own positivist triad, see 4.4.

them, and the way we think about law and the legal system. His posthumous 'postscript' to this celebrated work was published in 1994.[6]

Despite its importance and accessibility, few students actually read *The Concept of Law* or, at any rate, the whole of it. This is unfortunate, for there are few better methods of familiarizing yourself with (what are still) the central questions of jurisprudence. And Hart's reflections are formulated so elegantly, coherently, and clearly that by reading it you will gain more than an 'understanding of law, coercion, and morality as different but related social phenomena' (as Hart, in his preface, modestly describes the aim of the book). Moreover, it is no exaggeration to say that *The Concept of Law* has been used as a springboard by several legal theorists (including Raz, Finnis, Dworkin, MacCormick) and has provided the inspiration for many more.[7]

4.2.1 Hart as legal positivist

Although he is unquestionably a positivist (particularly in the sense of maintaining, for analytical purposes, the separation of law and morality) Hart acknowledges the 'core of indisputable truth in the doctrines of natural law'.[8] You will have read in 2.1 that one of the hallmarks of the natural law tradition (attacked by Bentham and Austin) is the view that such a separation cannot be sustained. How then can the leading contemporary positivist concede that there is a 'minimum content' of natural law? The answer is that Hart's positivism (though it follows very much in the tradition of classical English legal positivism, especially as developed by Bentham) is a far cry from the largely coercive picture of law painted by his predecessors. For Hart, law is a *social* phenomenon: it can only be understood and explained by reference to the actual social practices of a community.

4.2.1.1 'Minimum content of natural law'

Hart's formulation of the 'minimum content' of natural law is therefore a recognition of the fact that in order to survive as a community certain rules must exist. These are a consequence of the 'human condition' (he is strongly influenced here by David Hume) which Hart sees as exhibiting the following fundamental characteristics:

- 'Human vulnerability': We are all susceptible to physical attacks.
- 'Approximate equality': Even the strongest must sleep at times.
- 'Limited altruism': We are, in general, selfish.
- 'Limited resources': We need food, clothes, and shelter and they are limited.
- 'Limited understanding and strength of will': We cannot be relied upon to cooperate with our fellow men.

Because of these limitations there is a necessity for rules which protect persons and property, and which ensure that promises are kept. But, despite this view, Hart is *not* saying that law is *derived from* morals or that there is a necessary conceptual relationship between the two. Nor is he suggesting that if we accept his 'minimum content' of natural law this will guarantee a fair or just society. (How valid is this analysis? Are we really

[6] HLA Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994).

[7] If you cannot read the entire book, you should, at the very least, digest Chs 4, 5, and 6. I strongly recommend Neil MacCormick's *HLA Hart* (the major part of which is devoted to an analysis of *The Concept of Law*) as a reliable and sympathetic account of Hart's contribution to legal theory. See too the excellent biography by N Lacey, *The Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford: Clarendon Press, 2004) and my review of the book in (2004) 34 *Hong Kong Law Journal* 661.

[8] *The Concept of Law*, 146.

'approximately equal'; what of minority groups, women, children? How complete is it; what about sex?)[9]

4.2.1.2 Breaking with Austin and Bentham

Hart severed positivism from both the utilitarianism (see 9.1) and the command theory of law championed by Austin and Bentham. In respect of the latter, his rejection rested on the view that law was more than the decree of a 'gunman': a command backed by a sanction. This imperative version of a legal order, moreover, located the sovereign beyond the law; this failed to account for the requirement that legislators comply with basic law-making procedures.

At the core of Hart's description of law and the legal system is the existence of fundamental rules accepted by officials as stipulating these law-making procedures. In particular, the 'rule of recognition' (see 4.2.6) which is the essential constitutional rule of a legal system, acknowledged by those officials who administer the law as specifying the conditions or criteria of legal validity which certify whether or not a rule is indeed a rule.

Another important feature of Hart's positivism is his approach to the central question of the extent to which the law is moral. The so-called Hart–Fuller debate concerning the 'morality of law' was examined in Chapter 2.

4.2.2 Law and language

An important element in much of Hart's writing is the *linguistic* analysis of law. The influence of the work of, amongst others, the philosophers Gilbert Ryle and JL Austin (not to be confused with the jurist, John Austin) is apparent in *The Concept of Law* (in the preface to which JL Austin's aphorism that we may use 'a sharpened awareness of words to sharpen our awareness of the phenomena' is quoted) and other works by Hart (notably his inaugural lecture 'Definition and Theory in Jurisprudence').[10] The relationship between law and language pervades much of his thinking about law; this gives rise to questions such as: what does it *mean* to have a 'right'?, what is a 'corporation' or an 'obligation'? For Hart we cannot properly understand law unless we understand the conceptual context in which it emerges and develops. He argues, for instance, that language has an 'open texture': words (and hence rules) have a number of clear meanings, but there are always several 'penumbral' cases where it is uncertain whether the word applies or not.

Thus no set of rules can provide predetermined answers to every case that may arise. This does not mean, however (contrary to the claims of the American realists, see 6.2), that the meaning of words is completely arbitrary and unpredictable. In most cases judges have little difficulty in simply applying the appropriate rule—without any need to call in aid moral or political considerations. The importance Hart attaches to language is sometimes criticized as being rather one-dimensional: language is obviously important, critics have conceded, but when a model of law as a system of rules (see 4.2.3) is attacked (eg, by realists) it is not the law's linguistic uncertainty that is the target, but the process of precedential legal reasoning. It is argued that this process cannot be adequately accounted for by postulating a model of judicial decision-making that treats it as merely the laying down of rules which bind subsequent courts.

[9] See Simon Roberts, *Order and Dispute* (Harmondsworth: Penguin, 1979), 24–5.

[10] (1954) 70 *Law Quarterly Review* 37.

4.2.3 Law as a system of rules

All societies have *social rules*. These include rules relating to morals, games, etc, as well as *obligation rules* which impose duties or obligations. The latter may be divided into moral rules and legal rules (or *law*). As a result of our human limitations there is a need for obligation rules in all societies: the 'minimum content of natural law' (see 4.2.1.1). Legal rules are divisible into *primary rules* and *secondary rules*. The former proscribe 'the free use of violence, theft and deception to which human beings are tempted but which they must, in general, repress if they are to coexist in close proximity to each other'.[11] Primitive societies have little more than these primary rules imposing obligations. But as a society becomes more complex, there is a need to change the primary rules, to adjudicate on breaches of them, and to identify which rules are actually obligation rules. These three requirements are satisfied in each case in modern societies by the introduction of three sorts of *secondary rules*: rules of change, adjudication, and recognition. Unlike primary rules, the first two of these secondary rules do not generally impose duties, but usually confer power. The rule of recognition, however, does seem to *impose duties* (largely on judges). This is considered further below.

In order for a legal system to exist, two conditions must be satisfied. First, valid obligation rules must be generally obeyed by members of the society, and, secondly, officials must accept the rules of change and adjudication; they must also accept the rule of recognition 'from the *internal point of view*'.

This is a bird's-eye view of Hart's picture of a legal system. Some of its more important (and controversial) features are now briefly examined.

4.2.4 Social rules

Hart rejects John Austin's conception of rules as commands and, indeed, the very idea that rules are phenomena that consist merely in externally observable activities or habits. Instead he asks us to consider the *social* dimension of rules, namely the manner in which members of a society *perceive* the rule in question, their *attitude* towards it. This 'internal' aspect (see 4.2.8) distinguishes between a rule and a mere habit. Thus, to use his example[12] chess players, in addition to having similar *habits* of moving the queen in the same way, also have a 'critical reflective attitude' to this way of moving it: they regard it as a *standard* for all who play chess; each 'has views' about the propriety of such moves. And they manifest these views in the criticism of others and acknowledge the legitimacy of such criticism when received from others. In other words, in order to explain the nature of rules we need to examine them from the point of view of those who 'experience' them, who pass judgment on them or, to use the language of hermeneutics, from the conceptual framework of the agent. It is particularly in respect of Hart's approach to the nature of rules that, though he is unashamedly positivist, Hart is to be distinguished from Austin and Bentham. He is concerned to demonstrate that far more significant than commands, sovereignty, and sanctions, is the *social* source of legal rules: they are a manifestation of our actual behaviour, our words, and our thoughts.

He also uses the concept of a 'rule' to distinguish between 'being obliged' and 'having an obligation'. The Austinian model cannot explain why if you are threatened by a gunman who orders you to hand over your money or he will shoot you, that though you may

[11] *The Concept of Law*, 89. [12] Ibid, 55–6.

be *obliged* to comply, you have no *obligation* to do so—because there is no *rule* imposing an obligation on you.[13]

In the postscript to *The Concept of Law*[14] Hart acknowledges that the existence of social rules requires more than its general acceptance by most members of a group. He recognizes the relevance of Ronald Dworkin's distinction between conventions and concurrent practice. The former involves acceptance which is dependent upon its acceptance by *others*. In this sense, the rule of recognition (see 4.2.6) is conventional. On the other hand, 'the shared morality of a group' consists in a 'consensus of independent *convictions* manifested in the concurrent practices of the group'.[15]

4.2.5 **Secondary rules**

It is important that you understand the nature and function of secondary rules. They play a leading role in Hart's system. Some encounter difficulty in respect of the three types of rules that Hart describes, and the relationships between them.

- *Rules of change*: Confusion sometimes arises as a result of Hart's use of this form of rule in *two* contexts. Rules of change are required in order to facilitate legislative or judicial changes to both the primary rules and certain secondary rules (eg, the rule of adjudication, below). This process of change is regulated by *rules* (secondary rules) which confer power on individuals or groups (eg, Parliament) to enact legislation in accordance with certain procedures. These rules of change are also to be found in 'lower-order' secondary rules which confer power on ordinary individuals to change their legal position (eg, by making contracts, wills, etc). Thus power-conferring secondary rules of change appear to have *two* meanings in Hart's model.
- *Rules of adjudication*: Certain rules confer competence on individuals to pass judgment mainly in cases of breaches of primary rules. This power is normally associated with a further power to punish the wrongdoer or compel the wrongdoer to pay damages. Further rules are required in this connection (eg, someone is under a duty to imprison the wrongdoer).
- *The rule of recognition* is essential to the existence of a legal system (and is considered further below). It determines the criteria by which the validity of the rules of a legal system is decided. As pointed out above, unlike the other two types of secondary rules, it appears, in part, to be *duty-imposing*: it requires those who exercise public power (particularly the power to adjudicate) to follow certain rules. This gives rise to an element of circularity[16] for the criteria for recognizing the validity of certain rules necessarily include—as a criterion of validity—the valid enactment of rules by the legislature in exercising its power conferred by the rule of change. But the rule of recognition presupposes the existence of judges whose duties are laid down by the rule of recognition. And these judges are empowered by a rule of adjudication. But this rule of adjudication is valid only if it satisfies some criterion of the rule of recognition. And, as just stated, the rule of recognition *presupposes* judges. And the existence of judges presupposes a rule of adjudication! 'Which member of this logical circle of rules', asks Neil MacCormick, 'is the ultimate rule of a legal system?'

[13] Ibid, 80. [14] Ibid, 255. [15] Ibid.
[16] Identified by MacCormick, *HLA Hart*, 108–9.

4.2.6 The rule of recognition

Pointing to the serious limitations of the classic legal positivist theory of sovereignty (see 3.4.4), particularly the idea that legal authority is expressed in terms of a habit of obedience, Hart instead contends that rules are valid members of the legal system only if they satisfy the criteria laid down by the rule of recognition. This secondary rule is a crucial aspect of Hart's model and you would be well advised to give it your closest attention. Not only is it important in its own right—as the centrepiece of Hart's positivism—but it provides the target of attack for several non-positivists, notably Ronald Dworkin, when they come to analyse, for instance, the judicial function (see 5.2.2).

Comparing it to the standard metre bar in Paris (the definitive standard by which a metre is measured), Hart says that the validity of the rule of recognition cannot be questioned: 'It can neither be valid nor invalid but is simply accepted as appropriate for use in this way.'[17] In the United Kingdom, he argues, the rule of recognition is 'what the Queen in Parliament enacts is law'. But the question of whether there is a *single* rule of recognition, whether it includes the doctrine of precedent (as it surely must) and whether there are several, perhaps graded rules of recognition is one which has not been adequately elaborated by Hart and which has generated considerable discussion.

Students generally find this the most perplexing aspect of Hart's theory. They often take the concept too literally. Hart certainly claims that for every developed legal system there is an 'ultimate rule of recognition' whose validity cannot be questioned and whose existence depends solely on the fact that it is accepted by officials 'from the internal point of view'. But Hart is not saying that the rule of recognition is merely a single rule or set of rules which, as if by some magical incantation, can supply the answer to the question: 'Which rules are legal rules?' It is more complex than that. The rule of recognition contains a set of different criteria of recognition which interact with each other in a variety of ways. A useful exercise is to attempt to set out the rule of recognition for a particular jurisdiction (which has certain constitutional and institutional features). MacCormick attempts such a formulation.[18] This is his fictitious rule of recognition for a state with a written constitution:

The judicial duty is to apply as 'valid law' all and only the following:

> (i) Every provision contained in the constitution of 1950, save for such provisions as have been validly repealed by the procedures set in Article 100 of that constitution, but including every provision validly added by way of constitutional amendment under Article 100;
>
> (ii) Every unrepealed Act of the Legislature validly enacted under, and otherwise consistent with, the provisions of the constitution of 1950;
>
> (iii) Every provision by way of delegated legislation validly made under a power validly conferred by any unrepealed Act of the Legislature;
>
> (iv) Every ruling on any question of law made by the Supreme Court or the Court of Appeal established by the Constitution of 1950, save that the Supreme Court may reverse any of its own prior rulings and those of the Court of Appeal, and the Court of Appeal may reverse its own prior rulings; and save that no judicial ruling inconsistent with any provision covered by criteria (i), (ii), or (iii) is valid to the extent of such inconsistency;

[17] *The Concept of Law*, 105–6. [18] *HLA Hart*, 110.

> (v) Every rule accepted as law by the custom and usage of the citizens of the State, either by way of general custom or local and particular custom, such being applicable either generally or locally so far as not inconsistent with (i)–(iv) above; and
>
> (vi) Every rule in force in the State prior to the adoption of the Constitution of 1950, save for any such rule inconsistent with any rule valid under (i)–(v) above.

But this, you may cry, is simply a roll-call of the 'sources' of law. Surely, the rule of recognition is more intricate (and less obvious) than that! To this protest there are, I think, two answers. First, the connection between any 'acid test' of law and the 'sources' of law is a necessary and indeed inescapable one. It is clear that in applying the criteria of legal validity, a court (for it is normally courts that are called upon to decide such questions) is bound to accord validity to the enactments of the legislature, the judgments of courts, etc. It would be curious if this were otherwise. But the rule of recognition is more: it is 'a common, public standard of correct judicial decision'[19] which is binding *only if accepted by the officials in question*. Secondly, this is more than a *list* of formal standards of validity; in Hart's theorem this fictitious rule of recognition is actually a single rule which comprises six criteria ranked in order of importance. And each of them exerts complex mutual interrelations with one another.

If this strikes you as exasperating, you will not be alone. The precise (or even the least confusing) meaning of Hart's rule of recognition continues to perplex legal theorists.[20] In *The Concept of Law* he uses the phrase in two interrelated ways. First, he occasionally suggests that such rules are 'linguistic entities that designate what the primary rules of the system are… [by] designating the criteria for legal validity'.[21] When the concept is so employed he gives as an example 'an authoritative list or text of the [primary] rules to be found in a written document or carved on some public monument'.[22] Secondly, he frequently describes the rule of recognition as consisting in certain linguistic entities (such as those expressed in various sections of the United States Constitution). Here the rule of recognition constitutes those criteria that identify what primary rules of the legal system are. It operates as a barrier to exclude those rules that fail to satisfy the criteria contained in the rule of recognition.

Secondly, Hart most importantly characterizes the rule of recognition as a 'social rule': a particular kind of social practice. This formulation of the rule of recognition is a central feature of his account of law, and is endorsed by Hart in the postscript to *The Concept of Law*:

> My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are conventional in the sense I have explained. This considerably narrows the scope of my practice theory and I do not now regard it is a sound explanation of morality, either individual or social. But the theory remains a faithful account of conventional social rules which include… certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.[23]

[19] *The Concept of Law*, 116.

[20] Here it is Benjamin C Zipursky, 'The Model of Social Facts' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to* The Concept of Law (Oxford: Oxford University Press, 2001), 227 ff.

[21] Ibid, 227. [22] *The Concept of Law*, 94. [23] Ibid, 34.

It is therefore unequivocally a *social* rule. This is well explained by Waluchow:

> In calling the rule of recognition a social rule, Hart means to distinguish it from rules whose existence is a result of official, rulemaking action(s) taken in accordance with secondary rules which establish and regulate this creative power. Unlike rules introduced by the formal actions of people in authority, social rules arise informally out of the complex practices of the members of the society or group in which they exist. In the case of a rule of recognition its existence is manifested in a complex general practice among the officials of a legal system and the general population. The former identify the valid rules of the system according to generally acknowledged and accepted criteria, while the latter acquiesce in, and conform with, the results of the rule of recognition's use by the officials.[24]

But, as Jules Coleman has observed, the rule of recognition cannot be equated with a social practice. The rule of recognition is a rule, and thus an abstract, propositional entity. A practice is constituted in part by behaviour, and is therefore not a propositional entity. The rule has conditions of satisfaction; the practice does not:

> The most important point about the relationship between rule and practice is that the rule of recognition comes into existence as a rule that regulates behaviour only if it is practised. The practice, we can say, is an existence condition of the rule of recognition. This feature falls out of the fact that the rule of recognition is a social or conventional rule: like the convention of driving on the right-hand side of the road, its claim to govern conduct depends on its being generally observed. By contrast, the legal rules that are validated by a rule of recognition purport to regulate behavior regardless of whether or not those rules reflect actual practice… Put precisely, while the claim to legal authority requires that all laws be capable of regulating conduct, the claim of legal norms generally to regulate conduct depends on the existence of a rule whose own claim to do so depends on its being practised.[25]

This ambiguity in the meaning of the rule of recognition impairs the authority of Hart's wider project, since several elements of his theory turn on the properties of the rule of recognition. How can so fundamental a conception simultaneously convey three different meanings? In the words of one critic echoing Coleman:

> [I]t is vital to Hart's theory that rules of recognition state criteria that primary legal rules satisfy or fail to satisfy. This feature seems to require the first or second version of 'rule of recognition' as something prepositional. But it is similarly vital to Hart's rule of recognition that it is a social practice of judges. Yet a social practice is not something propositional, and a linguistic or propositional entity is not a practice of judges.[26]

Despite this impediment, you may conclude it is far from fatal to Hart's rule of recognition (as both a secondary rule and a social practice), and that the explanatory power of this central idea emerges relatively unscathed.

4.2.7 The existence of a legal system

It has already been seen that it is Hart's view that a legal system may be said to 'exist' only if valid (primary) rules are obeyed and officials accept the rules of change and

[24] WJ Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994), 235.
[25] Coleman, *The Practice of Principle: In Defense of A Pragmatic Approach to Legal Theory*, 77–8.
[26] Zipursky, 'The Model of Social Facts' in Coleman (ed), *Hart's Postscript*, 228.

adjudication. In Hart's words: 'The assertion that a legal system exists is . . . a Janus-faced statement looking both to obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour.'[27] It is not clear whether these conditions are being postulated by Hart as a historical or developmental thesis (ie, primitive societies eventually develop by virtue of the emergence of secondary rules), or whether it is a purely hypothetical model to illustrate the function of these rules or as a heuristic device by which to recognize the existence of a legal system—as JW Harris puts it:

> If a country is in a state of turmoil and the political scientist is trying to assess whether it has that social grace commonly known as 'law', wheel in the patient and apply this two-pronged stethoscope—'Are your primary rules generally observed?' 'Do your officials accept your secondary rules?'[28]

Hart is not suggesting that *members of society* need 'accept' the primary rules or the rule of recognition; it is only the *officials* who need to adopt an 'internal point of view'. He acknowledges that if a legal system does not receive widespread acceptance it would be both morally and politically objectionable. But these moral and political criteria are not identifying characteristics of the notion of 'legal system'. The validity of a legal system is therefore independent from its efficacy. A completely ineffective rule may be a valid one—as long as it emanates from the rule of recognition. Nevertheless, in order to be a valid rule, the legal system of which the rule is a component must, as a whole, be effective.

4.2.8 The 'internal point of view'

It is important to grasp precisely what Hart means by this ubiquitous phrase (which appears in numerous guises throughout *The Concept of Law*). Let him speak for himself in a passage that is worth studying closely:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong.'[29]

This 'internal' aspect of rules serves, of course, to distinguish social rules from mere group habits. You will notice, too, the emphasis on the language ('normative terminology') that is generated by the presence of rules. But a question that has been raised is whether by 'accepting' secondary rules, officials must 'approve' of them. The better view is that acceptance does not mean approval. In other words, certain judges in a wicked legal system (say, apartheid South Africa) may abhor the rules they are required to apply; this would nevertheless satisfy Hart's conditions for a legal system to exist. See the case study in Chapter 2. There is also a distinction between *accepting* the rules and *feeling bound* by them: see the discussion of the views of Alf Ross in 6.3.1.

[27] *The Concept of Law*, 113.
[28] JW Harris, *Legal Philosophies*, 2nd edn (London: Butterworths, 1997), 123.
[29] *The Concept of Law*, 56.

4.2.9 The judicial function

In developing his theory of a legal system as a 'union of primary and secondary rules', Hart seeks to reject both the strictly formalist view (with its emphasis on judicial precedents and codification) and the rule-scepticism of the American realist movement (see 6.2). In so doing, he strikes something of a compromise between these two extremes: he—naturally—accepts that laws are indeed rules, but he recognizes that in arriving at decisions, judges have a fairly wide discretion. And he is, in any event, driven to this conclusion by virtue of the rule of recognition: if there is some 'acid test' by which judges are able to decide what are the valid legal rules, then where there is *no* applicable legal rule or the rule or rules are uncertain or ambiguous, the judge must have a strong discretion to 'fill in the gaps', in such 'hard cases'. The extent to which judges *do* have a discretion to decide—almost as they please—what the law is in these cases has, of course, become one of the most hotly contested subjects in contemporary jurisprudence (and hence popular examination question fodder; it is discussed at greater length in 5.2).

I have already mentioned that Hart recognizes that, as a consequence of the inherent ambiguity of language, rules have an 'open texture' (eg, what is a 'vehicle'?) and, are, in some cases, vague (eg, what is 'reasonable care'?). He therefore has no difficulty in accepting the proposition that in 'hard cases' judges *make* law. They will, of course, be guided by various sources (eg, persuasive cases from foreign jurisdictions), but, in the end, the judge will base his decision on his own conception of fairness or justice. Whether this is a valid way of describing the judicial function is examined in 5.2.

4.2.10 'An essay in descriptive sociology'?

In his preface to *The Concept of Law*, Hart says the book may be viewed in these terms. And the extent to which this is a justifiable claim is a matter that has attracted the attention of both jurists and social scientists[30] (as well as the occasional examiner). Lloyd prefers to regard it as 'an essay in analytical jurisprudence'[31] and Twining finds it difficult to support the claim 'not because it is wrong or misleading, but because the idea of a descriptive sociology of law is not developed in *The Concept of Law* nor in Hart's other writings'.[32] Yet Hart's insistence that officials accept the rule of recognition 'from the internal point of view' and his view that there should be a 'critical reflective attitude' to certain patterns of behaviour as a common standard echoes Max Weber's concept of internal legitimation. (See 7.5.) In her biography of Hart,[33] Nicola Lacey uncovers an intriguing mystery. When John Finnis borrowed Hart's copy of *Max Weber on Law in Economy and Society* he discovered that the pages had been heavily annotated by Hart. Beside one passage, in which Weber discusses the idea of law drawing its legitimacy from an 'internal' perspective, Hart had written, 'Good, like it, likely to be useful.' And useful it turns out to have been. Yet when, on two separate occasions, Finnis asked Hart whether this central idea in his concept of law had Weberian origins, Hart denied that he had been influenced by the German sociologist. One can only wonder: why? Lacey suggests that it may have been part of a general hostility among analytic philosophers towards modern social theory. We shall never know.

[30] See, for example, M Krygier (1982) 2 *Oxford Journal of Legal Studies* 155.

[31] *Introduction to Jurisprudence*, 2nd edn (London: Butterworths, 1997), 336.

[32] (1979) 95 *Law Quarterly Review* 557, 579.

[33] Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

Stephen Perry has sought to show that Hart's substantive theory fails to provide a satisfactory conceptual analysis. Nor, he contends, does it account successfully for law's normativity. This is because Hart is committed to 'methodological positivism' which holds that a theory of law should provide external descriptions of legal practice that are morally neutral and without justificatory aims:

> Hart's own theory of law, being external, is admittedly without justificatory aims: it does not try to show participants how the social practice of law might be justified to them. But the theory is not, I have argued, morally neutral. Even so it does not offer a solution to the problem of the normativity of law in the way that, say, Raz's theory does. One reason for this is precisely that the theory is external; another is that it rests on a purely descriptive account of the concepts of obligation and authority. As far as these latter concepts are concerned, Hart is content simply to make the observation that officials and perhaps others accept the rule of recognition, meaning they *regard* it as obligation-imposing. This is to describe the problem of the normativity of law rather than to offer a solution.[34]

In other words, Hart's twin analytical ambitions of analysing both the concept of law and its normativity cannot be achieved by adopting an external, purely descriptive approach. The law, Perry argues, is not susceptible to a scientific method of investigation, for it is unable to address its normativity. A similar point is made by MJ Detmold:

> Hart's mistake… was to try to run two incompatible analyses together: the analysis of sociological statements, where existence can be separated from bindingness and thus from moral statements; and the analysis of internal normative statements, where it cannot. *The Concept of Law* suffers throughout from a failure to separate these things.[35]

This is a bold, provocative claim, but it is one that Detmold attempts to substantiate with largely philosophical evidence which is at once dense and difficult.

4.2.11 **Critique**

It would be impossible to consider here the prodigious literature that Hart's work has generated. Nor could any student be expected to read even one tenth of it. But you may be certain that you will need to have a thorough understanding of *The Concept of Law* and probably also the later reflections of its author in the 1994 postscript (written when he was frail and unwell). Some of the criticisms that have been made of Hart's general thesis have been referred to above. There are many more (eg, Is the 'internal point of view' an oversimplification? Can people have an 'internal' attitude to rules of which they are unaware? Does Hart's system of rules ignore the concept of an institution? Is his anthropological evidence descriptive or analytical?). The most substantial and influential critique is the subject of Chapter 5.

Be sure you are acquainted with the principal criticisms that have been made of the thesis (from a variety of standpoints). Are you able to say whether and why you consider these attacks to be justified? Your analysis should exhibit, particularly in respect of this celebrated jurist, a 'critical reflective attitude'.

[34] Stephen Perry, 'Hart's Methodological Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to* The Concept of Law, 353.

[35] MJ Detmold, *The Unity of Law and Morality* (London: Routledge & Kegan Paul, 1984), 54.