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HLA Hart's General Theory of Law in the French Legal Context: Some Questions Focussed

- The process of becoming clearer about the *questions* of legal philosophy, better understanding why those questions matter, and indeed the very process of generating more, and more perplexing such questions, is as much part of the criteria of success of legal philosophy as is the process of attempting to provide answers to those questions[1]

<u>Question 1:</u> Is Hart's legal philosophy sufficiently general to apply to the French legal context?

Proliferates into several more questions …

Q1(a): Did Hart intend that his legal philosophy would be sufficiently general to apply to the French legal context?

> 'My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal culture … My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.'[2]

So …yes, he did intend it to be sufficiently general to apply at least to all state law. For some musings on non-state law in this regard, see note 3 below.[3]

Q1(b): What is it important to know about Hart's legal philosophy in order to assess whether it is sufficiently general to apply in the French legal context?

- that the key to the science of jurisprudence, for Hart, is *structural*: it lies in the combination of 2 types of rules, the union of primary and secondary rules (*The Concept of Law*, chs V and VI)
- that, as per quotation above, that the theory is *descriptive* & does not seek to commend, or condemn, justify, or decry, on moral or other grounds the **forms and structures** in his general account of law
- that it is a 'bare bones' or minimal account of what is necessary in order for a legal system to *exist* - its rules need not have a particular content, or a particular aim; may be morally good, bad, or indifferent – Hart is not indifferent to these things in general, indeed as moral philosopher and as citizen he cares about them a great deal, but he does not think their presence or absence are what make law into law – what makes law into what it is are its **forms and structures**
- 'There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. … those rules of behaviour [primary rules] which are valid according to the system's ultimate criteria of validity must be generally obeyed [by ordinary citizens], and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication [secondary rules] must be effectively accepted as common public standards of behaviour by its officials.'[4]

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[1] For more of my views on this issue, see eg J Dickson, 'The Central Questions of Legal Philosophy' (2003) 56 *Current Legal Problems* 63; J Dickson, J Dickson, 'Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry' (2015) 6 *Jurisprudence* 207; J Dickson, *Elucidating Law* (forthcoming book, under contract with Oxford University Press, expected publication date 2021), chapter 4.

[2] HLA Hart, *The Concept of Law* (2nd and 3rd editions, Clarendon Press, Oxford, 1994 and 2012), at 239-240 (emphasis in original).

[3] See eg Hart, *The Concept of Law*, ch X; K Culver and M Giudice, *Legality's Borders*: *An Essay in General Jurisprudence* (New York: Oxford University Press, 2010); K Culver and M Giudice, 'Not a System but an Order: An Inter-Institutional View of European Union Law' in J Dickson and P Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (OUP, Oxford, 2012).

[4] Hart, *The Concept of Law*, 116 (my clarifications in square brackets).

- Nb this is, in a certain sense, **not much**!, ie it does not take that much, in terms of those forms and structures necessary, for a legal system to exist! Especially when we realise that 'acceptance' by legal officials of the secondary rules is not much either, and, in particular, need **not involve moral acceptance, or involve thinking or believing that the secondary rules, and the primary rules they validate, are good or justified:**

- '… it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so … In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those [including legal officials] 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.'[5]

- Sleep-walking, obedient citizens, and cynical (or fearful) officials just going through the motions/in it for the money and status…?

- 'The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house, But there is little reason for thinking that it could not exist or for denying it the title of a legal system.'[6]

Q1(c): What would count as evidence for, or as evidence against, the view that Hart's legal philosophy is sufficiently general to apply in the French legal context?

- Here I am counting on you! Examples, questions, ideas, challenges?
- A couple of brief thoughts about Mate's question and the laws of the Vichy regime during WWII
- How to interpret, "to assess" and "to investigate theoretically"
- If we interpret these phrases as "to morally evaluate" or "to morally judge" the laws of the Vichy regime during WWII, then we need to note that Hart's general and descriptive theory **is not attempting to answer them**, although it regards itself as a useful and helpful and focussing precursor to a later inquiry which will seek to answer them (which later inquiry Hart definitely regards as important, as did Bentham before him). 2 stage model of jurisprudential inquiry.
- If we interpret these phrases to mean "to ascertain whether XYZ counts as law or not" then Hart's general and descriptive theory **will attempt to answer** whether the laws of the Vichy regime during WWII count as law or not. Interested in audience view on this matter. Nb if these things were NOT law then this will NOT, for Hart, be due to their injustice and immorality of content and/or aim – these things are vitally important to Hart, morally speaking, but they are not what make law law, or what render putative law as not law – see previous point about Hart's account being about those forms and structures that make law into what it is.

<u>Question 2:</u> Is Hart's legal philosophy sufficiently *particular* to apply to the French legal context /does Hart's legal philosophy give sufficient possibility to draw from the richness of understanding of French legal philosophers, and from the richness of their experience of the French legal context?

- The thought prompting Question 2 is that perhaps Hart's rather 'austere', 'bare bones' and 'minimal' account only of what is necessary for legal systems to *exist* does not give sufficient opportunity for input from the rich wealth of knowledge and understanding of French legal philosophers of the French legal context

[5] Hart, *The Concept of Law*, 202-203 (my clarifications in square brackets).
[6] Ibid 117.

- However, I think that **Question 2** can be answered in a positive light, and that Hart's approach to philosophy of law can and does give sufficient opportunity to draw from the richness of understanding possessed by French legal philosophers, and the richness of their experience of the French legal context.
- This is so because of the role of (non-moral) evaluations of importance and significance in Hart's legal philosophy:

  '[the legal theorist will] be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values.' [7]

  'It [Hartian legal theory] wouldn't be morally evaluative. It's evaluative in a sense, but any theory that tries to define or explain a complex activity would have to select some items out of it as important enough to be focused upon. I mean, if I'm watching a game, if I'm describing the game as a game, I won't pick out in order to describe the game the size of the players, because it doesn't throw light on any major question. Whereas I will pick out that they are not only struggling to get hold of the ball, but if they put it in a certain place then that counts as a point towards winning. So it's evaluative in a sense that you pick out features of the complex activity, not because it justifies it morally, but because these would be relevant to among other questions what moral questions you ask. But it doesn't give the answer.'[8]

- In my own work in the methodology of legal philosophy, I have also sought to emphasize the role of (non-moral) evaluation in constructing a theory of law, and the idea that the legal philosopher must make choices and selections and decide what is important and significant to explain:
  J Dickson, *Evaluation and Legal Theory* (Hart Publishing, Oxford, 2001)
  J Dickson, 'Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry' (2015) 6 *Jurisprudence* 207
  J Dickson, *Elucidating Law* (forthcoming with OUP, 2021), especially chs. 4-8.
- This feature of legal philosophy leaves room for particular legal philosophers with particular understandings of particular legal contexts to bring to our attention, consider theoretically, and investigate theoretically, certain facets of law's nature/what makes law into what it is
- Some possible examples (but I am counting on you to furnish us with examples drawn from the French legal context, and from French legal philosophy and philosophers):

(a) HLA Hart, and why it was important for him to emphasize that law remains law in spite of its immorality or injustice:

'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 … 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' (*The Concept of Law*, p210).

(b) Julie Dickson, Scots law, and whether there can be non-state legal systems in the sense of multiple intra-state legal systems, and/or supranational legal systems

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[7] HLA Hart, *Comment,* in R Gavison (ed.) *Issues in Contemporary Legal Philosophy*: *The Influence of HLA Hart* (Clarendon Press, Oxford, 1987) at 39.

[8] Words of HLA Hart, in D Sugarman, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' 32 (2) *Journal of Law and Society* (2005), 267-293, at 288. Nb the above is from a transcript of an interview; Hart in his own words is available here in the audio files of the interview: https://soundcloud.com/oupacademic/sets/h-l-a-hart-david-sugarman
Hart on the sense in which his theory is evaluative-but-not-morally-evaluative-or-justificatory, is in Part 6 of the interview, starting at 3 mins 40 secs into Part 6.