



ANU LAW STUDENTS' SOCIETY

LAWS2249 Legal Theory 2nd Semester 2009

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Question 2(a) – D (72)

The answer to the question ‘in what ways and to what extent is the law indeterminate’ is difficult, given the vast array of ways to think about law itself. Similarly, the effect of such indeterminacy on the rule of law (RoL) varies depending on what theory you subscribe to. Therefore, the easiest way to approach these questions is to traverse the literature and theory, and reach a conclusion personally. I will argue that law is in fact radically indeterminate but that this has a beneficial impact on the RoL. [✓]

I. Definitions

Before we may consider the effect of indeterminacy on the RoL, it is necessary to understand what the RoL actually means.

I contend that the RoL is a dynamic entity whose definition depends on the society in which it operates. The RoL may be seen as a continuum: at one end, law is considered the RoL. As such, the effect of indeterminacy will be significant. At the other end, the RoL is contested (because there is no consensus on what it should be/means), but I believe this is a positive force as it encourages debate on what it should be. These issues are discussed later. [✓]

Secondly, we may define indeterminacy as the law not having a clear meaning.

II. How and to what extent is the law indeterminate?

This question’s answer depends on the theory you subscribe to – therefore, I will list the sources and the extent of indeterminacy of each theory and reach a conclusion as to which I believe is the more relevant approach.

1) Ethical positivists

Under this theory, there is a belief in legal formalism – that the law is determinate, and that judges can and do apply one correct interpretation of facts and law to reach a unique and correct decision.

It is clear then that under this theory, the law is not indeterminate at all. Consequently, there can be no source of indeterminacy and no ‘extent’ or degree of indeterminacy.

2) Legal Realists

Under this theory, the indeterminacy thesis applies. This states that the law is indeterminate and that judges decide cases on something other than law.

For legal realists, judges decide cases on non-legal factors (such as moral/political/economic sense of what is right) and that the law is used as post-hoc realisations.

For legal realists, the law is indeterminate in 2 ways: rationally and causally. The law is rationally indeterminate because there is more than one legal rule that can explain a decision, which leads to causal indeterminacy. This is the idea that judges use something other than the law to decide cases.

It appears then that the extent of legal indeterminacy (in this theory) is perverse. The law is so indeterminate by its nature (i.e. there are so many precedents to choose from). [✓]

3) Critical legal studies

This theory sees the law as fundamentally indeterminate (Bellotti) because for every principle there is an equally valid counter principle (McCormick). [this might be open to contestation though!]

Therefore, the law is extensively indeterminate and that indeterminacy stems from the fact there are multiple principles to choose from (CLS states judges decide which to choose by ideology).

4) Other theorists

Hart states that the law is inherently indeterminate because of language constraints. He believes that language is always open to different interpretations such that indeterminacy is unavoidable – this is the ‘open texture’ of the law.

However, Hart sees indeterminacy as the exception not the rule, as in the vast majority of cases the law is sufficiently clear. Only when there is a hard case is the law indeterminate, and judges get around this zone of discretion by considering the social consequences of the decision.

Stone also believes that indeterminacy is sourced from the ratio decidendi of cases – this ‘open texture of fact’ means that judges have so many precedents to choose from that the law is indeterminate to a large extent.

At this point it is helpful to pause and reconsider: the law may be seen as indeterminate as it has multiple precedents from which judges must choose, the open texture of law makes law indeterminate, as well as judges using non-legal sources to decide cases. [✓]

This being the case, it appears on balance that the law is fundamentally indeterminate.

However, the question must be asked: if the law is so radically indeterminate, how does law continue to exist and why is it that citizens do not engage in civil disobedience to overthrow an inherently subjective legal system and impose a truly impartial and fair/equal judiciary?

The answer to this question is that indeterminacy has a positive effect on the RoL. This will now be discussed.

III. Consequences of indeterminacy for the RoL

Again, the consequences vary depending on what theory you are considering.

For the legal realists and critical legal studies, indeterminacy undermines the RoL. It does this because the more indeterminate the law is, the more judges are using personal morality and other non-legal sources to decide cases. In doing so, the RoL values are not being enforced, and what is actually being perpetuated is the judges personal (and illegitimate) conceptions of what law is and should be. [✓]

However, I maintain that indeterminacy does not have such a dire effect on the RoL: rather, it is fundamentally beneficial – for this reasons, the citizens to do not overthrow the legal order in light of indeterminacy.

This view is explained by reference to Hart and Stone. [✓]

Hart states that in hard cases, the constraints of language will always result in indeterminacy. However Hart sees this as beneficial as it allows for flexibility in the law and encourages good interpretation practises. So whilst legislation may be indeterminate, it is beneficial as it permits judges to be flexible with it to improve it.

At this point I draw on Dworkin's theory of adjudication. If a judge incorporates the law and the morality of a people, a more principled decision may be reached. If statutes are indeterminate, judges may improve its function by interpreting it in such a way that reflects the morality of a people. In turn, the RoL is aided on a narrow and laden meaning, as what constitutes rights may be decided, and values such as fairness and democracy be enforced

Stone also states that indeterminacy has a positive force on the RoL. For Stone, indeterminacy stemming from multiple ratio decedendi allows judges to choose the best ratio and apply it. [✓]

Much like Dyzenhaus, Stone conceives a system where judges can draw on common law principles that are morally sound and superior and apply them.

Therefore indeterminacy in the common law aids the RoL as judges may choose those precedents that encapsulate the RoL more fully and uphold values of equality, fairness and reasonableness.

It is in my opinion that the law is fundamentally indeterminate – judges must attempt to find meaning in ambiguous language, and at times solve cases on 'gut feelings' and use the law as a post-hoc rationalisation.

However, unlike the legal realists and CLS, I believe indeterminacy aids the RoL in both common law and statute situations, as it allows judges to be flexible on their approach and apply law that is morally sound and complying with the RoL.

Further, in situations where the RoL has a politically contested definition, determinacy will promote debate about what rights constitute a RoL, in turn increasing the RoL's validity and application.

IV. Conclusion

The extent and ways that the law is indeterminate and the effects of indeterminacy on the RoL varies depending on what theory you subscribe to. However, I believe that the law is indeterminate but this has a positive influence on the RoL in both statute and common law situations. [✓]

[a great essay]