

## A LEVEL

*Candidate Style Answers*

# LAW

**H415**

For first teaching in 2017

## **H415/03 Further Law – Section A: The nature of law**

Version 1

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# Introduction

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The sample assessment material used in this resource is here: <http://www.ocr.org.uk/Images/315219-unit-h415-03-further-law-sample-assessment-material.pdf>

# Section A Question 1

'The law should enforce morality'. Discuss the extent to which you agree with this statement.

[25]

## Level 4 answer

Morals are a set of beliefs and values. Philip Harris defines morals as principles affecting standards of behaviour. Morals change over time and are not shared by all members of society. Many morals are based on the dominant religion in a society e.g. 'Thou shall not kill'. Laws on the other hand are a set of rules that are recognised and applied by the state.

The question asks 'should the law enforce morality?' There is sometimes great difficulty for parliament to pass laws that reflect the morals and beliefs of everyone in society. Durkheim commented that in small societies it was possible for there to be a common morality and therefore common laws. However, in modern society people may have different morals based on social status, income, ethnicity, religion etc. This is because we live in a pluralist society. Pluralist societies contain a wide range of moral standards and values. This makes it very difficult for the law to please everyone. Parliament may make use of Private Members' Bills to pass controversial laws. This way the political parties do not have to reveal their views on controversial issues. Instead, backbench MPs will pass the law, for example, in 1967 the Abortion Act legalised abortion. This was a very controversial law at the time and still has people who oppose it today. More recently, the Assisted Dying Bill was defeated in parliament as the MPs couldn't agree. Many people in society would be in favour of such a change in the law however there is still opposition.

Lord Devlin took a paternalistic approach in his cases and thought that the law should set the basic standard of morality and that society should aim for higher standards. Devlin reacted to the Wolfenden Report which led to the legalisation of homosexuality in the Sexual Offences Act 1967. Devlin was critical of the report and thought that there should be a shared morality in society and that society may disintegrate if morals were not upheld. Professor Hart disagreed. He was influenced by the utilitarian approach of John Stuart Mill. Both Hart and Mill thought that a minority in society should not be made to conform to the will of the majority. Hart went further and said that the law should not enforce morality as it would infringe a person's autonomy.

There have been cases where one of the parties holds a particular religious viewpoint that the courts do not agree with. In *Re A*, the parents of conjoined twins opposed the separation of their babies on religious grounds; however, the court authorised their separation. In *Re S*, a pregnant woman refused to have a caesarean section because it went against her beliefs; however, the court ordered the procedure to go ahead against her will. These decisions are controversial as the judge is making a moral decision. Judges are criticised as being old and out-of-touch because they are from a narrow social background. It is argued that a judge's morals may be different from those of the public. Many critics of the decision in *R v Brown* made this point when the House of Lords refused to allow a group of homosexual men to raise the defence of consent when they partook in S&M. The House of Lords decision was however, not based on sexual orientation. Instead the court did not want to be seen to endorse cruelty and degradation.

Natural Law theorists such as St Thomas Aquinas believed that law and morals came from God. Since the decline of religion in many societies, Lon Fuller argued that a valid legal system had eight requirements, including that it is in existence, published, understandable and consistent. Positivists such as Bentham criticised the natural law theories for confusing legal issues and moral issues. The disagreement between the natural law theorists and the positivists was seen in the Hart-Fuller debate. Laws made by the German government during the Second World War were still valid laws according to Hart. Even though they were immoral, they were legally enforceable. Fuller said that these laws went against natural law and that, because they were immoral, they were never actually valid. The German courts agreed with Fuller when they prosecuted informants as war criminals even though what they had done was legal during the war.

So, in conclusion, the law does try to enforce morality in many cases but as morals are constantly changing with each generation, the law sometimes fails to keep up. There cannot be a complete separation between law and morals as many are intertwined. The Human Rights Act 1998 is an example of the law enforcing the rights and freedoms of individuals. What causes conflict is when the law tries to force its idea of morality on a pluralist society.

## Examiner commentary

This is a detailed essay on the law and morality. The candidate has written a very well structured answer that includes definitions of the key terms and citation of theorists, cases and Acts of Parliament. They have used examples throughout and have demonstrated an excellent knowledge of the law and discussed a wide range of legal concepts. This candidate has decided to concentrate on one central theme (pluralism) but an equally good answer could be produced by a candidate who develops the Hart-Devlin debate further and includes criticisms of both sides of the debate.

The introduction to this essay starts with clear definitions of the key terms 'morality/morals' and 'law'. The use of theorists in this paragraph makes the definitions more detailed and developed. Referring to the exam question is good exam technique. The second paragraph refers directly to the question set and starts to address its issues. This is a well-developed evaluation of the problems of trying to make the law enforce morality in a pluralist society. Good terminology is used and there are examples in the answer. Examples can come from the 'whole course of study' and this student has used examples from the Law Making, Crime and Tort units.

The Hart-Devlin debate is a well-known aspect of a morality essay. The explanation of the debate is fully developed and the inclusion of the Act makes this a high level response. The citation of relevant cases shows an excellent knowledge of the law. The example of cases included come from both the criminal and civil law.

A conclusion is required for a high level AO3 mark. It also refers back to the original question. The conclusion summarises the main discussion point that runs through this essay (it is difficult to pass laws that reflect the morals in a pluralist society). The essay is linked throughout and follows a logical structure. Although this response covers a wide range of theorists, a focus on a smaller number with relevant detail and evaluation would be an acceptable alternative approach.

## Section A Question 2

'Privacy and data protection are the greatest technological challenges facing the law'. Discuss the extent to which this statement is accurate. [25]

### Level 4 answer

Technology is a growing area of interest for lawyers and academics. Parliament has to legislate to control technological advancements and the courts have to adapt to modern day scenarios. These advancements have increased exponentially in a very short period of time and the law struggles to keep up. The law needs to regulate the usage of technology and consider the moral and human rights issues too, particularly in relation to privacy and data protection.

Professor Cate comments on the recent expansion in digital data. Smart phones were first launched in 2007, and in those first ten years sold millions of handsets. Members of the public are now carrying a powerful computer with the ability to send GPS signals, voice record, video, connect with the internet, purchase from shops, store bank and credit card details, make payments and has security features including fingerprint and eye recognition. This means that a lot of personal data is being stored. It has the potential to be used by criminals but also includes issues of privacy as data is often shared. An obvious advantage is the location data that can be used by the police to track criminals and the police have the ability to remotely turn on the camera and microphone on a phone or PC if they suspect serious offences such as terrorism. The use of mobile phone tracking is governed by the Regulation of Investigatory Powers Act 2000. This does however, lead to a potential breach of privacy rights as our data could be being accessed without our knowledge. People can already add a tracker to a phone and the owner may be unaware that their movements are being monitored e.g. parents tracking a child's phone.

Emails, texts and other personal information can be retrieved from mobile phones and computers. It is now quite commonplace for phone records to be used as evidence in criminal cases. This is an example of technology making it possible for the police to prove a person's whereabouts, times of phone calls and the content of emails and text messages even if they have been previously deleted. However, the storage of personal data means that there are more opportunities for identity theft or identity fraud. There is also a lot of controversy surrounding the storage of other data such as fingerprints, medical records and DNA. All of this law is governed by the Data Protection Act 1998 and, more recently, the Investigatory Powers Act 2016. Although this Act does require a warrant to be issued by a judge before data can be accessed, the Act has given the National Crime Agency and GCHQ a lot more power to check the internet activity of the public.

The EU's General Data Protection Regulation is directly applicable in all member states from May 2018. It is designed to reshape the way businesses collect and store data. This regulation will have extra-territorial applicability to protect all citizens of the EU regardless of where the business is located. Companies who store data can be fined up to 20 million euros for non-compliance. A company will only be able to store and use a person's data with very clear consent. The new rules also include the right to access the data stored and the right to be forgotten. It is hoped that these increased powers will make data collection more accountable.

There are various ways in which a person's privacy may be breached. CCTV is used by both the public and the private sector with very little official regulation in the UK apart from a mention in the Data Protection Act 1998. Public sector surveillance to prevent and detect crime is used on transport systems and in city centres; new HD cameras can track from over a mile away. This means that a person will potentially be videoed many times every single day. There are Codes of Practice issued to operators but with the massive expansion of the use of CCTV, there is a potential breach of Art. 8 ECHR – the right to privacy. The Venice Commission called for stricter rules and there have been concerns raised over the lack of regulation by academics, including Lynsey Dubbeld. However, its continued use is justified if it is an effective way to keep the public safe.

So in conclusion, it would seem that there are many challenges that the law is dealing with in relation to these issues. That said, there will be some more pressing matters that the law will have to face as technology continues to advance.

## Examiner commentary

This is a well written essay on law and technology with clear explanations and examples showing excellent knowledge of laws relating to privacy and data protection (AO1). The evaluation stays focused on the question, points are fully discussed and there is a conclusion (AO3).

The candidate has kept their answer linked to the question throughout the response. Technology is a vast topic with lots of examples. Rather than list lots of examples, this essay concentrates on two issues for data (mobile phones and internet activity) and one issue for privacy (CCTV). An equally good answer could have included different examples or more examples in less detail. It is always to be remembered that this is a 25 mark essay so the amount of content will have to be selected carefully due to the time constraints. The candidate has linked to statutes where appropriate, academics and input from Europe (both the EU and the ECHR). Examples can be used from any of the areas of law studied on the course.

The introduction explains the issue of creating laws that keep up with the changing nature of technology and the candidate refers specifically to the issues of 'privacy and data protection' as these are asked for by the question. This is good technique, important when the questions directs the candidate to deal with a particular type or number of issues. If a question is posed in a general way then consideration of a wide range of issues could be as valid as a response which selects one or two issues and deals with them in detail.

The AO3 is well developed and links to the issue of trying to balance the rights of the individual to lead a private life against the benefit of data to the police to detect crime.

Reference to very recent rules and statutory provisions shows an up-to-date knowledge of this topic. This candidate concentrates on one breach of privacy – CCTV. There are many other things that the candidate could have referred to e.g. ANPR, Biometrics, RFID etc.

The higher levels of AO3 require a conclusion that links to the question.



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