

JULIE DICKSON, EVALUATION AND LEGAL THEORY, HART PUBLISHING, 2001.

1. Is/ought distinction
 - a. Bentham: separation of expository and censorial jurisprudence (pp. 4-5)
 - b. Austin: „the existence of law is one thing; its merit or demerit is another (p. 5)
 - c. Kelsen: „the task of the science of law is not to approve or disapprove of its subject, but to know and describe it“ (p. 6)
 - d. Hart: „general and descriptive“ theory of law which is „morally neutral and has no justificatory aims“ (p. 7)
2. A different view: In order to adequately characterise law „as it is“, a legal theorist must necessarily take a stance on the moral merit or demerit of the law (p. 7)
 - a. *first*: account of the point, purpose or function of law, in terms of the values (often moral) which law serves; *second*: characterisation of law (pp. 7-8)
 - b. Dworkin: law *should* operate so as properly to constrain governmental coercion (p. 8)
 - c. Finnis: law *should* provide the framework conditions which will allow us to realise certain values or basic goods in our lives for ourselves (p. 8)
3. Analytical jurisprudence
 - a. „concerned with explaining the nature of law by attempting to isolate and explain those features which make law into what it is“ (p. 17)
 - b. „concerned with the nature of law in the abstract, as opposed to the way in which it is instantiated in particular legal systems“ (p. 18)
4. Criteria which demarcate a good or successful analytical theory of law
 - a. theory which consists of propositions about the law which (1) are **necessarily true**, and (2) **adequately explain** the **nature of law** (p. 17)
 - b. „**nature of law**“ = essential properties which a given set of phenomena must exhibit in order to be law (p. 17)
 - c. „such properties are evidently ones which law, at any time, and in any place, must exhibit“ (p. 18)
 - d. why necessarily true propositions (and not only those contingently true)?: only necessary features are part of law's essential nature and can assist us in the task of getting to the heart of this social institution in the sense of understanding that which makes it into what it is (p. 18)
 - e. but: does law have essential features/properties? (p. 18)
 - i. Dickson: „given that we regard there as being something special about certain forms of social organisation which we account as legal, and given that we recognise that, throughout the history, some forms of social organisation have amounted to legal systems and some have not, the only way in which we can begin to investigate what this particular form of social organisation is like, and how it differs from other types of social organisation, is by attempting to isolate and explain those features which are constitutive of it, and which make it into what it is. Such features can be nothing more nor less than law's essential properties, and it will be necessarily true that law exhibits such properties“ (p. 19)
 - f. if law does not have essential features: is a successful theory possible? (p. 18)

- i. Dickson: „This, however, will have to be demonstrated by showing the inability of theories of law of the type under consideration to find and explain any essential properties in the case of law“ (p. 19)
- g. how many essential properties there are?
 - i. „given that law is a complex and multi-faceted social phenomenon, however, we would seem to have no reason to believe that such properties will be few in number and indeed it is at least possible that there may be an indefinite number of such properties“ (p. 20)
- h. should one include critical approaches within the ambit of analytical jurisprudence?
 - i. see examples on p. 21: claims that law is essentially unjust phenomena and that it is essentially morally justified social institution (e.g. Finnis)
- i. why is Dworkin's theory excluded from the ambit of analytical jurisprudence as defined by Dickson?
 - i. see the explanation on pp. 21-22 (his theory is contingent upon the particular legal practices of a specific society)
- j. **adequate explanation** of the nature of law: it is important for any analytical theory „to deal with the data which it purports to characterise in way which is appropriate to, and adequate in respect of, the nature of that data“ (p. 24)
 - i. thus: we cannot choose *any* sub-set of „necessarily true propositions explaining those properties which something must possess in order to be law“ (p. 23)
 - ii. e.g. Hart's shift to „internal point of view“ illuminated a whole range of data which was inadequately dealt with by earlier versions of legal positivism (which offered external account of legal phenomena) (p. 24)
 - iii. methodological precept: „it is necessary for a legal theory to approach the data which it seeks to characterise in a way which is appropriate to the nature of the data, on pain of otherwise offering a distorted account of it“ (p. 24)