The Denning Law Journal 2009 Vol 21 pp 183-188

**BOOK REVIEW**

# McCOUBREY & WHITE'S TEXTBOOK ON JURISPRUDENCE

## *J E Penner*, 4th edn (Oxford: Oxford University Press 2008) ISBN 9781847030221

*James Slater* [*]

Professor J E Penner has assumed responsibility for *McCoubrey and White's Textbook on Jurisprudence*, in the form of the new 4th edition. Previous editions were well structured, clear and wide ranging introductions to a difficult subject, and in these respects Penner's 4th edition is no different. The main changes are twofold. First, there is more detailed exploration of certain topics; secondly, there is a broadening of subject matter through the inclusion of theoretical schools unaddressed by previous editions. Overall, the 4th edition is a significant improvement on its predecessors and Penner is to be congratulated for making a good textbook better.

The way the subject of jurisprudence is divided by the textbook follows tradition. Thus the chapter titles include 'Classical Natural Law', 'Classical Legal Positivism: Bentham, Austin and Kelsen', 'Legal Realism', 'Hart: The Critical Project', 'Critical Legal Studies' and 'The Economic Analysis of Law'. What are new to this edition are the chapters 'Marxist Theories of Law' and 'Feminist Legal Theory'; these new chapters address important schools of thought and are therefore welcome additions. Overall, the textbook is comprehensive and versatile and should, as a result, find itself on the reading list of many jurisprudence courses.

Jurisprudence is complex subject, requiring a level of philosophical sophistication unmatched by anything else on the undergraduate law curriculum. In light of this it is challenging to teach at undergraduate level. If a textbook is to assist with this challenge, it must make the topic comprehensible without excessive omission and/or distortion in the name of simplification. This is a difficult balancing act and Penner's textbook accomplishes it well. For example, the chapter on classical natural law does justice to the richness of the subject whilst remaining accessible; particularly

[*] BA (Sussex), LLM (Harvard), PhD (Birmingham), Senior Lecturer in Law, the University of Buckingham.

welcome is the informative discussion of Islamic law.[1] The nature of American legal realism is clearly explained, with succinct biographies of Holmes, Llewellyn and Frank followed by thematic analysis. The chapter on the critical legal studies movement gives an accurate yet succinct flavour of this radical descendant of American legal realism, and does not shy away from engagement with the complex work of Roberto Unger. Also noteworthy is the illuminating distinction Penner sets out in the opening chapter between what he calls the philosophy of law and legal theory.[2] In the former he places the task of understanding the phenomenon of law in abstract: how is it identified? Is it coercive by nature? In what sense does it relate to morality? Legal theory, on the other hand, accepts some kind of definition of law but addresses, amongst other things, its role in society, whether it is a force for good or oppression, and what practical effects it can have. Penner acknowledges, correctly, that there is much cross fertilisation between these two general categories, but marking the distinction certainly helps to see the ways that, for example, the analytical endeavours of Hart and Dworkin differ from the more practical and critical concerns of the American legal realists and feminist theorists. My only criticism here is that, having set out this useful distinction, it is never mentioned again; certainly undergraduate students, at whom the book is primarily targeted, could do with occasional reminders of its relevance to whatever topic is under analysis.

Nevertheless, on a few occasions, I felt the textbook would have benefited from a more in-depth analysis of the issues it raises. I will focus on two instances where that deeper analysis would have been welcome: the plausibility of H L A Hart's approach to legal reasoning, and the concepts of, and distinction between, soft and hard positivism.

An important feature of Hart's legal theory is his vision of legal reasoning, and Penner addresses this vision through Hart's refutation of rule scepticism, during which he summarises the distinction Hart drew between the core and penumbra of a rule.[3] Hart's view was that rules are made up of words, with those words having a core of determinate, or settled, meaning, and a penumbra of indeterminate meaning. From this, Hart inferred that when a situation falls within the core meaning, as is the case in most instances, the rule settles the dispute without the exercise of discretion, thereby confounding the rule sceptic. Only in the penumbra, where the word's meaning is unclear, must the judge exercise discretion, and in such situations he should exhibit imagination, flexibility and awareness of social consequences in reaching his

[1] A discussion, at pp 25-34, that is new to this edition.
[2] Pp 1-6.
[3] P 77. Hart's theory of legal reasoning is also mentioned at p 121.

decision.[4] In such situations, Hart accepts that the rule sceptic is welcome, but argues that this relevance in the penumbra should not blind us to his irrelevance at the core.[5]

Hart's reference to the core and the penumbra is meant to track a distinction between easy cases, where the legal resolution of a case is governed by the law unambiguously, and hard cases, where the law is ambiguous, and the judge is thereby obliged to exercise discretion in order to reach a decision. In such cases, discretion is exercised with the use with non-legal materials of a moral and practical nature. In such cases the judge does not apply existing law, at least not exclusively, but makes new or fresh law.

Having set out Hart's refutation of the rule sceptic, Penner draws attention to the case of *AG v Prince Ernest Augustus of Hanover*.[6] This case concerned the meaning of an antique statute, the Princess Sophia Naturalisation Act 1705; the Act provided that:

> "Princess Sophia...and the Issue of her Body and all Persons lineally descending from her, born or hearafter born, be and shall be, to all Intents and Purposes whatsoever, deemed, taken, and esteemed natural-born Subjects of this Kingdom."

The Act was the product of constitutional expediency, ensuring that, in light of Queen Anne's childlessness, the next monarch would be British. Prince Ernest August of Hanover, a distant descendant of Princess Sophia, claimed British nationality under the literal interpretation of the Act, an interpretation accepted by the High Court. The Court of Appeal, approaching the Act under the golden rule of interpretation, held that such an outcome would be absurd, thereby reversing the decision. The House of Lords restored the decision of the High Court; Penner comments: "Whatever view may be taken of this case and its outcome, it would appear that there was a choice to be made within an open-textured provision."[7] Despite the reference to open-texture, I believe Penner's point is that the difference of opinion between, on the one hand, the Court of Appeal, and, on the other, the High Court and House of Lords, reveals the possibility of discretion despite a situation falling within the core of settled meaning of the language used by a rule. This potentially undermines Hart's theory of legal reasoning in important ways, yet, instead of entering into an analysis of how this might be, Penner confines himself to the comment

[4] H L A Hart *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) pp 66-67.
[5] Hart *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1961), chapter VII "Formalism and Rule-Scepticism"; see, in particular, p 154.
[6] [1957] AC 436.
[7] P 79.

quoted. However, the average undergraduate would certainly benefit from such an analysis, in particular an exploration of Lon L Fuller's criticism of Hart that the application of statutory provisions always requires reference to their purposes, with the result that the difference between easy and hard cases depends not on the determinacy or otherwise of language, but our understanding of its meaning in light of those purposes.[8]

Similarly, there is failure to engage in sufficient depth with the concepts of, and distinction between, soft and hard positivism. Positivism is the thesis that the sources of law are exclusively a matter of social fact.[9] Soft positivism holds that those factual sources can nevertheless make morality a necessary condition of legal validity, whereas hard positivism denies the possibility of even this contingent relationship between legal validity and morality. Despite its importance, soft positivism is only mentioned once, in the context of the debate between hard and soft positivists, yet its importance means it merits considerably more attention than it receives. For example, not only is it relevant to the debate with hard positivism, it also features prominently in Hart's defence of the concept against criticisms levelled by Ronald Dworkin at his account of soft positivism and soft positivism generally.[10] A summary and critique of Hart's defence of the concept against criticisms levelled by Dworkin would not be amiss in a textbook such as this.

Hard positivism, specifically Joseph Raz's version thereof, does receive more attention.[11] Penner explains how Raz justifies his hard positivism by reference to a vision of law as a practical authority.[12] According to this vision, the purpose of law is to mediate between the reasons which apply to the subject's case and the subject, and, having performed this function, to tell the subject what to do without any need for the subject to explore what is required

---

[8] See Lon L Fuller "Positivism and Fidelity to Law" (1958) *Harvard Law Review* 630 at 661-669, discussed by Neil Simmonds in *Central Issues on Jurisprudence* (London: Sweet and Maxwell, 3rd edn, 2008) pp 163-164.

[9] See generally John Gardner "Positivism: 51/2 Myths" (2001) 46 *American Journal of Jurisprudence* 199. See also the online entries to the Stanford Encyclopedia of Philosophy, "Legal Positivism" and "The Nature of Law", by Leslie Green and Andrei Marmor respectively.

[10] See "Postscript", above n 5, especially pp 250-254.

[11] Pp 135-139.

[12] See for example: *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) especially chapters 8 and 9 ("The Problem about the Nature of Law" and "Authority, Law and Morality"); *The Morality of Freedom*, especially chapter ("The Justification of Authority"); and "Facing Up*:* A Reply" (1989) 62 *Southern California Law Review* 1153–1235. A very good general discussion of Raz's hard positivism can be found in H Davies and D Holdcroft *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991) chapter 1 "Legal Positivism".

on the balance of reasons. If it cannot do this, with the result that the subject is forced back onto an analysis of what to do in light of the relevant reasons, it is no longer acting as an authority. To the extent, therefore, that the law does not give such clear-cut guidance, it is not fully formed, requiring the judge to create, or supplement, the law by reference to extra legal factors of a moral or other kind. Hard positivism flows from this vision of law as a practical authority because, arguably, the law can only act as an authority when it can be identified and applied without recourse to these extra legal factors.[13]

What is missing from Penner's analysis is whether Raz's justification for hard positivism is sustainable in light of the reality of legal reasoning, including Raz's acknowledgment that judges often mix law application and law creation when deciding cases,[14] and also retain a power, within institutional limits, to ignore clear law in the name of morality and justice.[15] This need to supplement the law with extra legal factors when deciding cases arguably threatens Raz's justification for hard positivism, because, if it is the norm rather than the exception, the frequent reference to extra legal factors severely compromises law's practical utility, with the result that it can no longer fulfil its authoritative function. Though this debate is complex, it would not be out of place in an undergraduate textbook to give something of its flavour, in particular some sense of the criticisms of Raz made by Gerald Postema,[16] and Raz's response to those criticisms.[17] However, Penner makes no mention of the debate.[18]

Nevertheless Penner's willingness to engage with Raz's is a step in the right direction. Striking the balance articulated above between comprehensibility and complexity remains a challenge to a large extent unmet

---

[13] *The Authority of Law*, see above n 12, pp 49-50.

[14] *The Authority of Law*, ibid, pp 208-209. See also "On the Nature of Law" (1996) 82 *Archive fur Rechts und Sozialphilosophie* 1, and "Why Interpret?" (1996) 9 *Ratio Juris* 349.

[15] "Facing Up", above n 12, at 1204 and 1208-09.

[16] See Gerald J Postema "Law's Autonomy and Public Practical Reason" in Robert P George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1999) pp 79-118. Similar criticisms have been made by Fernando Atria: see "Legal Reasoning and Legal Theory Revisited" (1999) 18 *Law and Philosophy* 405, also to be found in Fernando Atria and Neil MacCormick (eds) *Law and Legal Interpretation* (International Library of Essays in Law & Legal Theory: Second Series) (Vermont: Ashgate Publishing Company, 2003).

[17] "Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment" (1998) 4 *Legal Theory* 1.

[18] Penner has addressed the jurisprudential issues raised by legal reasoning in Chapter 14 "Legal Reasoning" in D Schiff and R Nobles (eds) *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford: Oxford University Press 2005) 649.

by textbook writers where Raz is concerned, but Penner has made good progress in so doing.

Overall, this is a very good textbook, and one that I would be more than happy to recommend to my undergraduate jurisprudence students. It is clearly written, and strikes a good balance between accessibility and complexity.