PART 1 – JOHN DAWSON

INTRODUCTION

Introduction to a central question in Jurisprudence - THE RULE OF LAW:

- In the midst of disagreement over values, can we live under 'the rule of law'?
- A problem of interpretation of the legal rules makes it hard to live under the rule of law - potentially

- A central question: we live in a cosmopolitan and diverse society; agreement however large deal of disagreement - don't agree about politics, religions, morality, taxes, economics, sexuality, food we eat.
- We live in the midst of change and disagreement - enormous advantages; order and stability. As well as personal security and property, land title, ability to enforce contracts, recover debts. Great advantages in knowing where we stand and living under the rule of law.
- The rule of law is linked to certain set of values - sable govt., security, reliance, investment

Some Ideas:

1. We should have established processes to resolve our disagreements peacefully - through politics, political parties, elections, coalitions, Govts. are formed - they are entitled to lay down the law on a certain subject if following the rules (appealed and amended) - legitimate process of laying down the rules. Applied universally to all citizens; publicly available - we know what the law is and we have notice of it.
    - ADVANTAGES: Through these mechanisms arguably, obtain advantages of the rule of law. We respect the rules as they can be changed through the correct process, they are knowable, prospective - apply from the date they have come in force, they are henceforth, predictability, open and transparent. People are not encouraged to litigate.
2. Can these advantages really be achieved? Is it possible to live under the rule of law?
    - Interpretation of the rules, where do we go for guidance on interpretation of the rules
    - Driven outside the law on this guidance - application of these rules - thus are we no longer living under the rule of law if we must go beyond the law.
    - This has consequences - their own personal beliefs, subjectivity rather than objectivity.
    - What would a fully formal system of legal reasoning require of us? - arguably require all these kinds of things, choose the correct rules in every situation, resolve any inconsistency between rules - the general or specific rule?, identify the precise text of the rules - what about common law rules?

Thinkers: Hasnas and Smillie

One of Hasnas's examples: the correct interpretation of 'discrimination':

- The Civil Rights Act 1964 (USA) prohibits 'discrimination' in employment
- So, are affirmative action programmes, that give preferential treatment of African Americans in employment, a prohibited form of 'discrimination'?
    - To give slight preference
- Question: Could a judge solve this problem objectively, independently of their moral or political beliefs?
    - Text and the purpose - could give an objective view
    - However, more than just distinguishing between people - adversely. Intertwined legal and political issue.

Unlawful 'discrimination' in the Civil Rights Act (USA) might mean:

1. Making a distinction between persons on any prohibited ground, including race, in employment decisions
2. Treating adversely the members of disadvantaged or vulnerable groups, in employment decisions

Question: how do we know 'right' meaning, in this context?

Can we resolve problems of interpretation in a rule-like manner?
Can second order (or secondary) rules point us to one correct meaning?

- In this case, rules of statutory interpretation?

What are the purposes of the ban of discrimination in employment in the Civil Rights Act 1964 (USA)?

- To advance the economic position of Black Americans?
- To ensure colour-blind hiring policies?
- To provide equal employment opportunities?

Is any of these purposes implausible?
But do they point to the same conclusion about the lawfulness of affirmative action programmes?

- Read the statutory context, historical situation, debates in congress, law reform reports
- Do you think they would all come to the same conclusion?
- Does purpose resolve these problems? No - shift the problems to another level

Stanley Fish:

- "If a rule's meaning is determined by reference to its authors… 'purposes', then meaning is a matter of author-interpreter relations, not a property of the text.
  The interpreter must decide, from a variety of (selected) evidence, the situation or context in which the author spoke, in order to determine the author's intentions.
  That is an act of interpretation"
- Each of them present their own problem to interpreting the new rules

At the centre of Juris lies a debate between formal and sceptical thinkers about the possibility (and desirability) of living under 'the rule of law'.

- The interpreters beliefs etc. effect the interpretation - test and legislature

Competing Concepts of Law

Some general questions of jurisprudence (or the philosophy of law):

- Is the law an authoritative system of binding rules?
- Is it both possible and desirable to govern human societies through such rules?
- Must these rules be supplemented by principles, policies, or discretions?
- If so, does that blur the boundaries between law and other spheres of social life, such as morality or politics?
- Can we distinguish law clearly from morality or politics?
- How can law's content be known, impartially or objectively?
- What is 'truth' in legal argument?
- What is the proper role of the judge (as opposed to the legislature)?
- How should judges reason when deciding hard cases?
- Are judges impartial or biased?

Paradigms of jurisprudence:
Thinkers in different 'schools' of jurisprudence take different positions on such questions. Two broad schools have dominated contemporary jurisprudence (though several different names are given to these schools):

i. a positivist (or formal) school; and
ii. a sceptical, critical, realist, or pragmatist school.

Members of the latter school are sceptical of the arguments advanced by the former.

Those two positions may be viewed as the paradigmatic, or polar, positions in jurisprudence (or the philosophy of law), or as opposing views about how legal reasoning proceeds (or should proceed), even if no person may cling entirely to either pole in its pure form. Many intermediate positions are taken: eg, by Ronald Dworkin.

The two paradigm positions might be contrasted using the following kinds of terms:

formal / sceptical
rule / discretion
constrained / flexible
certain / indeterminate
universal / individualised
known / unknown
objective / subjective
impartial / partisan
is / ought
law / ethics, politics, religion, gender, culture

A formal or positivist thinker might argue:
"Legal reasoning is a highly formal mode of argument, or it should be. The debate is constrained by clearly identifiable and authoritative legal rules. These rules tell us what the law is. Only rules of that kind form the proper foundations of legal argument. When legal argument is constrained in that way by existing rules, the debate will be objective, and the law will be applied universally to all citizens, and they will be able to know the law. Only then could we say that we lived under the rule of law. This kind of legal system can produce certain answers and impartial solutions, independently of the personal views of the participants in the debate, because the rules will constrain the range of legitimate answers to a legal dispute, not the ethics or politics, or the views on gender or culture, of the participants in the debate."

A sceptical thinker might reply:
"That may be the ideal situation, but rule-based legal reasoning of that kind is not possible in fact (at least not all the time). That's not realistic. Not all legal reasoning can be based on clearly identifiable and authoritative legal rules. Many different approaches and sources are used, and many different plausible solutions can be found to legal problems. There is often considerable freedom, discretion, or choice, in the reasoning employed. The reasoning styles of different judges reveal this, as do the split decisions of appellate courts. Experienced judges often disagree completely on the meaning or application of the same legal rule, or choose different rules to follow. No purely legal criteria can determine which judge is correct. Outcomes in hard cases are influenced as much by what participants think the law ought to be as by any view of what the law is. Both politics and ethics are involved. In the end, the decision reached may be partly subjective and partisan, or partly based on the experiences or background beliefs of the person making the judgment. Complete objectivity is therefore a myth in legal reasoning, and a dangerous myth, because the claim of objectivity tends to obscure the underlying choices that are really being made."

Many of the issues can be stated as questions about the role of a judge:

- How far does the reasoning of a certain judge, or court, tend towards one or other paradigm?
- When may a judge be influenced by their views as to what the law ought to be?
- Is it possible for a judge to set aside their own political or cultural beliefs and reach decisions that are more objective than partisan?
- Should a judge at least aspire towards the model of formal legal reasoning, or pretend that is how their decisions are made? Does that add legitimacy to the legal system?
- Or should judges acknowledge the freedom and subjectivity of their trade, to reveal the foundations of their decisions and permit their scrutiny?
- How can a judge be both bound by rules and able to change them at the same time (eg, when 'developing' the common law)?
- If a judge can change the rules as a case is decided, is the new rule that is announced then applied retrospectively to the current case? If so, is that unfair to the litigants?
- Do we live under 'law' if judges can apply rules retrospectively to our case?
- If judges are not bound by rules, what constrains their decisions?
- Is 'the law' simply what the judges say the rules will be, or our best prediction of what the courts will decide?

Note the linking together in such arguments of related ideas about:

- the meaning of 'law' and the nature of legal reasoning
- the proper relations between law and other areas of social life
- the proper role or function of the judge (or courts)
- the legitimacy of the legal system
- the possibility of living under 'the rule of law'.

SMILLIE V HASNAS / FORMALISM V SCEPTICISM

Agenda:

- Illustrating the sceptical and formal approaches to jurisprudence
- Comparing the views of legal reasoning of Hasnas and Smillie
- Analysing Smillie's apparent example of formal legal reasoning in action: Ross v McCarthy
- Considering how a sceptic might respond

Rule of Law: authoritative legal rules; laid down by specific institutions

- How far is it possible to lead away from these kinds of rules
- We would apply these rules because they are the rules - can be changed by going back through Parliament (political process)
- New situations arrive; new questions with no existing law; thus new precedents arise this way.

Positivists: want the law to be POSITIVE, really identifiable, positively laid down, promulgated by the state (readily available) , tolerably certain what the law is. Benefits is that the citizens know what the law is so they don't infringe it, know how they can act.

Sceptic: IS THIS REALLY ACHIEVEABLE? What are the implications? It has big implications; discretion, things positivists don't engage in. How desirable is ROL Actually? Could it be too formal? Too rigid? How do rules work in changing social circumstances? What if we get stuck with anachronism rules? Does this undermine the legitimacy of legal system in the eyes of the citizens?

It is a debate really - both sides easily agreed with; but different conclusions

A fully 'formal' system of legal reasoning would seem to require an 'objective' method for:

- Identifying the legal rules that apply to every situation
- Resolving any inconsistencies between the rules
- Determining the precise text of the rules
- Determining the scope and meaning of the rules
- Determining how the rules apply to new fact-situations

- Is this really achievable?

Hasnas:

- Classical Sceptical Arguments
- Argues that a formal approach to legal reasoning is often not possible because:
    - Conflicting rules may apply to the same problem (rule-scepticism)
    - The language (or text) of the rules needs interpretation (language-scepticism)
    - Secondary legal rules (e.g. for solving conflicts between rules, or determining their 'purposes') may not assist
    - The choice of rules, or their meaning (and the outcome) may then depend on non-legal considerations: e.g. the moral or political views of the interpreter
    - This has implications for certainty and stability of law

Where does the stability come from? It can still be there. The judges are a homogeneous group.

Hasnas Writes:

- "The stability of law derives not from any feature of the law itself, but from the overwhelming uniformity of ideological background among those empowered to make legal decisions"
- "In fact… the law is not truly stable, since it is continually, if slowly, evolving in response to changing social mores and conditions".

- Showing different implications - different source of instability of the judges rather than the rules themselves.

Professor Smillie:

- Says 'formalism' is usually possible and desirable; it is a 'corollary of' a Positivist approach to law:
- Formalism involves:
    - 'Strict rule-based adjudication'
    - 'consistent application of reasonably precise rules'
    - Adherence to 'long-established' or 'settled' rules
    - No 'radical alteration' of well-established principles, except in 'exceptional circumstances'
    - Leaving 'radical' change to Parliament
    - A 'modest view' of the judicial function
- He thinks Cooke and Richardson: insufficiently formed; too ready to change established principle
- They break down the barriers between fields of law - e.g. contract and equity with damages

I. Smillie's critique of reasoning in the NZ Court of Appeal

Three ways to think about Smillie's article: as

1. An argument that formal legal reasoning is possible and desirable most of the time.
2. An argument that judicial reasoning in the NZCA during the 1980s and 1990s was insufficiently formal, or paid too little regard to settled rules and established principles, or was overly influenced by substantive considerations like 'fairness' and 'efficiency'.
3. An argument concerning the potential consequences of such reasoning for the legal system, when adopted by senior judges: eg, subverting central values associated with the rule of law.

Questions to ponder:

• Is Smillie's argument convincing in all respects?
• How might Cooke and Richardson PP respond?
• Might they rely on sceptical arguments against 'formalism', in response?

'Formalism', says Smillie, 'is a natural corollary of a positivist view of the nature of law itself' (ie, of the view that the law should be 'positively' and clearly laid down in recognised and authoritative sources, such as legislation and decisions of the courts).

Formalism means, Smillie says:

'Strict rule-based adjudication'; 'consistent application of reasonably precise rules'; adherence to 'long-established' or 'settled' rules; no 'radical alteration' of well-established principles, except in 'exceptional circumstances'; 'radical' change is for Parliament; a 'modest view' of the judicial function.

The apparent advantages of such formal reasoning (or reasoning from legal rules alone)

• Respect for the legitimacy of authoritative rule-making institutions:
eg, the legislative process, the decisions of higher courts
• Prospective, not retrospective, effect: 'you know where you stand'
• Predictability and certainty in application
• Openness and transparency: the rules are publicly available
• Uniformity, lack of bias or arbitrariness, preventing abuse of power
• Efficiency, finality, cost-reduction: eg, fewer incentives to litigate.

Ross v McCarthy:

- Example of advanced as an illustration of formal legal reasoning

- Motorist injured when car collided with cow on road. The farmer was negligent in allowing the cow to stray on the road.
- Accepted that negligence did happen - due care was clearly not taken.
- But did NZ law impost liability on farmers in this situation?
- The history of the law concerning farmers' liability for stock on the roads:
    - 1917: NZCA found against farmers' liability.
    - 1932: Donoghue v Stevenson (UK): House of Lords established a general duty to avoid causing others foreseeable harm (ie, liability for negligence)
    - 1947: House of Lords refused to apply that principle to straying stock, continuing the rule that farmers had no liability.
    - 1950s: Australian, Canadian courts imposed liability on farmers, following the 1932 decision of the House of Lords in Donoghue v Stevenson.
    - 1960s: NZ Parliament passed 'impounding' laws, imposing criminal penalties on farmers for straying stock.
    - Plus: radically changed conditions on NZ roads by the 1960s compared with 1917.
- **Question**: Was the 1917 decision of the NZCA, against farmers' liability, 'settled law' in NZ by the late 1960s? Or was a choice required between applicable rules?

Questions

- What rule of civil liability, for stock straying on roads, should the NZCA now apply in 1970, in light of this varied chain of legal events?
- Could the case be resolved in a purely 'formal' (or rule-based) manner?
- Is the decision in *Ross v McCarthy* an example of such 'formal' legal reasoning?
- Is one right answer dictated by 'logic' or straightforward application of settled rules?
- Could the opposite conclusion have been reached, following other established rules?
- Was this field of law already characterised by uncertainty?
- Was the Court forced to choose between two plausible lines of reasoning by reference to considerations beyond the rules?
- Is policy reasoning implicit in the decision?
- Is the Court's choice of policies uncontroversial?
- Does the case show that formal legal reasoning in hard cases is possible?

SMILLIE: In this situation; the law in NZ was perfectly well settled- the COA is right to stick to the 1917 rule.

- Problem:
    - Conflict between the general rule of negligence (Donoghue v Farmers are not liable)
    - Conflict between criminal and civil law in NZ

Turner J in Ross v McCarthy:

- "NZ is country of farmers"
- " To impose liability would conflict with the established interests of the farming community"
- Are these formal reasons for deciding the case?
- What about the safety of motorists?

- Could we have a further set of secondary rules that could help us?

Could secondary legal rules resolve these uncertainties?

- Should NZ courts formulate hard rules for resolving conflicts between:
    - General & specific rules at the same level of authority?
    - House of Lord's decisions made at different times?
    - Decisions of the HOL and decisions of the highest courts of Australia and Canada?
- What would be the advantages and disadvantages?
    - Positivists: gives certainty, clarity, prosperity.
    - Disadvantages: Very inflexible - reduce choice and options, injustice,
    - If CA could never overrule itself, law becomes anachronistic.

II. Two sceptical responses

1. (illustrated classically by Hasnas) **Formal reasoning is not always *possible*.**
The arguments for formal legal reasoning *assume* that rule-following is *possible*. But all the following sources of indeterminacy exist: incompleteness of the rules; conflicts between rules at similar levels of authority: e.g., between general and specific rules, between conflicting precedents, between broad and narrow *ratio* for the same case; vagueness and ambiguity in language; inclusion of evaluative terms in the rules; the need to make specific exceptions, to prevent absurdity, gross injustice, thwarting of apparent purpose, untenable consequences; the need to apply rules to novel facts; the need to balance incommensurate and conflicting interests … leading inevitably to reliance on substantive forms of reasoning as well as rules.

2. Formal reasoning is not always *desirable*.
Leaving some discretion to decision-makers is valuable:
• to permit them to choose between conflicting rules
• to fill gaps in the rules
• to consider all the relevant factors
• to address unforeseen situations
• to avoid absurd or plainly undesirable consequences
• to accommodate the parties' preferences
• to develop the law in changing social conditions
• to utilise the accumulated experience of decision-makers
• to strike the best compromise between conflicting interests
• to 'do justice' in individual cases.

Carl Schneider, in 'Discretion and rules: a lawyer's view', from K Hawkins ed, *The Uses of Discretion* (1992):
'Rules cannot be written that will always work as their authors [intend] … and decision-makers work in institutional settings which necessarily give them scope for judgment. However much we may acknowledge the primacy of rules in a system of law, we cannot deny the large and essential service discretion performs.' 'When a good rule can be written, it is much to be preferred to a grant of discretion. Compared to discretion, rules offer advantages in terms of legitimacy, wisdom, fairness and efficiency. But we can never safely assume that each advantage fully presents itself in any particular situation. All the defects that rules are heir to work to dilute those advantages and to drive us towards some mix of rules and discretion'.

INTRODUCTION TO THE POSITIVISM OF HLA HART

Agenda:
- Introduction to the positivist jurisprudence of Hart
- Introduction to his concept of the rule(s) of recognition
    - One kind of secondary legal rule
- The commitment of 'officials' (especially judges) to a specific set of rules of recognition as the key to the certainty and stability of a legal system
- The 'external' and 'internal' points of view on these rules of recognition
- A NZ illustration of judicial identification and application of the rules of recognition: the reasoning of Fisher J in *Berkett*

Hart:
- Legal positivism
- Positivist jurisprudence
- Liberal, English academic lawyer
- Oxford Law Faculty

HLA Hart in Postscript to 2nd edition of The Concept of Law (1994) at 252:
"The underlying question concerns the degree or extent of uncertainty which a legal system can tolerate if it is to… [provide] generally reliable and determinate guides to conduct identifiable in advance"
- How much certainty must be we have to say we live under the rule of law?
- We may live under something else - religion, politics etc.

Some advantages of 'positive' legal rules:
- Predictability and certainty in application

- Openness and transparency: rules publicly available
- Prospective, not retrospective, effect:
    - 'you know where you stand, *in advance*'
- Uniformity, lack of bias/arbitrariness - when applied
- Efficiency, finality, cost-reduction - in adjudication.

- The advantages of 'the rule of law'

Some disadvantages of applying formal legal rules:

- Inflexibility, or rigidity
- Inability to adapt to (changing) circumstances, and changing social values
- Prevents the exercise of 'leeway' or discretion
- Produces injustice in particular cases and in unforeseen situations

Reasoning from 'positive law' would seem to require a formal method for:

- Identifying the legal rules that apply in every situation
- Resolving any inconsistencies between the rules
- Determining a precise text for the rules
- Determining the scope and meaning of that text
- Determining how the rules apply to new fact-situations

- Can we do this? - Hart says we can do this most of the time; judges created stability in legal grounds around the world. Courts do this by applying a secondary rule of recognition. We have multiple sources of law

Berkett - Fisher J:

- What the rules of law are in a difficult case
- Spells out the rules of recognition as they are in NZs legal system.
- CASE: Maori women against the recognised rules of NZ law = ought not to be applied to her. Criminal charge, brought about Maori women living on an island near Tauranga - her argument is her iwi never signed the TOW, never invited to and therefore she said they never consented to the inclusion of this island in the colony of NZ or the application of British law to them.
    - Charged with assaulting a fisheries officer with a tractor.
    - Brings JR proceedings in the separate HC as proceedings were happening in the DC.
    - Governed by Maori customary law - just defending her fisheries

- What is Fisher J suggesting, in *Berkett v Tauranga District Court* [1992] 3 NZLR 206, about the manner in which 'the law' can be 'recognised' in NZ? At page 211, Fisher J says:
    - "... the accused's arguments can be answered very shortly by reference to the supremacy afforded by the Courts to Acts of Parliament. While most legal systems aspire to some form of internal logic in the sense that each rule is derived directly or indirectly from another, the authority of the legal system as a whole must obviously flow from some ulterior premise or premises.

    - "In this case the premises are simple: each Court will follow the rulings of a Court superior to it in the same curial hierarchy and all New Zealand Courts will recognise and act upon the Acts of their Parliament. A logical corollary is that to the extent that the New Zealand Parliament has preserved or adopted Imperial Acts, the Courts will give effect to them too ….

    - "… as the third arm of government the Courts themselves have always chosen to regard themselves as bound by such Acts and until any written constitution to the contrary they can be relied upon to do so in the future. … This court has no jurisdiction to question the validity of the three Acts in question."

- **What if Fisher J suggesting about:**

- How NZ courts (or judges) 'recognise' (or identify) the relevant legal rules to apply to the cases before them?
    - Law has always been this way.
    - Why do judges follow this?
    - Could be implicitly endorsing it by fact that he is a judge.
    - Political justification as to why NZ law is that way - because England colonised and enforced it. Trying to give legal explanation however political discussion is coming in about the legal constitution. He doesn't think this is the role of the judge. Trying to draw a line between law and politics as Hart suggest; rules of recognition.
- The origins or sources of these judicial patterns of rule-recognition?
    - Apply these without written constitution - would be new source of law
        - Change the structure
    - Rules of recognition are different in every legal system
    - He isn't indicating why they are adhering to these rules?
        - Democratic process - commitment to that
        - Stability

HLA Hart, in The Concept of Law:

- "What is crucial is that there should be a unified or shared official acceptance of the rule[s] of recognition containing the system's criteria of validity'.

Hart:

The rules of recognition is (are) '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'.

Is Fisher J suggesting that the existence of a 'law' in NZ is a matter of 'social fact', not a matter of it content?

Question:

- Do you think this kind of response will satisfy Ms Berkett? Why not?
- Is she disputing the fact that NZ courts apply Acts of the NZ Parliament, as a matter of fact?
    - Raising the ought question rather than the is question
- If not, what is she disputing?

Why then do NZ judges accept a certain set of rule (or conventions) as to the sources of NZ law?
What kind of reason lie behind their commitment to that set of conventions?

Some reasons why judges might accept a certain set of rules (or conventions) as to the sources of law:

- To support the stability of the legal system
- To protect established rights and interests
- Commitment to the current constitutional order
- Commitment to the democratic process
- To meet the expectations of most people
- To avoid censure by their peers (& reversal on appeal)
- Habit/convention/tradition
- Fear (of ridicule)
- All of the above

Hart on the Rules of Recognition:

- They identify the authoritative sources of law that are 'recognised' and enforced in a legal system: ie, they permit us to 'recognise' what counts as a 'legal rule'
- They constitute a test for the validity of legal rules in that system
- Their content can be determined by observing, from an 'external' point of view, what officials in fact do.

- But the officials also have an 'internal' point of view on these rules of recognition: ie, they use them, as reasons for their actions, and as standards against which to judge their conduct and that of their peers.

Just bc we might agree that Fisher J has recognised correctly the rules followed by NZ courts; we can observe it as lawyers and recognise these rules of recognition. In this way we could have a clear stable, legal system. But none of this means for Hart that we have to endorse that rules of recognition ourselves - perhaps judges do but we do not. The officials must, but the rest of us do not have to. We may not agree that these apply. We can separate these judgements as to what the law is and what the law ought to be. The moral question, political question and legal question can be pulled apart. Judgement in domain of the law and what in fact it is; we can still reserve our own right to make our own moral of political judgement - separate domain of life.

Some central (and closely related) questions addressed by Hart

Can 'law' be distinguished from morality or politics?
Can 'is' and 'ought' statements be separated in legal reasoning?
What does it mean to say, 'I am legally obliged' to do X, as opposed to being 'morally' or 'socially' obliged?
Does the law consist of special kinds of social rules?
Can an empirical (or factual) test be found for the validity of legal rules, in a particular legal system, that would permit us to identify 'the law' of that system without making moral or political judgments? If so, is the existence of law in that legal system a matter of 'social fact'?
How is such a test for valid law maintained, and how can it be changed?

Some central elements in Hart's jurisprudence

- a developed legal system consists of the union of primary and secondary rules of law
- the validity of legal rules is determined by applying a certain set of secondary rules (called by Hart the 'rules (or rules) of recognition', that are accepted by officials in that legal system
- the commitment of 'officials' (especially the courts) to these rules of recognition is the key to the system's stability
- that commitment can be seen operating by observing the practices of the courts and other 'officials'; it can be seen in the choices they make about the sources of law to apply and the hierarchical order in which they apply them (eg, applying statutes over the common law, etc)
- the existence and operation of particular rules of recognition, in a particular legal system, is therefore a matter of fact, that can be observed, without making moral or political judgments
- officials work with these rules of recognition from an 'internal point of view': ie, they use them as reasons for reaching their conclusions (as Fisher J's decision in *Berkett* reveals), and as standards against which to evaluate their conduct and that of other 'officials' in that legal system
- by applying the accepted rules of recognition of the legal system, we can identify 'law' by reference to its source or pedigree, not by reference to its substance or content (ie, not by reference to its agreement with any particular theory of right, justice, fairness, equality, etc)
- in this fashion, we can distinguish 'law' from non-legal considerations: eg, morality, politics, religion, etc
- so there is no *necessary* connection between law and morality (sometimes called the separability thesis) although there is often such a connection *in fact* (in the sense that many moral propositions are in fact embedded in the law: eg, thou shalt not kill)
- nor is there any necessary connection between saying something is a law and saying it must be obeyed as an ethical matter (which is a separate question)
- there is therefore no contradiction between criticising the content of a law on moral, political or religious grounds, and accepting that it is indeed the law; in fact, it clarifies thinking to be able to say, 'X *is* the law, but it ought to be changed because ….'
- this approach also helps identify the correct institution, or process, through which the law should be changed: eg, usually through Parliament, or via the democratic process, which provides the best means of bringing new moral or political content into the law.