WHY OBEY THE LAW?

- Why should one obey the law?
- What is the source of obligation in law?
- Have looked at the nature of law, theories on why law ought to be obeyed at all

Obligation is a binding force. When we say that a person is obliged to do something, or when we say “I am obliged to do x”, it is because there is some DEMAND being made on them.

The demand or binding force can be external or internal or both.

Cf:

I feel obliged to tell you the truth: demand is internal.
I feel obliged to tell you the truth because if I don't I will be fined or if my friends find out they will despise me etc – demand is external.

The obligation to obey the law, is it:

☐ an inner felt duty because you believe in the law and think it is the right thing to do?
☐ A fear of punishment?
☐ Pressure to conform?
☐ Fear of social ostracism?

A number of legal philosophers have looked at this question.

1. Coercion – Austin and Bentham
2. Social Contract and Consent Theories – Hobbes, Locke, Rousseau, Socrates, Rawls etc
3. Integrity - Dworkin
4. Morality – Natural Law – Aquinas, Grotius, Finnis, Fuller
5. There is No Obligation – Obey because you want to, there is no obligation, no inherent compulsion – Raz, Wolff

1. COERCION

Austin and Bentham

John Austin born in 1790 was a professor of jurisprudence at the University of London from 1826-1832 and had a profound effect on British and Western jurisprudence.
student of Jeremy Bentham (1748 – 1832). Austin favoured Bentham’s views on legal positivism. Austin and Bentham felt that law was the command of the sovereign backed up by the ability to enforce it.

So the law was valid because of the threat of punishment for breach.

Classical positivism unites OBLIGATION with SANCTION. Coercion is equated with obligation.

So Austin’s view: that a person is obliged by the command of the sovereign = the superior will punish the person if he/she does not obey. It is the external force, the fear of punishment, which obliges a subject’s obedience.

Bentham was a utilitarian, who said that law should be about promoting the greatest good for the greatest number and that subjugation of individuals by law was for the good of the majority and could be justified and understood/analysed that way.

Obligation equals coercion when it is said that to obey the law is the same as saying we are coerced to obey the law.

Criticisms of this approach:

- obligation to obey the law is no different to obeying the order of a terrorist/gangster
- law has a greater status
- better reasons to obey
- more compelling analysis of the obligation indicates law is obeyed not only because of troublesome consequences


- Hobbes (1588-1679) published Leviathan in 1651
  - English Civil war of 1640-1653 - misery
  - Hobbes’ emphasis on the importance of a strong State
  - a science to the way man behaved.
  - natural behaviour would tend towards chaos and strife unless acted upon and governed by the rules of social living. (eg like Newton’s theory of physics, that matter will behave in a certain uniform way unless acted upon).
  - Only a covenant, kept by the rule of the sword, would keep man from falling back into his natural savage state.
  - Without rules, society would disintegrate and it would be every man for himself, against every other man and the result would be inevitably that the life of man would be ‘solitary, poor, nasty, brutish and short’.
  - Man banded together for mutual self-protection and in return, gave up some freedoms and agrees to be subject to the law.
  - He came up with the concept that society operates because of a social contract. He was a materialist, everything is corporeal. Hobbes was not spiritual and only matter was relevant or had value. Human motivations were derived from our biological nature, and the key drive was survival.
  - The social contract theory is based upon the key resources being required by people as being scarce (food, shelter, and the essentials of life). Because of scarcity, there is competition. Each would be forced into a war against all others. If there was no law/state set-up governing behaviour, it would be not possible to act properly simply from a sense of moral sentiment.

Why would there be perpetual civil war?
• To look after future interests (to grow a crop next year)
• To pre-empt an attack when one is weak or not expecting it (so attack first)
• Because there is no penalty for such actions but a price to pay for not protecting oneself and one’s interests.

- A State will not be an effective kerb upon the tendency of people to strike pre-emptively unless its authority is paramount. Therefore, to achieve a peaceful and stable society the power of the State must be absolute.
- Once committed to the state, as a member of the state from which we receive benefits, we are obliged to obey the law.
- It is a promise to behave, because we have taken benefits. Obligation because of what has been taken/received. Consent or social contract theorists argue that the ONLY source of obligation to obey the law is this promise we have effectively made. Like any contract, the obligation relates to the promise which has been made.
- A promise is defined as the making of a sign which signifies the creation of an obligation – knowingly made and with the intention of it being an obligation. (Signing a contract before witnesses is an example).

Promises are divided into strict promissory or quasi-promissory eg you might not sign an employment contract but a contract exists by dint of both sides of the agreement

- **Socrates** – simple: by living in a society and receiving benefits from that society one enters a quasi promise to abide by the laws of that society. One is obliged, having taken the benefits, to accept the burdens. *One of the burdens of living in a state is the burden of obedience to the law*. This is the notions of a quasi-obligation.

- **John Locke** – John Locke (b. 1632, d. 1704) was a British philosopher, Oxford academic and medical researcher, opposed authoritarianism by government or church or any authority other than the individual. Thought man had a divine purpose and should not necessarily hand over decisions to any ruling body – natural law should be the paramount guide – institutions are flawed/corrupt/superstitious...not necessarily following natural law.

He was an empiricist, everything we know is derived from experience or observation.

**Asked how might the state have authority over us?**

**Nature gave us individual rights to life, health, liberty and possessions. These exist prior to any political organisation.**

He thought that in the state of nature, moral law would generally be followed, some would break it and the law would be futile without enforcement, *so everyone* had a natural right to enforce the law, but that since individual enforcement might be excessive, inconvenient, difficult or inconsistent, it was useful to have a civil authority to resolves disputes and ensure peace.

The critical thing to ensure, acc to Locke was that it was never intended to confer legislative power upon a civil authority which would permit it to violate our pre-existing rights.

“**Whenever the legislators endeavour to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience and are left to the common refuge**”

All humans had reason and were equal.

Man gave up liberty to secure his property (social contract)
Rulers could not dispose of their subjects’ property, one’s toil gave a private right to ownership. (cf R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12 where proposed compulsory acquisition of privately-owned properties by the respondent was for the purpose of re-sale by Council and therefore fell within the constraint on acquisition in the Local Govt Act s 188(1) and NSW legislature which overturned effect of High Court 5-nil decision (See Land Acquisition (Just Terms Compensation) Amendment.)

“To properly understand political power and trace its origins, we must consider the state that all people are in naturally. That is a state of perfect freedom of acting and disposing of their own possessions and persons as they think fit within the bounds of the law of nature. People in this state do not have to ask permission to act or depend on the will of others to arrange matters on their behalf. The natural state is also one of equality in which all power and jurisdiction is reciprocal and no one has more than another. It is evident that all human beings – as creatures belonging to the same species and rank and born indiscriminately with all the same natural advantages and faculties – are equal amongst themselves. They have no relationship of subordination or subjection unless God (the lord and master of them all) had clearly set one person above another and conferred on him an undoubted right to dominion and sovereignty”- Locke

No taxation without representation (Lockean ideas used in the American constitution to protect life, liberty and property.)

Wrote Two Treatises of Government in 1689
1st Treatise – attacks patriarchialism
2nd Treatise – outline of theory re natural rights and social contract theory
(See also Lloyd Ch 3)

☆ John Rawls – American Professor of Philosophy at Harvard - supportive of the contract theory that an obligation arises in a liberal democratic society, to obey the law. Says there are two principles:

i. Each person is to have an equal right to the most extensive basic liberty compatible with a liberty similar to others
ii. Social and economic inequalities are to be arranged so that they are both reasonably expected to be everyone’s advantage and attached to positions and offices open to all.

He postulated that the fair sharing of wealth and resources could correct societal imbalances and law and morality was about achieving this.

1. Veil of Ignorance (the most fair rule would be one you came up with with no knowledge of who you are and how you might benefit)

2. Difference Principle (Inequality acceptable if you are treating the most needy differently).

☆ Jean-Jacques Rousseau (1712 – 1778) Leading French Philosopher (see p91 Harris)

“Man was born free and he is everywhere in chains”

- Wrote “The Social Contract” – the ruler is the agent of the people, not the master, which was misconstrued as a blueprint for totalitarianism.
- supported democracy
- duty of all those who participate in the society to obey that which is for the greater good of the state, thus eroding any notion of individual’s rights.
- distinction between the general will which is direct toward the common good, and the will of all, which was just the aggregate of a bunch of individual, selfish wills.

Vote = must then abide by result of vote. If don’t, then unfair and violating rule essential to democracy.
CRITICS

Critics of the social contract theory included arguments:
→ mere fact of living in a state cannot be taken as freely given consent as it is hardly feasible to up and leave.
→ not another society nearby with a different suitable regime
→ laws change and you might have voted in a particular government and then they radically change the rules/move the goalposts
→ Not comparable to other legally recognisable/enforceable contract scenarios
→ Premised upon pessimistic outlook re nature of man? (ie Hobbes)
→ Provided rationale for crime? eg offenders regarding themselves as having had a poor receipt of benefits from the state could consider the state as having broken the terms of the relationship, justifying their criminality (ie a release from the burden of obedience).

☆ Robert Nozick (Author of Anarchy, State and Utopia) thought that individuals have rights which are so strong and far-reaching that there were limits to what a society could impose, and that the concept of a social contract was erroneous. He gave the example of local authorities broadcasting music in the street which we enjoyed – we would nevertheless not agree that the local authority could then start billing us.

3. INTEGRITY - Dworkin

Ronald Dworkin (Law’s Empire)

Ronald Dworkin (born 1931) is an American philosopher, professor at University College London and the New York University School of Law. He is known for his contributions to legal philosophy and political philosophy. His theory of law as integrity is one of the leading contemporary views of the nature of law.

In 1969, Dworkin was appointed to the Chair of Jurisprudence at Oxford, in which position he succeeded H.L.A. Hart.

Dworkin disagrees with social contract theory. Says inadequate explanations for the source of law. Instead of obligation of law coming from a promise by way of social contract, Dworkin argues:

obligatory nature of law comes from:

i. Associative obligations – belonging to belonging to a family or neighbourhood you incur certain obligations without entering into any quasi or strict contract. Recognise family obligations parents to children, siblings to siblings, children to parents. Belonging to a society is akin to belonging to a family and gives rise to obligation by association.

ii. Integrity – Matter of circumstance; matter of rules; matter of principle – adhere to certain beliefs, ideas or principles

Ideal community is a community of principles. Obligation arises not from coercion, nor fear, but fidelity to a scheme of principles. It is a felt internal obligation based on a commitment to principles rather than an external force.

Criticism: Professor Leslie Green:

Family a wrong analogy to society as family does not demand obedience demands other things such as care, interest, loyalty, and co-ordination but not obedience.

4. MORALITY - NATURAL LAW

Principles of Natural Law
Natural Law – an individual has an obligation to disobey laws which are incompatible with higher moral principles. Natural Law is that set of universal moral principles starting with the principle do good and avoid evil.

Positivism – separation of law and morals. Recognise as constitutionally valid laws as legally binding upon citizens even if these laws infringe upon human rights. Specificity in concrete circumstances.

Purpose of law is to promote the common good. At times we can be obliged to disobey the law if a law is detrimental to the common good.

Nuremberg Trials – the famous example. Nuremberg trials were the trials of war criminals. Natural law theory holds that certain rights exist independently of the legal system and are incapable of abolition by legislative act. The Nuremberg trials imposed upon individuals a duty to disobey laws which are clearly recognisable as violating higher moral principles. This has become known as the “Nuremberg principle”.

(See article by Gabriel Moens “The German Borderguard cases: Natural Law and the Duty to Disobey Immoral Laws” the Nuremberg principle was invoked.)

Germany was reunified on 3 October 1990. The German public wanted to try the border guards who had killed East Germans trying to flee to the West. The Border Guards said that they were obeying orders.

- In military, orders are sacrosanct.
- Obeying orders is drilled into military people because others have lost their lives in the past because individuals have disobeyed orders - because they have felt like it or because they were not privy to the full intelligence/strategic picture.

The Border Guards caused German courts to reconsider the Nuremberg principle. See two main cases. Article B of the reunification treaty provided for West German law to apply to former East German territory.

The rule was that where there was two laws governing an event/crime committed prior to reunification, the “milder” law would apply; and there was immunity for an act which was not a crime under East German law prior to reunification. (Part of the treaty said that it was unlawful for anyone who committed an offence against a German or who did the act and then became a West German. Both of which caught East Germans. This was rejected as it nullified the immunity).

Two defences:

1. East German law said that the use of firearms was justified to prevent the completion of a crime at the border.
2. Border Guard not criminally responsible for carrying out an order unless a blatant violation of international or criminal law or obviously contrary to higher morals.

***

The duty to disobey immoral laws debated by

Professor Hart v Professor Fuller

Hart: What is law and what ought to be law two sep things
Fuller: Natural Law theorist – law must contain a minimum of moral content for it to be characterised as law. If a law did not satisfy the minimum moral content, it could not legitimately command the obedience of its citizens.

Fuller wrote in his The Morality of Law – external morality makes a law which deserves to be respected and obeyed, internal morality is the minimum conditions which every mature legal system
must satisfy in order to achieve its purpose. If legal rule are just, their satisfaction will promote respect for the rule of law.

- Are some things objectively wrong/disreputable?

Naturalist – the pursuit of high ideals contributes to the betterment of society – law embodies values. (Law must be good to be obeyed, evil orders ought to be disobeyed – must be a minimum content of good for the law to be valid).

Positivist – law is a tool not the yardstick or codification of what is necessarily good – law is value-free. (So if it is law, obey with a clear conscience – no evaluation – laws could be evil, if legally valid, should be unswervingly obeyed: moral validity not rel).

There is a problem with citizens evaluating for themselves every law, because this could cause instability.

Article ends saying that the legal system of Germany failed to achieve a satisfactory resolution to the perennial problem of whether there is a duty on citizens to disobey immoral laws.

5. THERE IS NO OBLIGATION

Joseph Raz (lecturer Hebrew Uni in the 1960s and then PhD at Oxford) – wrote The Morality of Freedom, The Authority of Law etc. (See Chapter 12 of The Authority of Law entitled “The Obligation to Obey the Law”.)

Natural Lawyers argue that the source of obligation in law rests in the fact that the laws are good and the rightness of the individual law determines whether or not the individual law ought to be obeyed.

Starting point is that law is good and ought to be obeyed.

RAZ is the opposite, in that says there is NO general obligation to obey the law. There might be an obligation to obey particular laws, but it would be for prudential reasons. The laws are good, or there is a risk of legal sanction, of social sanction (affecting different people to different degrees depending upon their social standing, family connections, background etc. The justness of the law or the legal system is not the source of an obligation.

He concludes that even if it makes sense in a society to obey the law, and the law is useful and important, there is nothing which gives rise to even a prima facie obligation.

Robert Paul Wolff is a Professor of Afro-American Studies at the University of Massachusetts Amherst USA. He is the author of more than twenty books, He wrote the famous In Defence of Anarchism in 1960. He criticised both conservative and small-l liberal thought.

Wolff assumes the Rousseau position: democracy is the reason we are obliged to obey the law – the majority are of that view so therefore we should follow and obey.

Rousseau = the majority view is a manifestation of the general will.

Wolff argues that the majority view does not always produce a just system nor a just distribution of political power. If people vote on the basis of self-interest rather than on the basis of universal moral principles, then could end up with a very unjust system.

CONCLUSION

Sources of obligation in law:
Force/coercion,
promises based on social contract (or ‘consent’ theory),
associative obligation/integrity,
principles of Natural Law - goodness and justice of the law - it is worthy of obedience.
And all-important philosophical question:

*Are we obliged to obey unjust laws?*

**Yes.** Duty to obey – we obey all law even unjust – coercion and social contract theorists

**Yes.** Duty to obey generally esp to uphold an otherwise just institution but *permit exceptions* – Natural Law theorists

**No.** No general duty to obey law - only duty to obey particular laws which one sees to be good/worthwhile – ‘No obligation’ theorists.