

Law and Morality in Analytical Jurisprudence



Faculty of Law, Katholieke Universiteit Leuven, Belgium

Philosophy of Law:
Law and Morality in Analytical Jurisprudence
Mr. Martin Buijsen
Prof. Dr. R. Foqué
Academic Year 1998-1999

samuel klaus
6. semester

weldadigheidsstraat 15
3000 leuven
belgium

Leuven, den 10. Juni 1999



© Samuel Klaus, 1999 (www.samuelklaus.ch)

Diese Publikation erscheint unter der *Creative Commons License Attribution-NonCommercial-ShareAlike 3.0* und ist im Volltext online abrufbar:

<http://www.samuelklaus.ch/publikationen.html>

Der Autor erlaubt ausdrücklich, sowohl für das gesamte Werk als auch für einzelne Teile desselben, unter Beachtung untenstehender Bedingungen:

- die Vervielfältigung und Verbreitung;
- die Schaffung derivativer Werke (Werke zweiter Hand);
- die Speicherung und Reproduktion unter Verwendung elektronischer Systeme (z.B. in Datenbanken u.ä.);

unter den folgenden Bedingungen:



Attribution: Das Werk muss dem Autor in eindeutiger Weise durch folgenden Vermerk zugeordnet werden:
© Samuel Klaus, 1999 (www.samuelklaus.ch)



NonCommercial: Das Werk darf, ohne ausdrücklich anderslautende Genehmigung durch den Autor, nur zu nichtkommerziellen Zwecken verwendet werden.



ShareAlike: Werden auf Grundlage des Werkes derivative Werke (Werke zweiter Hand) geschaffen, sind diese ebenfalls der Creative Commons License Attribution-NonCommercial-ShareAlike 3.0 zu unterstellen.

Bei jeglicher Verbreitung sind diese Lizenzbedingungen dem Werkempfänger mitzuteilen. Für von dieser Lizenz nicht gedeckte Verwendungsarten ist die schriftliche Genehmigung des Autors einzuholen.

Dies ist eine vereinfachte Zusammenfassung der Lizenzbedingungen. Der Volltext der Lizenzbedingungen kann eingesehen werden unter:

<http://creativecommons.org/licenses/by-nc-sa/3.0/legalcode>

<http://www.samuelklaus.ch/byncsa30.html>

0.0 Overview of Contents

| | | |
|-----------|---|-----------|
| 0. | Overview and Table of Contents, Bibliography..... | 3 |
| 1. | Introduction..... | 6 |
| 2. | Law and Morality in the Analytical Jurisprudence of H.L.A. Hart..... | 7 |
| 3. | Points of Inquiry | 8 |
| 4. | Distinction of Law and Morality | 9 |
| 5. | Concept of Law | 11 |
| 6. | Concept of Morality | 13 |
| 7. | Intersection of Law and Morality..... | 16 |
| 8. | Compliance of Law and Morality beyond the Minimum Content..... | 19 |
| 9. | Final Remarks | 21 |

0.1 Table of Contents

| | | |
|-----------|---|-----------|
| 0. | Overview and Table of Contents, Bibliography..... | 3 |
| 0.0 | Overview of Contents..... | 3 |
| 0.1 | Table of Contents..... | 4 |
| 0.2 | Bibliography..... | 5 |
| 1. | Introduction..... | 6 |
| 2. | Law and Morality in the Analytical Jurisprudence of H.L.A. Hart..... | 7 |
| 2.1 | Legal Rules as Social Rules..... | 7 |
| 2.2 | Departure from Imperative or Command Theory..... | 7 |
| 2.3 | Conceptual Distinction and Factual Intersection of Law and Morality..... | 8 |
| 3. | Points of Inquiry..... | 8 |
| 4. | Distinction of Law and Morality..... | 9 |
| 4.1 | Natural Law..... | 9 |
| 4.2 | Legal Positivism..... | 9 |
| 4.3 | Comparison of Natural Law and Legal Positivism..... | 10 |
| 4.4 | Conclusion..... | 10 |
| 5. | Concept of Law..... | 11 |
| 5.1 | Primary and Secondary Rules..... | 11 |
| 5.1.1 | Primary Rules..... | 11 |
| 5.1.2 | Secondary Rules..... | 11 |
| 5.1.2.1 | Rule of Recognition..... | 11 |
| 5.1.2.2 | Rules of Adjudication..... | 11 |
| 5.1.2.3 | Rules of Change..... | 11 |
| 5.2 | Internal and External Aspect of Rules..... | 12 |
| 6. | Concept of Morality..... | 13 |
| 6.1 | Characteristic Features of Morality..... | 13 |
| 6.1.1 | Importance..... | 13 |
| 6.1.2 | Immunity from Deliberate Change..... | 13 |
| 6.1.3 | Voluntary Character of Moral Offences..... | 14 |
| 6.1.4 | Form of Moral Pressure..... | 14 |
| 6.2 | Positive and Critical Morality..... | 14 |
| 6.2.1 | Positive Morality..... | 14 |
| 6.2.2 | Critical Morality..... | 15 |
| 6.2.3 | Interaction of Positive and Critical Morality..... | 15 |
| 7. | Intersection of Law and Morality..... | 16 |
| 7.1 | Similarities of Moral and Legal Rules..... | 16 |
| 7.2 | Minimum Content of Law..... | 16 |
| 7.2.1 | Human Vulnerability..... | 17 |
| 7.2.2 | Approximate Equality..... | 17 |
| 7.2.3 | Limited Altruism..... | 17 |
| 7.2.4 | Limited Resources..... | 18 |
| 7.2.5 | Limited Understanding and Strength of Will..... | 18 |
| 8. | Compliance of Law and Morality beyond the Minimum Content..... | 19 |
| 8.1 | From Pre-Legal to Legal Forms of Social Control..... | 19 |
| 8.2 | Establishment and Use of Coercive Power..... | 19 |
| 8.3 | Claims for Conformity of Law and Morality beyond Minimum Content..... | 19 |
| 8.3.1 | Power and Authority..... | 20 |
| 8.3.2 | Influence of Morality on Law..... | 20 |
| 8.3.3 | Interpretation..... | 20 |
| 8.3.4 | Criticism of Law..... | 20 |
| 8.3.5 | Principles of Legality and Justice..... | 20 |
| 8.3.6 | Legal Validity and Resistance to Law..... | 20 |
| 9. | Final Remarks..... | 21 |
| 9.1 | General Statement..... | 21 |
| 9.2 | Personal Statement..... | 21 |

0.2 Bibliography

- DREIER, Ralf Recht-Moral Ideologie: Studien zur Rechtstheorie
- Publ: Suhrkamp Verlag Frankfurt am Main, 1981
Cited: DREIER
- ECKMANN, Horst Rechtspositivismus und sprachanalytische
Philosophie: Der Begriff des Rechts in der
Rechtstheorie H.L.A. Harts
- In: Schriften zur Rechtstheorie
Heft 15
Publ: Duncker & Humblot, Berlin
Cited: ECKMANN
- FULLER, Lon L. Positivism and Fidelity to Law –
A Reply to Professor Hart
- In: Harvard Law Review, 630
Volume 71, February 1958, Number 4
Cited: FULLER
- HART, H. L. A. The Concept of Law
- Publ: Clarendon Press, Oxford, 1994
Ed: Second Edition
Cited: HART, Concept
- HART, H. L. A. Positivism and the Separation of Law and Morals
- In: Harvard Law Review, 593
Volume 71, February 1958, Number 4
Cited: HART, Separation
- HART, H. L. A. Law, Liberty and Morality
- Publ: Oxford University Press, London, 1963
Cited: HART, Liberty
- KAUFMANN, Arthur (Ed)
HASSEMER, Winfried (Ed) Einführung in die Rechtsphilosophie und
Rechtstheorie der Gegenwart
- Publ: C.F. Müller Juristischer Verlag,
Heidelberg, Karlsruhe, 1977
Cited: KAUFMANN / HASSEMER
- MACCORMICK, Neil H.L.A. Hart
- In: Jurists: Profiles in Legal Theory
Ed: General Editor William Twining
Publ: Stanford University Press, Stanford, CA, 1981
Cited: MACCORMICK

1. Introduction

The legal theory developed by Herbert Lionel Adolphus Hart was strongly influenced by the British tradition of liberal utilitarianism and legal positivism. The term analytical jurisprudence, in the English tradition of Jeremy Bentham, John Austin, and H.L.A. Hart, stands for one school of thought of positivistic legal theory, which itself dates back to Thomas Hobbes.

However, not the legal theory of Hart per se, seen in its proper context, but one specific aspect of it shall be considered more closely and elaborated: Throughout the course of this paper, more light will be shed upon Hart's perception of law and morality, the differences, the interdependencies, and the intersections between these two important notions in legal as well as in philosophical theory.

To do so, I shall first take a general approach at the notions of law and morality, as they are specified in Hart's Concept of Law. This general overview will inevitably lead to several crucial questions, which I will then try to elaborate throughout the paper, by first distinguishing the notions of law and morality, defining both in terms of Hart's legal theory, and then focussing on the connection between law and morality and the emanating consequences.

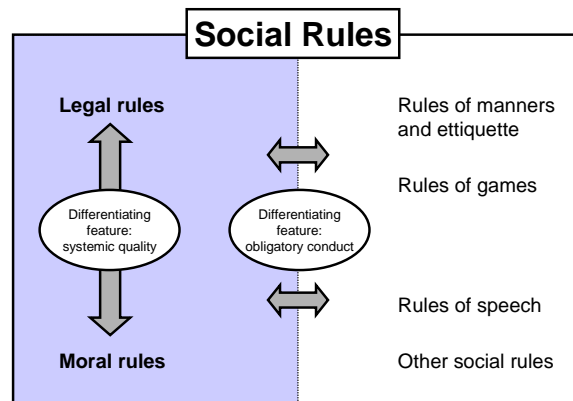
A general and personal statement on Hart's legal theory concludes the paper.

2. Law and Morality in the Analytical Jurisprudence of H.L.A. Hart

To create a fertile soil on which the elaboration of Hart's notions of law and morality will flourish, three general but nevertheless brief statements are necessary: the perception of legal rules as social rules, the departure of Hart from Austins imperative or command theory, and the strict conceptual differentiation of law and morality opposed to their factual mutual influence.

2.1 Legal Rules as Social Rules

A legal system, seen in the light of Hart's legal theory, is a system of social rules, social in a double sense: both in that they govern the conduct of human beings in societies, and in that they owe their origin and existence exclusively to human social practices.¹ Legal rules are therefore social rules, and belong as such to a general class of social rules, to which also belong such diverse other types of rule as rules of morality, of manners and etiquette, of games, of speech, etc.



From this general class, legal rules are differentiated by two features. The first one distinguishes legal and moral rules from the rest of social rules, whereas the second one draws a line between legal and moral rules:

"The first is that [...legal rules] are concerned with "obligations" or "duties" – they make certain conduct "obligatory" or "binding".

The second is that [...legal rules], unlike moral rules, have a systemic quality depending on the interrelationship of two kinds of rules, "primary rules" and "secondary rules" [...]"²

2.2 Departure from Imperative or Command Theory

In developing his legal theory, Hart carefully avoids to introduce any major novel thoughts, but rather builds his theory on the foundation of Austin's theory of commands (or, to be more accurate, on the remains spared by Hart's thorough criticism). Hart first further develops and restates Austin's definition of law as commands:

"The laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign."³

Hart then shows the inadequacies of this theory, the main objection evolving from the variety of legal norms, which not only impose duties, but also confer powers. Hart's criticism of the command theory lead him to introduce elements not implied in the ideas of an order, a threat, obedience, because "too much that is characteristic of law is distorted by the effort to explain it in these simple terms."⁴ The foundations of Hart's legal theory are thus laid.

¹ MACCORMICK, 20

² MACCORMICK, 20

³ HART, Concept, 25

⁴ HART, Concept, 155

2.3 Conceptual Distinction and Factual Intersection of Law and Morality

By defining his idea of legal positivism and distinguishing it from natural law, Hart defines the distinction and connections between law and morality. His denial that law is at its base moral and his affirmation that the existence of a law is always a conceptually distinct question from its moral valuation refer back to Austin who, more than a century before Hart, stated the core of legal positivism:

"The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry; whether it be or be not comfortable to an assumed standard, is a different enquiry."⁵

In the line of thought of Austin, Hart states that laws do not need to "reproduce or satisfy certain demands or morality, though in fact they have often done so."⁶ Unlike Austin, however, Hart describes this distinction between law and morality as purely conceptual, and specifies that it leads in fact not to a denial of a connection between and mutual influence of legal and moral systems of social control.

3. Points of inquiry

| Question | Covered in / on | |
|---|-----------------|-------|
| | Section | Page |
| How does Hart differentiate legal positivism and natural law, respectively, how is legal positivism defined ? | 4 | 9 |
| Which conception of law – natural law or legal positivism – is more appropriate to Hart and what are the enumerated reasons for this preference ? | 4 | 9 |
| Does a positivistic notion of law necessarily exclude the acceptance of higher values ? | 6.2; 7 | 14-16 |
| Does a positivistic notion of law allow for a moral minimum content of law ? How is such a minimum content defined ? | 7.2; 8 | 16-20 |
| What does the term "morality" in Hart's works mean ? | 4; 6 | 9, 13 |
| How are law and morality to be conceptually differentiated ? | 4; 5; 6 | 9-15 |
| Is there a factual intersection or connection of law and morality ? | 7 | 16-18 |
| Is there a necessary and sufficient condition for laws to be considered morally "good" laws ? | 7.2; 8 | 16-20 |
| What are the practical consequences from Hart's definition and elaboration of the notions of law and morality ? | 7.2; 8 | 16-20 |

⁵ AUSTIN, The Province of Jurisprudence Determined, 184, cited according HART, Separation, 597

⁶ HART, Concept, 185-86

4. Distinction of Law and Morality

According to Hart, the notion of law can mean two things:

"[L]aws which formulate the course of regularities of nature, and laws which require men to behave in certain ways. The former, which can be discovered by observation and reasoning, may be called "descriptive" and it is for the scientist thus to discover them; the latter cannot be so established, for they are not statements or descriptions of facts, but are "prescriptions" or demands that men shall behave in certain ways."⁷

4.1 Natural Law

On this very distinction of descriptive and prescriptive law, Hart elaborates the core of natural law:

"To these differences in the sense of "law", there correspond systematic differences in the associated vocabulary of words like "must", "bound to", "ought", and "should". So, on this view, belief in Natural Law is reducible to a very simple fallacy: a failure to perceive the very different senses which those law-impregnated words can bear."⁸

4.2 Legal Positivism

Throughout his works, Hart emphasizes that the notion of "positivism" in contemporary literature is used to designate one or more meanings of the following, non-exhaustive list:⁹

The contention that:

- laws are commands of human beings,
- there is no necessary connection between law and morals
- the analysis of legal concepts is worth pursuing and to be distinguished from historical, sociological, and moral inquiries
- a legal system is a "closed logical system" where reference to external factors is not needed
- moral judgements cannot, unlike statements of fact, be established or defended by rational argument, evidence or proof

In The Concept of Law, Hart hence defines legal positivism as follows:

"Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."¹⁰

In other words, there is no necessary connection between law and morality, or law as it is and law as it ought to be – "every positive law is law, irrespective of any conformity of content with any predetermined set of norms, called morality."¹¹

⁷ HART, Concept, 187

⁸ HART, Concept, 187

⁹ HART, Separation 601-602; HART, Concept, 302

¹⁰ HART, Concept, 185-86

¹¹ ECKMANN, 25

4.3 Comparison of Natural Law and Legal Positivism

The decision between natural law and legal positivism is for Hart not based on dogmatic, but on practical reasons:

"For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both."¹²

The wider concept of law means legal positivism, which includes the narrower concept, natural law. This narrow concept excludes from "law" all rules offending morality, although they might be valid by formal tests.

Three arguments in favor of the wider, positivistic concept can be enumerated:¹³

1. A systemic-theoretical argument, stating that the narrower concept, natural law, excludes morally iniquitous laws from theoretical legal scrutiny:

"If we adopt the wider concept of law, we can accommodate within it the study of whatever special features morally iniquitous laws have, and the reaction of society to them."¹⁴

2. An ethical-pedagogical argument, meaning that the wider concept is better apt to make people critical as to the question whether or not to obey morally iniquitous laws:

"What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny. This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law."¹⁵

3. An idiomatic-conceptual argument, based on conceptual clarity and calling for an ethically neutral notion of law:

"A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues, whereas a narrow concept of law may blind us to them."¹⁶

4.4 Conclusion

For the reasons mentioned above, the wider concept of law, legal positivism, is preferred by Hart to the narrow concept of law, natural law.

Legal positivism in this sense means the contention that there is no necessary connection between law and morality, or law as it is and law as it ought to be. However, this conceptual distinction of law and morality does not necessarily exclude a factual connection and mutual influence between law and morality, on which we shall focus after defining the two concepts involved, law and morality.

¹² HART, Concept, 209

¹³ Dreier, 192

¹⁴ HART, Concept, 210

¹⁵ HART, Concept, 210

¹⁶ HART, Concept, 211

5. Concept of Law

The strict conceptual distinction of law and morality thus established calls for further elaboration of the notions implied, the notion of law and of morality, respectively.

Hart's understanding of law is founded on two main pillars; the understanding of legal rules as a union of primary and secondary rules, and the complement of the external aspect of a rule with its corresponding internal aspect.

5.1 Primary and Secondary Rules

Hart's main objection against the command theory evolves from the variety of legal norms, which not only impose duties, but also confer powers,¹⁷ a fact to which the command theory is oblivious. Hart takes this variety of legal norms into consideration by dividing legal rules in primary and secondary rules.¹⁸

5.1.1 Primary Rules

Primary rules are rules establishing obligations and duties. Under this type of rule, "human beings are required to do or abstain from certain actions, whether they wish or not."¹⁹ Primary rules impose duties, thus proscribing forms of wrongdoing as "crimes", "offences", or "torts" and "delicts".

5.1.2 Secondary Rules

Rules of the other kind are "secondary" in that they do not themselves constitute binding standards of obligatory conduct. Rather, they relate in various ways to the primary ones, and "in this special kind of relationship lies the systemic quality of law."²⁰ Hart defines three kinds of secondary rules; the rules of recognition, of adjudication and of change.²¹

5.1.2.1 Rule of Recognition

In every legal system there exists a secondary rule essential to its distinct existence as a legal system. This very rule determines the criteria which settle the validity of the rules of a particular legal system, it sets down the duties of those who exercise public and official power, especially the power to adjudicate.

5.1.2.2 Rules of Adjudication

The rules of adjudication confer power on certain people to pass judgement on cases of alleged wrongs, giving officials competence of judging and law-enforcement.

5.1.2.3 Rules of Change

The rules of change state on one hand the process of deliberate change of primary rules of obligation and secondary rules of adjudication (by conferring power to enact legislation by specified procedures) and on the other hand empower ordinary individuals to make various changes in the legal position or legal relationships of themselves and others.

¹⁷ KAUFMANN / HASSEMER, 167

¹⁸ HART, Concept, 94

¹⁹ HART, Concept, 81

²⁰ MCCORMICK, 20

²¹ HART, Concept, 79ff; MACCORMICK 20ff

5.2 Internal and External Aspect of Rules

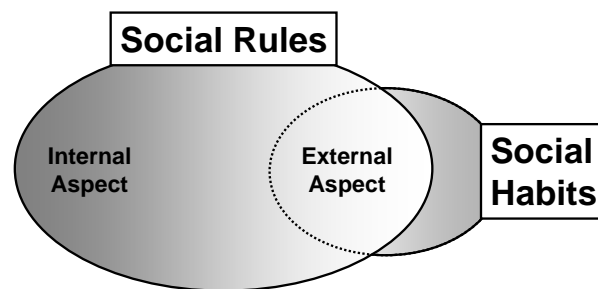
To advance the elaboration of the notion of law as a system of social rules, Hart contrasts social rules with social habits:

"A social rule has an "internal" aspect in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record."²²

Hereby, Hart denies the possibility of explaining rules solely by reference to external regularities of behaviour:

"Externally observable [...] patterning of behaviour is necessary to the explanation of a rule – necessary, but not sufficient. The further necessary element is an element of attitude among members of a group whose behaviour does reveal such patterning."²³

Whereas the regularity of behaviour is sufficient to characterise a social habit, a social rule requires the combination of the "external" regularity of behaviour and the "internal" attitude.



²² HART, Concept, 56

²³ MACCORMICK, 30

6. Concept of Morality

Having briefly defined Hart's notion of law, it is now appropriate to turn to the notion of morality, before confronting and comparing these two distinct systems of social control.

Hart conceives "morality not as immutable principles of conduct or as discoverable by reason, but as expressions of human attitudes to conduct which may vary from society to society or from individual to individual."²⁴

This definition of morality is indeed a broad and general one, being open to various criticism, such as the following one by Lon Fuller:

"[T]he word "morality" stands indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law. [...] When [Hart] speaks of morality he seems generally to have in mind all sorts of extra-legal notions about "what ought to be", regardless of their sources, pretensions, or intrinsic worth."²⁵

6.1 Characteristic Features of Morality

In narrowing and specifying the notion of morality, Hart further enumerates four distinct and cardinal features, which he sees as the "common denominator" of those principles, rules, and standards of conduct which are most commonly accounted "moral": "Importance", "Immunity from deliberate change", "Voluntary character of moral offences", and "Form of moral pressure".²⁶

6.1.1 Importance

An essential feature of any moral rule or standard is that it is regarded as something of great importance to maintain. This importance is manifested in different aspects:²⁷

- Moral standards are maintained at the cost of sacrificing personal interests.
- Serious forms of social pressure are exerted to obtain conformity with and to secure the communication and the teaching of moral standards as a matter of course to all in society
- The acceptance of moral standards is generally recognized as useful

6.1.2 Immunity from Deliberate Change

Legal and moral rules can be similar in that they may prescribe the same behaviour, but are distinct in that moral rules cannot be deliberately changed:

"It is characteristic of a legal system that new legal rules can be introduced and old ones changed or repealed by deliberate enactment [...]. By contrast moral rules or principles *cannot* be brought into being or changed or eliminated in this way."²⁸

²⁴ HART, Concept, 156

²⁵ FULLER, 635

²⁶ HART, Concept 168

²⁷ HART, Concept, 173f

²⁸ HART, Concept 175

6.1.3 Voluntary Character of Moral Offences

No moral blame or social pressure can be exerted upon unintentional violation of moral rules – to be morally criticizable, the offence in question must have been made intentionally.²⁹ This internal aspect of morality does not mean, however, that "morals is not a form of control of outward conduct; but only that it is a necessary condition for moral responsibility that the individual must have a certain type of control over his conduct."³⁰

6.1.4 Form of Moral Pressure

The prominent pressure used for the support of social morality consists of emphatic reminders of what the rules demand, of appeals to conscience, and reliance on the operation of guilt and remorse:

"Moral pressure is characteristically, though not exclusively, exerted not by threats or appeals to fear or interest, but by reminders of the moral character of the action contemplated and of the demands of morality."³¹

6.2 Positive and Critical Morality

Thus having defined the general notion, Hart distinguishes two forms of morality, positive and critical morality:

"I would revive the terminology much favoured by the Utilitarians of the last century, which distinguished "positive morality", the morality actually accepted and shared by a given social group, from the general moral principles used in the criticism of actual social institutions including positive morality. We may call such general principles "critical morality" [...]."³²

With the introduction of critical morality, Hart leaves the field of descriptive analytical jurisprudence and enters the debate upon justice and good laws, aimed at expounding principles for the just and proper uses of law in a civilized society.³³

6.2.1 Positive Morality

"The morality" of a given society, or the "accepted" or "conventional" morality of an actual social group, refers to standards of conduct which are widely shared in a particular society. This shared or positive morality is defined by the four cardinal features mentioned above (Importance, Immunity from deliberate change, Voluntary character of moral offences, Form of moral pressure).

²⁹ HART, Concept, 178

³⁰ HART, Concept, 179

³¹ HART, Concept, 180

³² HART, Liberty, 20; cited according to MACCORMICK, 47

³³ MACCORMICK, 6

6.2.2 Critical Morality

The basic idea behind the notion of critical morality is the existence of a moral position from which a positive morality may be criticized. This position of critical morality is characterized by two formal conditions, one of rationality and the other of generality:

"Thus it is implied in such criticism first that social arrangements should not rest on beliefs which can be shown to be mistaken, and secondly that the protections from harm, which morality characteristically affords through the actions and forbearances it demands, should be extended at least to all men who are able and willing themselves to observe such restrictions."³⁴

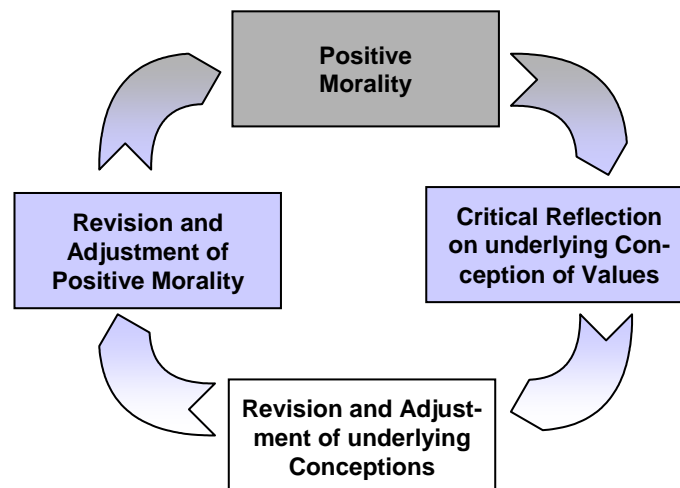
The requirement of rationality refers back to ideals and values, underlying moral principles, and not susceptible to proof:

"Rationality of principles [...] requires that they be geared to some coherent scheme of values. Principles which seem attractive but which on careful consideration turn out to be inimical to our real values ought to be rejected by any rational person."³⁵

6.2.3 Interaction of Positive and Critical Morality

"Critical morality seeks to exhibit and lay bare the value assumptions implicit in positive morality, to reassess these and render them coherent and thus to develop critical principles by reference to which we can reappraise and re-orient our ordinary day to day judgements and standards of judgement."³⁶

Critical morality thus helps us to continuously reflect upon and adjust the values underlying and founding our moral principles.



³⁴ HART, Concept, 183

³⁵ MACCORMICK, 49

³⁶ MACCORMICK, 50

7. Intersection of Law and Morality

Section 4 focused on the conceptual distinction, and sections 5 and 6 on the elaboration of the notions involved. This section's focus is on the factual connections and mutual influences between law and morality.

First, similarities of law and morality are taken into consideration, followed by the discussion of a minimum content of law. The next section then draws on the topic of conformity of law and morality beyond this minimum content.

7.1 Similarities of Moral and Legal Rules

"Moral and legal rules of obligation and duty have [...] certain striking similarities enough to show that their common vocabulary is no accident."³⁷

Hart summarizes these similarities of moral and legal rules as follows:³⁸

1. Moral and legal rules alike are conceived as binding independent of the consent of the individual bound by them.
2. They are both supported by serious social pressure for conformity
3. Compliance with both legal and moral obligations is regarded not as a matter for praise but as a minimum contribution to social life to be taken as a matter of course
4. They both include rules governing the behaviour of individuals in situations constantly recurring throughout life rather than special activities or occasions
5. Both legal and moral rules make demands which must obviously be satisfied by any group of human beings who are to succeed in living together.

The first three similarities can be related back to the three aspects of importance as a distinct and cardinal feature of defining (positive) morality (see section 6).

The remaining two similarities are the basic assumptions necessary for the following elaboration of a minimum content of law.

7.2 Minimum Content of Law

Hart's analytical approach to law is not aimed at normatively deciding how law ought to be, but describes how law in fact is and tries to explain its characteristics:

"[Hart] will nicht – auch nicht unter der nur hypothetischen Voraussetzung eines Zieles – bestimmten, wie das Recht *sein* soll, sondern er will als Rechtstheoretiker feststellen, wie das Recht *ist* und warum es so ist."³⁹

In his attempt to identify certain regularities of legal and moral systems, Hart turns to the inquiry on the minimum content of law:

"Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control."⁴⁰

According to Hart, the following truisms not only define the core of good sense in the doctrine of natural law, but also explain why the definition of the basic forms of law and morality in purely formal terms, without reference to any specific content

³⁷ HART, Concept, 172

³⁸ HART, Concept, 172

³⁹ ECKMANN, 45

⁴⁰ HART, Concept, 192-3

or social needs, has proved so inadequate.⁴¹ However, the departure from the strictly descriptive and formal field of analytical jurisprudence makes it necessary for Hart to make reference to such a specific content or social need, as he calls it. In avoiding to follow the approaches of earlier theories, which he strongly criticized, Hart opts for the most basic social need imaginable: survival as the general aim of humanity.

Given that aim, Hart elaborates five truisms about the characteristics of human nature and their connection with law and morality, from which follows the "natural necessity"⁴² for the intersection of law and morality. In that sense, Hart delivers an empirical version of natural law:⁴³

"Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law [...]"⁴⁴

7.2.1 Human Vulnerability

As most important for social life, Hart sees those forbearances restricting the use of violence. The truism in this argument lies in the fact that human beings are both "occasionally prone to, and normally vulnerable to, bodily attack."⁴⁵ The necessity of rules restricting the use of violence lies in the simple fact that if there were no such rules, there would not be any point in having rules of any other kind – survival of the fittest would be the law of the land.

7.2.2 Approximate Equality

It is another fact that no individual is so much more powerful than others, that he is able, without cooperation, to dominate or subdue them for more than a short period of time – everybody must sleep sometimes:

"This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation."⁴⁶

7.2.3 Limited Altruism

Human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled:

"Men are not devils dominated by a wish to exterminate each other, [...] neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible."⁴⁷

⁴¹ HART, Concept, 199

⁴² HART, Separation, 623

⁴³ ECKMANN, 46

⁴⁴ HART, Concept, 193

⁴⁵ HART, Concept, 194

⁴⁶ HART, Concept, 195

⁴⁷ HART, Concept, 196

7.2.4 Limited Resources

Those resources, which human beings need to survive, are limited:

"[This fact makes] indispensable some minimal form of the institution of property [...] and the distinctive kind of rule which requires respect for it."⁴⁸

7.2.5 Limited Understanding and Strength of Will

Obligation-creating rules, securing the recognition of promises as a source of obligation, and a standing procedure for self-binding operations is required to create a minimum form of confidence in the future behaviour of others, in order to ensure the predictability necessary for cooperation:

"All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many would succumb to the temptation."⁴⁹

This fact not only applies to contractual "vinculum iuris" relationships, but is also a reason for mutual forbearances on a societal level:

"Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system."⁵⁰

⁴⁸ HART, Concept, 196

⁴⁹ HART, Concept, 197

⁵⁰ HART, Concept, 198

8. Compliance of Law and Morality beyond the Minimum Content

The criterias used in the previous sections to define morality are of a formal nature – they do not involve the content which rules or standards must have in order to be moral. Consequently, the accepted positive morality of a society, though conforming to all the cardinal criterias of morality, may be utterly iniquitous, e.g. not extending its minimal protection and benefits to all within its scope.⁵¹ At this point, the process leading to the establishment of such a possibly iniquitous morality shall be examined.

8.1 From Pre-Legal to Legal Forms of Social Control

Societies can either be organized with merely moral forms of social control, or they introduce legal forms of social control. The step from pre-legal to legal forms of social control is according to Hart a necessary one, because in a merely moral system of social control, "there will always be some who will wish to exploit it, by simultaneously living within its shelter and breaking its restrictions."⁵²

As beneficial this step from a simple form of society, with primary rules of obligation as only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions might be, it brings its solid gains at a certain cost:

"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."⁵³

8.2 Establishment and Use of Coercive Power

In stepping from the pre-legal into the legal world, the voluntary cooperation of a majority in society creates authority, establishing the coercive power of law and government. This power may be used in two principal ways:⁵⁴

1. It may only be exerted against deviants breaking the rules which afford them protection.
2. It may be used to subdue and maintain, in a position of permanent inferiority, those members of society whose voluntary cooperation is dispensable for the creation of authority.

8.3 Claims for Conformity of Law and Morality beyond Minimum Content

The awareness, that this risk of abuse of power has materialized and may do so again, leads to the claim that law must conform to morality beyond the minimum content of law. Hart does not make a specific proposal as to the form or extent of such a conformity – he rather states, examines, and provides with critical remarks six different forms of this claim.

⁵¹ HART, Concept, 180, 200

⁵² HART, Concept, 195

⁵³ HART, Concept, 202

⁵⁴ HART, Concept, 201

8.3.1 Power and Authority

"A necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules. In this sense it is true that the coercive power of law presupposes its accepted authority."⁵⁵

However, the voluntary acceptance of the authority of the system may be purely accidental, not-intentional; there is no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.

8.3.2 Influence of Morality on Law

"The law of every state shows at a thousand points the influence of both the accepted social morality and wider moral ideals."⁵⁶

Not only is there a factual correspondence of law and morality, the stability of a legal system itself can be said to depend in part upon such types of correspondences, thus incorporating the "necessary connection of law and morals."⁵⁷

8.3.3 Interpretation

If laws are to be applied in concrete cases, they require interpretation. The judicial decisions in this interpretation often involve a choice between moral values, and not merely the application of some single outstanding moral principle.⁵⁸

8.3.4 Criticism of Law

Although the existence of a necessary connection between law and morality may be obvious, there might still be disagreement both as to the appropriate moral standards to which law has to conform, and as to the required points of conformity.⁵⁹

8.3.5 Principles of Legality and Justice

Law and morality always have a minimum area in common, due to the fulfilment of exclusively formal criterias (which, as stated above, is compatible with great iniquity):

"[B]ecause a minimum of justice is necessarily realized whenever human behaviour is controlled by general rules publicly announced and judicially applied."⁶⁰

8.3.6 Legal Validity and Resistance to Law

The positivistic call for clear terminology and the consequent distinction of law and morality does not mean that every positive law shall necessarily be obeyed: Every subject of a legal system has the possibility (and duty) to compare positive law to moral principles and in the case of incompatibility draw the conclusion:

"This is law; but it is too iniquitous to be applied or obeyed."⁶¹

⁵⁵ HART, Concept 203

⁵⁶ HART, Concept, 203f

⁵⁷ HART, Concept, 204

⁵⁸ HART, Concept, 204

⁵⁹ HART, Concept, 205

⁶⁰ HART, Concept, 206

⁶¹ HART, Concept, 208

9. Final Remarks

9.1 General Statement

The main attention of Hart's thoughts concerning law and morality lies on the compatibility of a positivistic notion of law with the acceptance of higher values.⁶² This compatibility is the focus of and the driving force behind his theory, both concerning the distinction of law and morality and positive and critical morality. The reason for these distinctions is, at its base, a moral one:

"Paradoxical as some may find it, Hart's reason for insisting on the conceptual separateness of "law" and "morality" is thus a moral reason. Hart is a positivist because he is a critical moralist. His aim is not to issue a warrant for obedience to the masters of the state. It is to reinforce the citizen's warrant for unrelenting moral criticism of the uses and abuses of state power."⁶³

Another point of great value in Hart's works is the clarification and elaboration of basic terms and notions, thus providing clear terminology not only to the "positivistic camp" but to legal theory in general.

9.2 Personal Statement

The study of Hart's work not only triggered a personal interest for further inquiry on legal positivism, but also advanced my understanding and appreciating of the various subtle shadings and notions involved in legal theory in general and in the contrast of natural law and legal positivism in specific.

However, as meritable as this occupation with Hart's work has been, it also led to the acknowledgement of various points of criticism.

For one thing, Hart does, in my eyes, very carefully avoid to openly introduce and state any cordially novel thoughts in his theory – he states, restates, criticizes and elaborates exclusively on existing theories, thus leaving the impression of a very skilled sports commentator never to be seen on the playfield himself.

A further point of criticism is Hart's way of formulating his thoughts. As insightful as his ideas are, as unstructured and inconsistent is his approach. His works are hard to read, both due to the lack of clear structure and to the inconsistency in terminology

The structural shortcomings seem to be related to his anglo-saxon approach of preferring examples in order to elaborate ideas, thus neglecting the theoretical supportive concepts behind his thoughts.

The inconsistencies and deficiencies of terminology seem to be the result of Hart's following the approach of Wittgenstein: Terms and notions are not to be understood through definition, but through elaboration of the instances of their common usage.

⁶² ECKMANN, 37, 39

⁶³ MACCORMICK, 160