Hart: The Concept of Law

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REVIEWS


This is a remarkable book with many agreeable features. It is of limited physical dimensions (no book ought to be more than two or three hundred pages in length!). It is written in plain language and in a clear style. You are always able immediately to grasp the intention of the author. The organization and structure of the work is simple and well-arranged. It is not (as are so many works on jurisprudence) a book on books. The author is more interested in his subject than in the literature on the subject. Discussions are cut down to a minimum and tucked away in notes. He illuminates old problems in the light of the modern Oxford philosophy. In this light, answers you have known before take on a new dimension of meaning. It is easy to read the book and it is a pleasure. You should read it!

The organization of the book, as I have said, is simple. Having stated in an introductory chapter that speculation about the nature of law has centered almost continuously upon three principal issues, the author accordingly divides his exposition into three main parts. The first issue is: how far is it possible to understand law by means of the gunman's model, i.e., as orders backed by threats?1 The second principal issue—and the second part of the book—is concerned with what are rules, and to what extent is law an affair of rules.2 The third perennial question is how far law in its “essence” is a branch of morality or justice, how far legal obligations are related to or different from moral duties.3 A concluding chapter is concerned with specific problems of international law.

I

To anyone well acquainted with the writings of and about John Austin, the chapters dealing with the “gunman’s model” will hardly seem earth-shaking; but the way in which the shortcomings of the model are demonstrated is new, refreshing, and convincing. It is an essential point in Hart’s criticism of the Austinian model that it does not take notice of the distinction between two kinds of rules which Hart calls primary and secondary rules. (I myself have used the terms, rules of conduct and rules of competence, for the same distinction.)4 The primary rules are duty-imposing; they are immediately concerned with the behavior required of human beings. The secondary rules are

1. This issue is dealt with in chapters II, III, and IV.
2. Chapters V, VI, and VII.
3. Chapters VIII and IX.
power-conferring; they provide that human beings under certain conditions shall have the power (competence) to create by their acts (acts in law) new rules belonging to the system. It is Hart's main thesis that law is a union of primary and secondary rules and that the understanding of this combination is the key to the science of jurisprudence. This thesis should not be understood as a definition in the sense of a rule by which the correctness of the use of the word "law" can be tested. It should rather be understood as an attempt to point out the "essence" of law which—when this word is deprived of its original metaphysical implication—means some qualities with great explanatory power.

This leading point of view is elaborated in chapters V, VI, and VII which form the central exposition of the author's own views. The power-conferring rules are divided in three subgroups: rules of recognition, rules of change, and rules of adjudication. The rules of recognition specify some feature or features possession of which is taken as a conclusive affirmative indication that the rule belongs to the system, that it is a rule of the group to be supported by the organized pressure of the judicial and executive organs. These rules will indicate, e.g., the conditions under which a rule may be created by enaction (legislation) or by the force of customs or precedents. The reader will understand that Hart under the label of "rules of recognition" is concerned with what usually is called the sources of law. It is assumed that when a plurality of sources are recognized, they will be ranked in an order of relative subordination and primacy. Thus, in the British system, customs and precedents are subordinate to legislation. Because of this hierarchical structure, it is possible to consider the various rules of recognition as integrated logically in one and only one rule: the rule of recognition. In this way the logical unity of the system is guaranteed.

The rules of recognition give rise to the notion of validity. To say that a rule is valid means that it satisfies the criteria of recognition and therefore will be accepted and applied according to its content. If a rule does not satisfy the criteria it is invalid or without legal effects. The rule of recognition is the supreme norm of the system from which the validity of any other norm is derived. It is apparent that this ultimate rule is similar to the "basic norm" in Kelsen's pure theory of law. There is, however, a difference of great conse-

5. P. 79.
7. Pp. 44, 93, 98, 102, 144.
8. The much cherished logical unity of a legal order, in my opinion, is more a fiction or a postulate than a reality. The various sources in actual fact do not make out a logical hierarchy but a set of co-operating factors. Custom and precedents, says Hart, in the British system are subordinate to legislation. I believe that Hart, if he tried to verify this assertion, would find that it squares better with a confessed, official ideology than with facts. International law, according to Hart, is no system but a set of rules. Pp. 230-31. Why is it tacitly assumed that municipal law is a systematic unity?
9. P. 100. See also pp. 68-69.
quence. To Hart, a statement of validity is always relative to another rule of the system, ultimately to the supreme norm of recognition. When validity in this way is relative to a rule of recognition, the notion cannot be applied to the supreme rule of recognition itself. Once we arrive at the top, we can no longer ask for validity. The question is now a question of existence.10 Does the supreme rule—and through it I should add the whole system—actually exist, i.e., is the system a social reality or only an imaginary structure? This question, according to Hart, is an empirical question of fact. When we make the assertion that a legal system exists we in fact refer in compressed, portmanteau form to a number of heterogeneous social facts, especially to the way in which courts in actual practice identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.11

This view is in complete harmony with my own views on verification of propositions about the existence of legal rules,12 but it is contrary to the teachings of Kelsen. Kelsen also holds that the supreme rule of recognition (the basic norm) possesses validity, but in his view its validity must be postulated or hypothetically assumed. Hart rightly criticizes this view but does not seem to understand that Kelsen's divergent opinion is not a matter of the basic norm being inconsequential, but the manifestation of quite another conception of "validity." That a norm is valid means, according to Kelsen, that individuals ought to behave as stipulated in the norm. Hart calls this "a needless reduplication" and says that it is "mystifying" to speak of a rule making it an obligation to perform the obligations established in another rule. The mystery is dispelled, however, once it is understood that the notion of validity with which Kelsen operates is the traditional idea of a "higher" claim on obedience, the natural law idea transformed into a quasi-positivist mould: the higher validity is not derived from any absolute principle but postulated as inherent in any actually efficacious legal order.13

In the third section of the book Hart deals with the relation of law to morals. He gives an analysis of the idea of justice which squares well with that given by me in my book On Law and Justice. The essence of justice, he says, is equality, the claim that like cases shall be treated alike. This principle presupposes a material standard of evaluation to decide what makes cases alike. In itself the idea of justice is incomplete, an empty form which cannot afford any determinate guide to conduct.14 I completely agree—but don't see why Hart then stamps my view, that the words "just" and "unjust" are devoid of meaning when applied to a legal rule, as an absurdity. Is it absurd to say of

12. See Ross, op. cit. supra note 4, at 34-38. On the misunderstandings caused by my use of the word "validity" where Hart speaks of "existence," see page 35.
13. I have elaborated this view in a review of Hans Kelsen, What is Justice?, 45 Calif. L. Rev. 564 (1957) and in an article Validity and the Conflict Between Legal Positivism and Natural Law to be published in Revista Juridica de Buenos Aires.
an empty form that it is devoid of meaning? I have worked out the distinction between the formal principle of equality and the supplementary material standard with great care, and it should be evident that my phrase points to exactly the same conclusion as that stated by Hart—that the idea of justice without such supplementation cannot afford any determinate guide to conduct.

In the chapter on Law and Morals Hart reckons with the Natural Law claim that law necessarily must conform to some extent with morals. Without denying that law and morals are interrelated in many ways, Hart denies the idea of a necessary conformity. In last analysis, it is a question of expediency in forming our concepts. It seems clear, he says, that nothing is to be gained, either theoretically or practically, by denying the name of law to a bad or even an abominable system if that system in other respects presents the features of a legal order.  

II

A recurrent theme of high interest is the distinction made by Hart between internal and external statements in our language referring to legal rules. This distinction is related to, but not identical with, a distinction between the internal and external aspect of a legal rule (or any social rule). The distinction between the two aspects of a rule is no new idea. It has often been pointed out that a social rule is more than a mere regularity in observable behavior and that legal rules for this reason cannot be ascertained and described merely by behavioristic methods. I myself have stressed this point in saying that a social rule presupposes not only an observable regularity but also that the rule be felt as "socially binding" by the human beings following it. This means that a person not only will feel himself spontaneously motivated ("bound") to a certain pattern of behavior, but at the same time will expect that a breach of the rule will call forth a protest from his fellows in the group.

Hart objects that it is a misrepresentation to depict the internal aspect as a matter of feelings. Such feelings of being bound may occur but are neither necessary nor sufficient for the existence of "binding" rules. "What is necessary," says Hart, "is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought,' 'must,' and 'should,' 'right' and 'wrong.'" For my own part, however, I am unable to understand how it is possible that a person could have an attitude as described—criticize himself for breaking the rule, and acknowledge that criticism on the part of his fellows is justified—and still feel free to act as he likes. I believe that the attitude and reactions described by Hart are the overt manifestations of feelings engendered in the individual during his growth in

15. P. 205.
17. P. 56.
the group. Hart uses the word "acceptance" or even "voluntary acceptance" to depict the internalization of the rule. In my view this is misleading, pointing too much in the direction of a deliberate decision. It may, in extraordinary situations—e.g., under revolutions—happen that an attitude of allegiance is the outcome of a decision. But most people will feel themselves bound by the social norms of the group without ever being conscious of any choice or decision.

When a social group, says Hart, has certain rules of conduct, this fact affords an opportunity for many closely related, yet different, kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. The two kinds of statements are called, respectively, external and internal statements.\(^{18}\) I believe this distinction to be very important as it seems to throw new light on controversies in the analysis of legal concepts. For my part I want to add that the internal language is not of a descriptive nature. Its function is not to state or describe facts, not to confer information of any kind, but to present claims, to admonish, to exhort. When I say "You borrowed my car. It is your duty to take good care of it," my intention is to claim a certain behaviour from the borrower and to justify this claim by a reference to the (legal or moral) rules concerning borrowing. I don't inform him of the rules, I apply them. The external language, on the other hand, is descriptive in nature. It is concerned with facts, the description and prediction of facts.

Hart primarily is concerned with the internal language and it is his belief that most of the obscurities and distortions surrounding legal and political concepts will vanish if it is understood that they essentially involve reference to the internal point of view.\(^{19}\) He displays little concern with the external language. When he occasionally refers to it he seems to consider members of dissenting minorities within a group as the users of this language. Rejecting the rules, the dissenters talk about them only from the point of view of what probably will happen if the rules are broken.\(^{20}\) To me it is astonishing that Hart does not see, or at any rate does not mention, the most obvious use of the external language in the mouth of an observer who as such neither accepts nor rejects the rules but solely makes a report about them: the legal writer in so far as his job is to give a true statement of the law actually in force.\(^{21}\)

21. Hart seems to assume that the language used by officials, lawyers, or private persons speaking about legal matters is normally the internal language. This is a rather rough simplification. When a client consults his counsel, the information received will be external statements describing the law actually in force and calculating the chances for a successful lawsuit. Moreover, a lawyer pleading before a court, especially an appellate court, may, at any rate partially, refer to the law as an observable fact. And the same is the case with judges and other officials in the opinion rendering a decision.
Hart’s attitude—concerned, as it is, exclusively with the practical-normative use of legal terms in daily language—may be explained partly by the corresponding well-known attitude of the Oxford philosophy in its approach to analytic problems generally, partly by the fact that Hart is himself neither a legal writer nor educated as a professional lawyer. My attitude, on the other hand, as clearly stated in On Law and Justice, has been to direct my analysis toward legal concepts as they function in the doctrinal study of law, what we on the Continent are accustomed to call the science of law. If this difference in approach is understood and remembered a good deal of the criticism directed by Hart against Scandinavian Realism, and particularly against me, must be dropped as misdirected.

The same conclusion seems warranted with regard to his discussion of “validity.” As mentioned above, Hart analyzes this concept as used internally or relative to a given rule of recognition. A statement of validity, in his view, is a statement according to the system or applying a rule of the system. No wonder that Hart cannot accept my analysis of “validity” in terms of social facts. If he had been a little more attentive, he would have noticed that the issue which I treat is quite different from that with which he deals. As clearly appears from the way in which the problem is stated and treated, I am concerned with the external statement concerning the existence of a rule or system of rules. I admit that Hart may be excused for the misunderstanding because the use of the word “validity” to designate the existence of a rule—as I now understand—is odd in English usage. This shows how difficult the job of translation is. In Danish as in German two varieties of the same root occur: gylding and gaeldende. Whereas gyldig functions in the same way as valid the phrase gaeldende ret is used externally to designate the existing law, the law in force.

When this is taken into account there exists, as far as I can see, virtually no disagreement between Hart and myself. Hart concurs in the opinion that the question of the existence of a rule or a system of rules is an empirical question of fact depending on the way in which the courts in actual practice identify what is to count as law. It is a good policy to discuss matters only with people with whom you agree—in fundamentals. Following this policy I have discussed some aspects of Hart’s work in the belief that, in fundamentals, the Oxford Philosophy and the Scandinavian Approach have more in common than Hart has been able to see. That the appreciation is not mutual is no reason why I should not express my high esteem for his work and my belief that we are following the same path.

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