BOOK REVIEW

The Concept of Law

(Clarendon Press, second edition, 1994)

Edited by Penelope Bulloch and Joseph Raz

H.L.A. Hart's *The Concept of Law*, first published in 1961 and aimed at undergraduate law students, is a classic of jurisprudence. The book will be read and provide insight when the vast majority of others in the field have disappeared. Indeed it is as safe as such predictions can be to say that this is one of the four or five great legal philosophy texts written in English this century. Like all classics, it has earned the right (in a loose, non-Hartian sense) to be read.

This review will concern itself with the second edition, and in particular with the forty page Postscript which is all that distinguishes the two editions. The main outline of the first edition, of course, is well-known. In it Hart set out his views that law is best understood as a system of rules (of a particular, *recognised* sort) and that 'law as it is' *should be* kept conceptually distinct from 'law as it ought to be'. For many people today, Hart's two-part classification provides the core tenets of legal positivism. Certainly of the three issues Hart identified in 1961 as lying at the heart of jurisprudential concerns (namely, a) how legal obligation differs from and relates to orders backed by threats b) the connection between and overlap of moral obligation and legal obligation and c) the extent to which law is a creature of rules), at least the latter two remain there still. And his theoretical construct of a test in each society for determining whether a social rule is a legal one or not — his aptly named *rule of recognition* — has passed into the general legal vocabulary, it is so well known.

The Postscript in the second edition is Hart's response to criticisms of the 1961 edition. It is 32 years in the making and even then, because of Hart's death in December of 1992, incomplete. Indeed it is the editors who have put the Postscript into its published form from Hart's papers at the time of his death. Hart had envisaged that the Postscript would consist of two sections, the first a reply to the direct attacks of Ronald Dworkin and the second a response to those who had claimed to spot not just obscurities and inaccuracies, but contradictions, and at certain points, actual incoherence, in his original exposition. Unfortunately the second section was never written. The reader is simply tantalised in the introduction to the Postscript with Hart's concession that:

> in more instances than I care to contemplate my critics have been right and I take the opportunity of this Postscript to clarify what is obscure, and to revise what I originally wrote where it is incoherent or contradictory.[1]

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[1] p. 239. The page references are to the second edition. The editors, quite inexplicably in this reviewer's opinion, reset the type in such a way that the main text's pagination in the second edition does not correspond with that in the first. (A rough guide is to add 1-4 pages to the first edition page reference to find the same passage in the second.)

One can merely speculate about what Hart would have conceded had this second section been written. This reviewer suspects that the bulk of such revisions would have involved Hart's 'internal aspect of rules'[2] and the so-called critical reflective attitude that rules engender. The difficulties partly arise because Hart's work is explicitly a work of *descriptive* jurisprudence. He tries to describe and analyze a legal system, any legal system, from the perspective of the uninvolved, visiting Martian. This, of course, clearly distinguishes Hart from others like Finnis or Dworkin, but there is nothing, in itself, wrong with taking such a perspective. And consistently with that vantage, nowhere does Hart explicitly endorse or adopt a particular internal or critical point of view. He merely tells us that people in any legal system will have a critical reflective attitude about the rules.

There are questions, however, about what this attitude entails. More specifically, does 'acceptance'[3] of the rules imply 'approval' of them as well? Although Hart states that regular *citizens* need not approve of the legal rules (*i.e.* adopt the internal point of view), he certainly suggests that legal *officials* must approve[4] of them (*i.e.* adopt an internal perspective). Surely, though, one can imagine a legal system in which legal officials accept and administer the rules, but do so out of fear or direct self-interest and without approving of them. A society's legal officials need not believe that the law they apply and administer is morally legitimate.[5]

Hart's claim that the internal aspect of rules cannot be reduced to "a mere matter of 'feelings'"[6] is likewise open to doubt. The critical reflective attitude engendered by rules may well, for all the observing Martian can say, merely be a function of felt psychological sentiments without any imposed external constraints.[7]

None of these obscurities or incoherencies, however, undermines the gist of Hart's case. Had the second section been written, Hart's clarifications and revisions would not have weakened the basic power and attraction of the jurisprudential case so persuasively set out in *The Concept of Law*.

The attacks of Ronald Dworkin, Hart's successor in and present holder of the chair of Jurisprudence at Oxford University, are quite a different matter. They go straight to the heart of the very worth of Hart's theory. It is these that Hart replies to in the forty pages of the Postscript. Of the two envisaged sections, this — the one we have — is surely the more important.

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2 First mentioned at p. 56.

3 *Vide*, for example, p.102.

4 *Vide* p.115 *inter alia*.

5 For a fuller elaboration of this point *vide* J. Goldsworthy, 'The Self-Destruction of Legal Positivism' (1990)10 *Oxford Journal of Legal Studies* 449, in particular from pp.452-460.

6 p. 57.

7 Notice that an *explanation* for existing psychological feelings, say in terms of sociological conditioning or of one's place in the economy, is consistent with there being no externally imposed moral (as opposed to physical) constraints. Whether there in fact be any externally imposed moral constraints lies at the heart of moral philosophy's dispute between moral objectivists and moral relativists.

Dworkin's criticisms of Hart have been various. The main ones relate to the effects, and indeed possibility, of a rule of recognition, the difference between rules and principles, whether legal rights can be devoid of moral force, and the irrefutability of judicial discretion. Underpinning all Dworkin's particular forays, however, is his disparagement of 'descriptive legal theory' and his advocacy of 'constructive interpretation.' According to him, legal theory (or 'jurisprudence' to the American) is by nature an interpretive exercise; as a participant in the legal system one identifies law only after justifying those principles which best 'fit' the whole institutional history of the settled law. The proper perspective to take then, for anyone who must justify in order to identify, is not that of the visiting Martian but, in effect, that of the judge.

Hart begins his Postscript by protesting that a descriptive and general legal theory is simply a "radically different enterprise from Dworkin's",[8] whose own theory is explicitly evaluative, justificatory and addressed specifically to the Anglo-American legal world. The two theories are so differently aimed that Hart says he cannot see how they do or should significantly conflict. Certainly Hart is adamant that his own theory, *pace* Dworkin, cannot be illuminatingly re-stated as an interpretive theory. Surely evaluative issues are not the only proper issues in legal theory, remarks Hart. "Description may still be description, even when what is described is an evaluation."[9] This reviewer agrees. Having said that, however, the Postscript is most notable for Hart's particular replies to the criticisms of Dworkin, a few of which bear specific recounting.

Firstly, Hart notes that Dworkin has, in *Law's Empire,* so modified his *Taking Rights Seriously* views with talk of both an 'interpretive' and 'preinterpretive' sense of law that it is hard to see where he differs from one of the core tenets of Hart's own positivism.

Secondly, Dworkin's characterization of the *rule of recognition* is inaccurate. Assuredly such a rule *can* incorporate a moral content or test, as Hart noted in the first edition at p. 199 in reference to the U.S. Bill of Rights. There the rule of recognition directs judges to evaluate enacted rules against a set of rather vague moral standards, with only those that judges ultimately approve of being valid laws. Dworkin is wrong then that a rule of recognition needs to be limited to a test of some rule's source or pedigree; sometimes a particular rule (like any Bill of Rights does) can also explicitly incorporate a moral standard.

Nor does Hart envisage the *rule of recognition* as eliminating all uncertainty about what the law is. Indeed, though Dworkin rejects this too, Hart thinks that the law is frequently indeterminate, that the valid rules do *not* 'provide' an answer and so the judge has discretion. "[T]he law in such cases is fundamentally *incomplete*: it provides *no* answer to the question at issue in such cases. They are legally unregulated and in order to reach a decision in such cases the courts must exercise the restricted law-making function which I call 'discretion'."[10] This reviewer cannot help commenting here that many attacks on legal positivism, especially by those describing themselves as critical legal studies scholars, would benefit from an actual reading of Hart. Nowhere does he ever say that law's

[8] p. 240.
[9] p. 244.
[10] p. 252 (italics in original).

rules provide a complete code of answers. In fact, anticipating one of the critical legal studies' attacks, Hart is open, adamant and clear that any legal system will be partially indeterminate and that judges will have discretion to make law. It is Dworkin who believes there are no gaps in the law, no law-creating discretion, no thorough-going incompleteness.

Thirdly and relatedly, Hart rejects the Dworkinian thesis — of there being answers inherent in a coherent body of rules and principles — as attractive, but mistaken. This reviewer believes the Dworkinian thesis essentially rests on an analogy between moral judging and factual disagreement. Many reasonable and informed people may disagree about things such as the number of stars in a galaxy, which of the three cups is hiding the ball, and many other matters — and yet in those instances there *are* 'right' answers (at least in theory). Dworkin's technique is to extend that notion to moral judging. Controversy, he correctly observes, does not necessarily imply the absence of a right answer. It is just that when it comes to moral evaluation, says Dworkin, answers cannot be demonstrated; they must be argued for. As Hart notes however, Dworkin's thesis rests implicitly on the view that there are objective moral facts, that moral judging is more or less equivalent to fact finding. But this is a highly disputed philosophical theory. If there are no such objective moral facts, "a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion in accordance with his best understanding of morality."[11] In fact matters get worse, comments Hart. Whatever the answer is to the underlying philosophical dispute between moral objectivist and moral sceptic (and Hart studiously takes no sides), the *practical* difference between a) *making* law in accordance with one's view of morality and b) *finding* already existing law revealed by some moral test for law and guided by one's moral judgment, is non-existent. A particular Dworkinian judge must, in either event, make the 'best' moral judgment *he* or *she* can. And so who the particular *he* or *she* is makes a difference.

Fourthly, Hart says Dworkin's all-or-nothing view of rules is misconceived. To start, "the view that if a valid rule is applicable to a given case it must, unlike a principle, always determine the outcome of the case"[12] is unpersuasive. In addition, Dworkin's trademark "sharp contrast between legal principles and legal rules" [13] is no better able to stand up to scrutiny. The fact is, Hart states, that the difference between rules and principles is one of degree. (And on p. 262 Hart opines that Dworkin's sharp distinction between them may even be incoherent.) Rules simply tend to be more determinative and less broad than principles.

Fifthly, and importantly, Hart believes there can be legal rights devoid of moral force. Dworkin's criticisms of this doctrine, and perhaps therefore the force of much of his 'holistic interpretive theory', cannot escape the fact that one does *not* need moral grounds to assert a legal right. To see that legal rights *need not* be understood as a species of moral rights, *pace* Dworkin, this reviewer suggests imagining oneself living in South Africa in the 1960s or, *a fortiori*, in Nazi Germany.

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[11] p. 253.
[12] p. 261.
[13] *Ibid.*

Indeed a major benefit of Hart's descriptive legal theory shows itself when considering just these 'wicked' legal regimes rather than the predominantly benevolent Anglo-American legal systems to which Dworkin confines himself.

Finally, and in Hart's own eyes most fundamentally, there is the two theorists' conflict over whether judges have discretion, whether they exercise a limited law-creating power. Dworkin's arguments that they have not are threefold. He appeals to the language judges use (*i.e.*, they do not speak in their judgments of 'making' law). He accuses Hart of endorsing an undemocratic view by saying these unelected officials have this power. And he asserts that any such retrospective law-creating power would be unjust. Hart's replies are instructive. Hart asks that we distinguish the ritual language used by judges (and lawyers) in the courtroom from the plethora of extra-judicial statements by eminent judges and lawyers insisting there *is* an inescapable law-making task. Certainly there are strong institutional grounds for judges, in deciding a case, to speak *as if* there had always been an answer. (To understand why, merely put yourself in the shoes of a losing litigant.) But as others have remarked, one must distinguish between a) what judges say they are doing; b) what judges think they are doing; and even c) what a relatively impartial person would think they are doing. No theory can be safely built on the back of the language judges use in deciding cases.

The other two criticisms are answered by Hart in a similar fashion. If something (like law's partial indeterminacy or incompleteness) is a fact, he who observes it is not endorsing it. Indeed the recognition of the fact of this discretion may be beneficial to democracy if it leads to a heightened concern to limit that discretion. (The irony of Dworkin's allegation of an anti-democratic bias is that the actual effect of a Dworkinian-style of judging would be more latitude for, and less felt constraints on, unelected judges.) Ultimately, of course, *some* interstitial law-making power, "to deal with disputes which the law fails to regulate may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature."[14] Likewise, if *in fact* the law has left certain hard cases incompletely regulated then *ex post facto* law-making is not unjust; rather it is desirable. There can be no injustice "where there is no known state of clear established law to justify expectations."[15]

Towards whichever side one inclines in the Hart-Dworkin debate, these forty pages are valuable for giving the interested reader Hart's considered, and final, thoughts on the various disputes between the two. As a function of being a response to criticisms, the Postscript does not read as well as the original text. The prose is not as clear or as forceful as the earlier material (which, recall, was specifically aimed at undergraduates). Whether anyone could reply to Dworkin in a clear and vigorous prose though, when he frequently strikes this reviewer as not above a little verbal gymnastics and sleight of hand, is open to doubt.

If nothing else this Postscript may convince some doubters that not every legal theorist need offer a *justification* for the use of discretion. In the course of describing a legal system, even a well-developed one, Hart notes the fundamental role of rules and the absence of any *necessary* connection between legal rules and

[14] p. 275.
[15] p. 276.

moral rules. Along the way he observes that any legal system, because of the open-texture of language and because of people's often conflicting desires and goals, will leave the expected resolution of some issues uncertain and unsettled and this means the eventual decider, the judge, will have discretion. But nowhere does Hart attempt to tell the reader or judge how that discretion *should* be used. That is not his concern. Admittedly, there will be those who still cannot accept this and demand just such a justification — just such an account of how judges *should* decide when the normal constraints are absent. For all of those believers, who think providing this justification is *the* issue in legal theory, this reviewer suggests they save their money on this book and buy one of Dworkin's instead.

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