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

Some Questions Focussed[1]

Hello, and before beginning my talk this morning, I would of course like to say thank you, to Mate Paksy, and to Professor Halpérin for their kind invitation to take part in this research programme concerning HLA Hart in French legal theory and in the French legal context, part-funded this academic year by the Translitterae Programme. It is a great honour and pleasur for me to be here, and to share some thoughts with you on the matter of the research topic, and also to hear your thoughts – I am acutely aware of my relative ignorance of both the French legal context, and French legal theory, and I am counting on you to help me out here with examples, ideas, and challenges, from which I know I will learn so much. And it will be great to hear and discuss things with you today, but also if anyone wants to contact me afterwards once I am back in Oxford, my email address is at the top of the handouts I have distributed – please feel free to email me.

The title that I have given my talk today, which is also on the handouts which I have distributed, is 'HLA Hart's General Theory of Law in the French Legal Context: Some Questions Focussed'. And you will immediately notice that although the title indicates that I will be asking, and attempting to bring better into focus, some questions in this regard, I do not claim to be providing any of the answers! It is true that I will, at points, gesture towards the direction in which I think the answers lie, but I will often be doing that in quite a speculative way, and I am taking as my main task the focussing, and exploration, of some questions. Happily, from my point of view at least, I believe as part of my methodological views on legal philosophy, that getting 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 – and for anyone interested in reading more about my views on that, I have given a couple of references in footnote number 1 on the handout to where I say more about the role of asking more and better questions in the criteria of success of legal philosophy.[2]

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[2] 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.

Now, when Mate first wrote to me asking if I would like to take part in your research project, he himself posed one of the questions that I would like to try to bring further into focus today. As Mate put it in one of his emails to me: ‘what is at stake is to discuss whether Hart's jurisprudence is sufficiently general to be applied to assess French legal conundrums, for instance, to investigate theoretically the unjust legislation of the Vichy-regime.’

And that is an excellent question, I think, so, with some slight modifications to it, I will start there, with the question that I have labelled as **Question 1** on the handout:

Q1: Is Hart's legal philosophy sufficiently general to apply to the French legal context?

Now, as well as believing, as I mentioned a moment ago, that asking better and more focussed questions is part of what constitutes doing legal philosophy well, I also believe that one good question often leads to another, or, indeed, that one good question, when we start to think about it further, often proliferates into or refracts into several more questions. And so, for me, when I think about Question 1, it immediately splits for me into several more, such as, and these are also on the handout:

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

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?

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?

Now as regards Question **1(a)**, I think the answer is definitely yes. Hart did intend that his theory of law, as most famously expounded in his book *The Concept of Law,*[3] would be sufficiently general to apply to French law, and to the French legal system. In the original edition of *The Concept of Law*, published in 1961, Hart was not very explicit about the methodological presuppositions of, or about the methodological stance taken by, his theory of law. But in the posthumously published ‘Postscript’ that appears from the 2nd edition of *The Concept of Law* onwards - the Postscript being first published in the 1994 second edition - Hart is much more explicit about the methodological aims of his jurisprudence, telling us in the first section of that Postscript, and this quote is on the handout:

> ‘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:

[3] HLA Hart, *The Concept of Law* (1st edition, Clarendon Press Oxford, 1961; second edition, with a Postscript edited by Penelope A Bulloch and Joseph Raz, Clarendon Press, Oxford, 1994; 3rd edition with an Introduction by Leslie Green, Clarendon Press, Oxford, 2012).

> 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.'[4]

So Hart's intention is to construct a theory of what law is which is general in character. His is not a theory of Swedish law, or of Canadian law, or of South African law during the period of the apartheid regime etc but a theory **of law**, period. Now some people – indeed Hart himself was one of these people – have mused over whether Hart's theory of law was intended to cover, and whether it does cover, non-*state* law such as international law, or intra-state law, such as Scots law. And in footnote 3 on the handout, I have given some references to some of these musings, if anyone wants to consider that issue further. But whatever the correct answer to these matters, there is no doubt at all that Hart intended his theory of law to apply to, and believed it to apply to, all **state law**, and French law is, of course, one instance of state law, so Hart is definitely claiming that his theory applies to it.

But is Hart correct? Can he make good on his methodological claim to generality? This leads us onto Question **1(b), also on the handout, ie:**

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?

And here I am going to give my own view of where the answers to this question lie. As is well-known, Hart believed that his theory of law was a significant improvement on the nineteenth century command theories of law of Jeremy Bentham and John Austin because of the emphasis in his theory on the idea of a ***rule*,** and he believed that 'the key to the science of jurisprudence'[5] lay not in Austin's idea of coercive orders, but in Hart's idea **of a combination of 2 types of rules, that he came to call 'the union of primary and secondary rules.**[6] So, in my view, and this is also on the handout, it is important to know that the core of Hart's theory of law is ***structural*** : the key to understanding law lies in a structure of a combination of 2 different sorts of rules, and in understanding how they inter-relate. Relatedly, it is also important to know that, as per the quotation above, that the theory is ***descriptive*** and 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. Hart's account of law is hence a kind of 'bare bones' account of the **minimum** that needs to be the case in order to a legal system to *exist.* Law, in order to be law on Hart's account need not have a particular content, or a particular aim, and it might be either morally good, bad, or indifferent, and it might be justified or unjustified to

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[4] Hart, *The Concept of Law*, 2nd and 3rd editions, at 239-240 (emphasis in original).
[5] Ibid at 81, quoting Austin.
[6] Ibid, chs V and VI, *passim*.

have it and/or to follow it. Hart is not indifferent on these matters in general, indeed he cared about them a great deal, as a moral philosopher, and as a citizen of his country and of the world, but he thinks that they are NOT what renders something law, or not. What renders something law, for Hart, are **forms and structures, in particular, the structure of the union of primary and secondary rules,** with some conditions attached to those forms and structures, which he lays out as follows:

> '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.'[7]

And I think it is important to note that this is, in a certain sense, not much!, that is, arguably, not that much is required in terms of those forms and structures which must come into being in order for law to exist! Especially when we realise that 'acceptance' by legal officials of the secondary rules of change, adjudication, and recognition, is, according to Hart, not necessarily 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.'[8]

So, for Hart, in a sense, you don't need that much to have a legal system on your hands! Do you have some primary rules, of whatever content and whatever justification and moral quality, which exist and are by and large obeyed? Do you have secondary rules of change, adjudication and recognition which tell legal officials how to alter, decide disputes regarding, and how to recognise as legally valid those primary rules? Are those secondary rules accepted and applied by officials where acceptance may **but need not be** for moral reasons/because the officials think it is a genuinely good idea to so accept them? If so, then you have a legal system. And that isn't that much. Indeed, Hart even muses that in some configurations, eg where the population merely obey primary rules in a sheeplike way, and the officials merely accept for lukewarm reasons such as, perhaps, the money, the job status, to keep their families relatively safe from the regime, that:

> '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.'[9]

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[7] Ibid, at 116 (my clarifications in square brackets).
[8] Ibid at 202-203 (my clarifications in square brackets).
[9] Ibid 117.

And so this now brings us to **Question 1(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?**

Well, here, I am counting on you to fill me in/help me out. To show, for example, that Hart's theory of law *cannot or does not* apply in the French legal context, ie to provide evidence *against* the view that Hart's theory of law is sufficiently general to apply in that context, we would need some counter-examples from aspects of French law that (i) are definitely law and (ii) cannot be accounted for on Hart's view of what makes law law. So with that in mind, and either now, or at the end of my talk in the discussion later on, I am looking to you for some examples, questions, ideas, and challenges, drawn from the French legal context which you think either confirm, or disconfirm, aspects of Hart's theory of law.

So that's for you to think about. But - very quickly - I will just offer a couple of brief thoughts about Mate's question and the laws of the Vichy regime in France during WWII. Now you'll recall that in explaining the research project to me, Mate asked: "whether Hart's jurisprudence is sufficiently general to be applied to assess French legal conundrums, for instance, to investigate theoretically the unjust legislation of the Vichy-regime."

A couple of thoughts on this. First of all, it matters what we mean by "to *assess* French legal conundrums" and by "to *investigate theoretically* the unjust legislation …" Because if we mean by "to assess": to morally evaluate, or morally judge the quality of, then Hart's general and descriptive theory of law will not help us out here. And if we mean by "investigate theoretically" something like "use theory to morally evaluate" then Hart's general and descriptive theory of law will not help us out here. But in saying Hart's theory "will not help us out" here, I am NOT saying that Hart's theory does not apply to French law. I am saying that the part of Hart's legal philosophy that I have talked about here today so far does not aim to morally evaluate anything, and does not aim to morally judge anything. It aims only to tell us what is and is necessary in order for a legal system to exist – it concerns the existence conditions of a legal system, not their justification conditions. Moreover, Hart is not saying that it is not important to investigate law morally, and to morally judge it. He thinks these things are vitally important. But it is not his main task in *The Concept of Law*. The task of morally assessing law belongs to a different kind of inquiry than the one he undertakes in TCOL into the existence conditions of legal systems. As Hart himself tells us, there may be a link between the kind of inquiry he is engaging in, and the kind of inquiry which would investigate, evaluate, and judge, *morally*, aspects of law including aspects of French law:

> '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 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.'**

So Hart's general and descriptive theory of law does not attempt to answer all the questions we might want to ask and answer about, for example, the immoral and unjust laws of the Vichy regime in WWII, or any of the other unjust and immoral laws that unfortunately still exist in many places in the world today. It attempts a more preliminary task: to tell us what it is that makes something law. In this way, then, and as I have mentioned on the handout, Hart supports a sort of 2 stage approach to legal philosophical inquiry, as did Bentham before him.

Now, on the other hand, if we interpret the terms in Mate's question – terms such as "to investigate theoretically" – NOT to mean "to morally evaluate and/or morally judge" but rather to mean "to ascertain whether XYZ things count as law", then Hart's general and descriptive theory of law DOES aim to answer whether the unjust laws of the Vichy regime were law. And because you have a wealth of understanding and of knowledge of those laws and the circumstances in which they arose than me, I will leave it for you to tell me whether you think Hart's account gives a correct answer to that. But one thing to note is that, if the laws of the Vichy regime turn out NOT to have been law, then, for Hart, this will have nothing to do with their unjust and morally problematic content and aims. For the morality or immorality of their content and/or aims is not what makes law law according to Hart. Again, it is the structural properties which count for him as regards what is needed to law to exist. So his questions of the example of the Vichy regime's laws would be: were they a union of primary and secondary rules? Were the primary rules by and large obeyed? Where the secondary rules accepted and applied by legal officials? (nb where "acceptance" can be very "thin" and does NOT necessarily connote that the officials morally believed in the rules or thought it a good idea to identify as law those rules). And there may be some interesting questions around those issues, to do with generality of application, and to do with effectiveness – and I will be happy to learn from you on them.

So that was some discussion, then, and, I hope, some focussing, concerning **Question 1 - Is Hart's legal philosophy sufficiently general to apply to the French legal context? –** and concerning the other sub-questions into which Question 1 split, or proliferated, when we considered it further.

But now I want to move on to something a bit different, as I move towards concluding this talk. In a sense I want to turn the main research question of your project on its head, and to ask, as I have on the handout: **<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?

Now what is prompting to me to ask this question in a way stems from what I have said so far about the character of Hart's theory of law. That is to say, 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 particular knowledge of French legal philosophers or from the richness of their understanding of the French legal context in particular. And, I am assuming, in our theories of law, that we ought to want to draw on such richness of understanding, in order to understand law better.

Now what I will say here about Question 2 will be somewhat brief, because I want to leave ample time for discussion, during which I can try to elaborate more on this, or on anything else you would like me to. But my view, as I say on the final page of the handout, is that 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.

So how would that work? Well, I believe that there is this opportunity to draw on, and from, the richness of experience of particular legal philosophers in particular legal cultures because of the role of certain sorts of evaluations - evaluations of importance and significance - in Hart's legal philosophy, and indeed it is my view that such evaluations should feature in all legal philosophy.

What do I mean by evaluations of importance and significance in this context? Well, the idea is that when a theorist approaches law she or he has to decide what to focus on, what to bring to the fore, what to highlight, what is worth illuminating and elucidating. If a theorist were simply to reel off a list of features of law without attempting such evaluation, then, in the memorable words of John Finnis in the first chapter of *Natural Law and Natural Rights,* they would produce only:

> '… a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies'

And Hart, too subscribes to this view that successful philosophy of law inevitably involves the legal philosophy in making *certain kinds of* evaluative judgements. In Hart's own words, which are on the handout:

> '[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.' [10]

> '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.'[11]

And in case you are interested in reading more about this, in my own work in the methodology of legal philosophy, I have also sought to emphasize and explain 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, what is important to highlight and bring to the fore in constructing a theory of law – see for example, listed on the handout:

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.

The suggestion that I would like to make here is that **this feature** of legal philosophy - that it requires non-morally evaluative judgements of significance and importance on the part of the legal philosopher – 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.

And I will end by giving two possible examples of this phenomenon, but please note that I am absolutely counting on you to furnish us with examples drawn from the French legal context, and from French legal philosophy and philosophers!:

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

[11] 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.

The first example is from HLA Hart himself in *The Concept of Law*. I mentioned earlier in this talk that, for Hart, what makes law into what it is, are its forms and structures and not the morality or immorality of its content or aims. And so I mentioned that, unjust and immoral though they were, the laws of the Vichy regime in WWII would not cease to be laws for Hart on the grounds of their immorality and injustice. Those things matter morally a great deal, and they do to Hart also, but they are not what makes something law, or what causes something to cease to be law. But what I want to emphasize now is that Hart was not just telling us this truth about law as just one more thing he might have mentioned to us about it. Hart was making a non-morally evaluative judgement that it is important and significant to understand law as still remaining law in spite of its immorality and injustice. He was trying to illuminate the truth, to emphasize it, to bring it to the fore, because of something he held to be very important and significant. And this comes through strongly I think in the following quotation from Hart which is on the handout:

> ‘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).

Hart, as a legal philosopher, and as a citizen, of his own country and of the world, had an enormous worry in the wake of WWII – during which he worked for MI5 military intelligence – that because of law’s majesty and aura, people might be too quick to jump when law called, and might not remember that, in the end, all human law must be submitted to the demands of our moral conscience. He thought that he could help people to be more appropriately resistance to bad law, and to be more appropriately morally critical of it, by emphasizing that what made law law was not its moral qualities but its structural ones. On this view of Hart’s, immoral and unjust things can still be law. And he thinks that by emphasizing that truth, the next time law comes calling and asks us to do something, we will remember that law can be law and be evil, and we will accordingly not be too quick to jump to follow it, and will subject law to appropriate moral scrutiny. So Hart’s particular worries, concerns, interests, shaped his bringing to the fore and emphasizing as important certain features of law. **[Note to self: nb these indirect evaluaions of importance may focus and facilitate the asking of the directly evaluative questions we later want to ask. As in Hart quote about the game etc. Indirect evals do not themselves make moral value judgements, but may focus and**

facilitate us making them later, at a different stage in the inquiry – book chapters 7 and 8.]

The second and final example draws on myself! I am from Scotland, and my undergraduate degree is a degree in Scots law from the University of Glasgow. And when you study law in Scotland, you are left in no doubt that, at least from its own point of view, and from the point of view of Scottish legal culture, that the Scots have their own legal system, separate from the legal systems of England and Wales, and of Northern Ireland, that jointly comprise the 3 legal systems of the United Kingdom. Moreover, when you study law in Scotland, you become aware of the wealth of academic literature on just these issues of how it is possible to have a distinctive Scottish legal system without Scotland – not yet in any case! – being its own independent state. These experiences, and this knowledge, I believe, has prompted me as a legal philosopher to develop an interest in non-state law and in non-state legal systems, and to develop an interest in considering the extent to which existing theories of law can correctly identify and explain the distinct legal systems existing in intra-state contexts such as the United Kingdom, and in beyond the state contexts such as in European Union law. And I have written about some of these issues in a variety of works concerning Scots law, and concerning the interrelations between various of the legal systems in the EU – I haven't bored you with these here but they are all listed on my faculty web page re Oxford's Faculty of Law. Now it is important to note that, although I believe that my particular background, and, I hope!, my particular richness of understanding of and of experience of, the Scottish legal context, has allowed me to identify as important, and highlight and bring to the fore certain issues regarding the character of legal systems in intra-state, and in beyond the state contexts, I do not regard the conclusions I have come to about these issues as being problematically parochial in character, Rather, I believe that I have been prompted to investigate, and have been placed in a strong position to understand and investigate theoretically, certain **general features of the nature of law,** including that legal systems do not only exist in state contexts, and including the manner in which legal systems interact with one another. These, in my view, are general truths that apply to all legal systems. But I have been led to investigate them, and have been in a good position to understand and consider them, and to make the evaluative judgements which I have needed to regarding the importance and significance of these features of law, by my particular background, experience, and richness of knowledge and of understanding of the Scots legal context.

And I believe that, if that is true of me, and of my fellow Scots and Scots legal philosophers, as regards drawing from the richness of our experience of the Scots legal context, then it is

also true of French legal philosophers as regards the French legal context, but I will leave it to you to tell me about that.

To conclude, then, I have tried in this talk to better bring into focus, and to discuss a little, 2 main questions (which themselves proliferated into several other further questions) concerning the application of HLA Hart's legal philosophy in the French legal context. And I have gestured towards what I think the answers to these questions are. In my view, Hart's general and descriptive theory of law, as expounded in *The Concept of Law*, is both (a) general enough, and (b) particular enough/makes sufficient room for insights drawn from the knowledge and experience of particular legal philosophers to apply to, and to illuminate certain features of, the French legal context. Thank you.