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**Book Review: H. L. A. Hart, by Neil MacCormick**

## Book Review

H.L.A. HART, by NEIL MACCORMICK. Stanford: Stanford University Press, 1981. Pp. viii + 184.

Every so often the stars in their courses produce for us the right man at the right time. This happened in the case of Herbert Hart, the subject of Neil MacCormick's book in the *Jurists: Profiles in Legal Theory* series. Before the Second World War jurisprudence was not a lively subject in Britain and it remained untouched by the two movements, Logical Analysis and Logical Positivism, which had come to dominate philosophy. As was to be expected, philosophy hibernated during the war and when academic life returned to normal it was felt, in Oxford, which soon became the Mecca of English-speaking philosophers, that the two dominant philosophical movements were played out. So a group of young philosophers (of which the present writer was a member) met every week under the leadership of J.L. Austin to discuss and develop some new ideas that had long been germinating in their minds. Herbert Hart, at forty, was the oldest member of this group. In 1929 he had graduated in the 'Greats' School from which so many of his predecessors had gone on to brilliant legal careers, practiced at the Chancery for eight years, and worked during the war in military intelligence.

What were these new ideas, and why was it so lucky for us that Hart was exposed to them at the moment when he took up a new career as a teacher of philosophy? Briefly, the main idea was that if we want to understand any subject matter whatever or to solve any of the traditional problems of philosophy, we must not reject, as Russell had advised,<sup>1</sup> the language in which we ordinarily talk about the subject matter as hopelessly imprecise, ambiguous, and inefficient, but take it very seriously indeed. If, for example, we are worried by the problem of free will and determinism, our first step must be to examine in their context such terms as intentionally, deliberately, on purpose, accidentally, inadvertently, by mistake, and so on. Not language in theoretical books, but language *in action* was the key to understanding.

At this point Hart, as a lawyer, must have had a *déjà-vu* experience denied to the rest of us. For was this not precisely what the Realists in America had been saying for half a century about the study of law? If you want to know what "intention" or "negligence" mean in law, burn the textbooks and study the way the courts use these terms. It is not surprising then that Hart, through his familiarity with legal practice, made an outstanding contribution to the new philosophy and that, through his familiarity with that philosophy, he has had an even greater influence on jurisprudence. As MacCormick puts

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<sup>1</sup> See, e.g., Russell, "The Philosophy of Logical Atomism," in March, ed., *Logic and Knowledge* (London: Macmillan, 1956).

it, "by redefining and re-examining the traditional questions in the style and spirit of the new philosophy . . . he excited the legal imagination to reconsideration of the philosophical significance of legal problems" and thus "became for English speaking jurists the focal figure of the succeeding thirty years."<sup>2</sup>

Although most of the book is devoted to an examination of *The Concept of Law*,<sup>3</sup> MacCormick starts and ends by reminding us that Hart was not only an analytical jurist; his work is informed throughout by a coherent moral and political philosophy which MacCormick calls "social democratic liberalism", and *The Concept of Law* cannot be understood except in the light of that philosophy. For example, MacCormick has seen, as some of Hart's critics have not, that the fundamental argument for Hart's legal positivism is not a theoretical but a *moral* one.

MacCormick acknowledges Hart as his master and agrees with his point of view both in jurisprudence and in political philosophy, but the book is not written in a spirit of hagiography. Most of the well-known criticisms of Hart's work, with the exception of Hughes' *Rules, Policy, and Decision-making*,<sup>4</sup> are given an airing and MacCormick adds some of his own. The upshot in almost all cases is that what Hart actually wrote was indeed mistaken, but that the remedy is not to abandon his method but to pursue it with greater vigour.

MacCormick calls Hart's method "hermeneutic", a word not used by Hart or his colleagues, which has recently been brought into vogue by Continental philosophers who derive from Hegel and Husserl. Nevertheless the title is apt; for the controlling principle of Hart's method is that law is a social system and, as such, can only be fully understood from the viewpoint of those whose system it is. It is this method that enables Hart to diagnose the error in all the systems that treat law as a set of *commands*, whether of God or Reason or a Sovereign, and also the error of the Realists who tended to treat laws as predictions of descriptions of behaviour. (One of MacCormick's most telling criticisms is that Hart tends to undervalue the Realist contribution to jurisprudence because he takes their more extreme slogans with a seriousness that they did not intend.) From the former he retains the idea that laws are normative rather than descriptive in character; from the latter the idea that whether or not a certain rule of law *exists* in a society is a matter of empirical observation. But the observer must record more than the fact that the members of the society always, or almost always, do *X* in circumstances *Y*, that their behaviour, in Hart's word, "converges." If that is all the observer records, he has misunderstood their behaviour. For, to use the familiar example, we do not regard a change in the traffic lights from green to red as a *sign* that enables us to predict that the traffic will in fact stop in the way that storm clouds enable us to predict rain; rather, we treat them as a *signal* addressed to us, as an instruction *to stop*.

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<sup>2</sup> MacCormick, *H.L.A. Hart* (Stanford: Stanford Univ. Press, 1981) at 19.

<sup>3</sup> Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

<sup>4</sup> Hughes, *Rules, Policy and Decision-Making* (1968), 77 Yale L.J. 411.

The key distinction introduced into jurisprudence by Hart's hermeneutic method is that between the "internal" and the "external" points of view towards the rules of any rule-governed system. It is this distinction which enables him first to undermine and then to build on Austin's Positivism,<sup>5</sup> and also to dismiss Holmes' famous remark, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."<sup>6</sup> Such an account of law might do for Holmes' "bad man", whose sole concern is to "avoid an encounter with the public force,"<sup>7</sup> or even for a lawyer advising a client not to press his claim on the grounds that, as the law stands, the case will surely go against him. But it cannot possibly do for the judge himself. For a judge does not use a rule of law to *predict* what he himself will find, he uses it as a *reason* for his finding. Thus the judge must, and others, of course, may and often do, adopt the internal point of view towards the rules of the system. By contrast, the external point of view is that of an observer who records the behaviour of the members of the society he is studying, and if he does his job properly sees that behaviour *as* rule-governed even though he does not himself adopt the internal attitude.

MacCormick finds several difficulties with Hart's short account of this distinction. First, what are we to say of a non-Catholic who tells a Catholic friend that he ought to go to Mass? Is he taking the internal or the external point of view towards the rules of his friend's religion? Secondly, "As a non-citizen of the USSR, and one who has little liking for its political and legal principles, I can nevertheless make true statements *of*, as well as *about* Soviet law." For example, "Soviet citizens may not hold or deal in foreign currencies." The first of these examples does indeed point to an ambiguity in Hart's account of the internal point of view. For Hart sometimes wrote as though adopting that point of view was the same as *endorsing* the rule, thinking it a good rule, and accepting it as a standard for *one's own* behaviour; and on that interpretation the non-Catholic is not taking the internal point of view towards the rules that one ought to go to Mass. But elsewhere he seems to hold that taking the internal point of view is more a matter of *using* the rule as *backing* for a "move" in a rule-governed system. Examples would be a judge or umpire giving a decision, a lawyer advising a client, a policeman ordering a motorist to show his licence, or a motorist stopping at a red light. In all these cases the agent, if asked to explain or justify his action, would appeal to the rule as sufficient reason; but he need not endorse the rule or think it a good one; and in some cases he could not regard it as a standard for his own behaviour. An example would be a male lawyer advising a pregnant woman to move elsewhere if she wants an abortion on the grounds that all abortions are illegal in her jurisdiction. So it is with the non-Catholic advising his Catholic friend; on the first interpretation he is not taking the internal point of view, because he does not regard the rule as a standard for his own conduct

<sup>5</sup> See, e.g., Austin, *Lectures on Jurisprudence or, The Philosophy of Positive Law* (London: John Murray, 1875).

<sup>6</sup> Holmes, "The Path of the Law," in *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920) 167 at 173.

<sup>7</sup> *Id.* at 170.

and may be indifferent or even hostile to the system of which it is a part. But on the second interpretation he is taking such a view because he is citing the rule as grounds for his advice. That there is a difference between these two interpretations is obscured but not eradicated by the fact that in most cases they will both be true together. For normally, especially in matters of morality, a person who is not a hypocrite will endorse and think himself bound by any rules that he cites as reasons for action. But in law this often is not so; courts sometimes feel bound to apply rules that they do not endorse.

MacCormick's second example can be used to make a point that he himself does not make. That he can make true statements of Soviet law in spite of not being a citizen of the USSR and of having no liking for its legal system is undoubtedly true; but the question is whether, in making such statements, he can be making them from the *internal* point of view. MacCormick seems to regard making a statement of, as opposed to about, law as the same as making an internal, as opposed to an external statement; but they are not the same. On the first interpretation it is clear that none of his statements of Soviet law can be made from the internal point of view, but on the second some of his statements will be from that point of view but others will not. If, for example, he says, "Soviet citizens, etc. . . ." while expounding Soviet law to students, he is not making an internal statement, though he is making a statement of Soviet law; but if he is advising a Russian friend visiting Scotland not to take any sterling notes back home with him, his statement would, like that of the non-Catholic, be an internal one.

All this may seem rather over-elaborate, but there are two important morals to be drawn. The first is that we cannot tell from the form of words used whether a statement is being made from the internal or from the external point of view; that depends on the context and purpose of the statement. The second is that my second interpretation of "internal", according to which a statement is internal if and only if the person who makes it is using it as a reason for some particular move such as deciding, advising, commanding, and so on, is much more important than the first. For it is the second interpretation that gives Hart his most powerful argument against Holmes' prediction theory and against Rule-Scepticism in general.

No aspect of *The Concept of Law* has come in for sharper criticism than the fact that Hart appears to think of law as a system of *rules* as opposed to a system in which principles, values, and other standards all have their parts to play; and it is true that "rule" is the word he most frequently uses, explicit references to principles being rare in *The Concept of Law* though more frequent in his other writings. In partial defence of this practice it may be said that he clearly uses "rule" in a wider and looser sense than that which his critics try to force on him, and that this habit came naturally to him as a lawyer since lawyers, in their casual talk, do tend to use "rule" in a very wide sense. Yet Hart, as a philosopher, ought to have been more careful; for one of the warnings most frequently uttered by his philosophical colleagues was that nemesis awaits those who take an ordinary word and use it in a new, usually wider, way for theoretical purposes, and this is precisely what Hart did. The use of the word "rule" to cover all standards certainly led him into error. For

one thing, it facilitated his use of a rather misleading analogy to the rules of a game to illustrate what he had to say about morality and law. More importantly it accounts for the impression, given by his notorious example "No vehicles in the park," that the difficulties encountered by courts in penumbral cases are due mainly to the open texture of single words, which is certainly not the case.

So one of the questions that must be raised in any assessment of the value of Hart's jurisprudence is whether his account of law as a "union of primary and secondary rules" can be extended to cover standards that, when we are being careful, we shall not want to call rules, but which figure prominently in a legal system. MacCormick rightly argues that it can be, and he gives the best discussion known to me of the differences and of the relations between rules and other standards. Rules, he says, tend to be cut-and-dried and to contain "some tinge or element of the purely conventional or arbitrary."<sup>8</sup> Traffic regulations spring to mind. When, some years ago, the Swedes changed their rule of the road from left to right, no voices were raised in horror. But if the courts were to announce that they would no longer pay attention to the principle "*Audi alteram partem*" or if Parliament were to abolish the crime of assault, our reaction would be very different. What is at stake in the first case is a principle of natural justice, in the second, the security of members of our society against physical aggression, and these principles figure *essentially*, not arbitrarily, in our legal system.

In effect, MacCormick restructures Hart's theory, drawing on *Law, Liberty, and Morality*<sup>9</sup> and on several smaller works in such a way as to allot to rules, principles, values, and ideals their proper places in a coherent whole which is both an analysis of moral and legal concepts and a substantive political philosophy. The foundation of the system is what Hart had called the "minimum content of natural law." He had argued that, given five "truisms" about human nature and about the world in which we live and given the assumption that human beings on the whole wish to survive, every society necessarily has rules against unrestrained aggression, fraud, and the destruction of material goods; and MacCormick shows how these rules, though to a certain extent conventional and arbitrary, are grounded in universal values:

Values are whatever human beings hold to as the underpinning reasons behind more immediate reasons for acting, for approving action, and for preferring certain ways of acting and states of affairs to others. They are as such not necessarily themselves backed by further or ulterior reasons. This we express rather than explain by saying that, for us, something or other is 'good in itself'; whatever is good in itself is, for that person, an ultimate as distinct from a merely instrumental or derivative value. Hence arguments concerning what is of ultimate value cannot proceed by way of demonstration or proof.<sup>10</sup>

These ultimate values cannot be promoted in a totally unstructured way, at least in a society of some complexity, if only because of the perennial pos-

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<sup>8</sup> *Supra* note 2, at 45.

<sup>9</sup> Hart, *Law, Liberty, and Morality* (Stanford: Stanford Univ. Press, 1963).

<sup>10</sup> *Supra* note 2, at 48.

sibility that your pursuit of your ultimate values may conflict with my pursuit of mine. And it is to meet this need for structure and for specific guidance as to how the values are to be implemented on particular occasions that positive morality and positive law come into being. Values turn into principles, and principles tend to be crystallized into rules. But this crystallization of values into rules creates new problems. Complex situations arise in which either none of the current rules seems applicable because of their novelty or adherence to the applicable rule not only fails to promote anything of value but actually promotes some disvalue. For example, considerateness for others is a value that can only be promoted within a framework of detailed conventions; but any attempt to concretize the requirements of considerateness may degenerate "into an excessively uptight and hidebound ritualistic observance of convention, rule, and punctilio for its own sake, serving no need or convenience."<sup>11</sup> Positive morality and even more obviously positive law have a perennial tendency to ossification for which the only remedy is the constant vigilance of the critical moralist.

The distinction between "primary" and "secondary" rules is another pillar of Hart's structure which MacCormick subjects to scrutiny. According to Hart primary rules impose obligations, while secondary rules confer powers, though that contrast is not wholly consistent with everything that Hart says about the primary/secondary distinction. MacCormick finds the idea of secondary rules theoretically dispensable since the powers conferred by those rules, for example, to make a contract or vote at an election, can themselves be analysed in terms of obligation-imposing rules. That this theoretical simplification *can* be carried through is, perhaps, possible; but it smacks of what Hart called "buying uniformity at the price of distortion."<sup>12</sup> For example, it is not illuminating to think of the secondary rules which confer on qualified people a right to vote if they follow the prescribed form as "really" rules imposing a duty on the returning officer to take appropriate action.

MacCormick, however, has a much more formidable objection to raise at this point. Hart had insisted on the separation of law and morals;<sup>13</sup> positive law and positive morality have much in common, but law is distinguished from morality precisely by the fact that a pre-legal social system lacks secondary rules. In such a system there are rights and duties and therefore rules towards which people, on the whole, adopt the internal attitude. But such systems are inefficient because they contain no mechanism for settling just what the rules are, who may make, abolish, or amend them, who is to decide whether someone has broken a rule and, if so, what compensation or penalty meets the case. It is the introduction of secondary rules that provides answers to these questions and thereby converts a pre-legal into a legal system. But MacCormick points out that this is not so; no *law* is needed to enable Colin and Flora to set up house together with mutual promises of fidelity, and even in

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<sup>11</sup> *Id.* at 54.

<sup>12</sup> *Supra* note 3, at 38.

<sup>13</sup> See Hart, *Positivism and the Separation of Law and Morals* (1958), 71 Harv. L. Rev. 593.



a pre-legal society it is natural enough that important transactions should come to be solemnized in some kind of ceremony or ritual. It is not so much that in a pre-legal society there are no answers to the crucial questions, as that there are no *official* answers backed by a *coercive* power concentrated in the hands of the State. This is an important point, but it is one on which Hart could and, I think, would agree.

But if this point is conceded, trouble is bound to arise over the Rule of Recognition, which is an important item in Hart's structure since it is by reference to this rule that it can be decided what is a legally valid rule or principle in the jurisdiction and what is not. Also, Hart's account of public secondary rules, which involves a Rule of Recognition more fundamental than the rules of legislation and adjudication, is in notorious danger of circularity. Here MacCormick solves both problems by virtually abandoning Hart's structure and substituting an account that pays more attention to the way in which the modern centralized state has arisen and by concentrating on the *duties* rather than the *powers* of officials, especially the courts. In so doing he gives an interesting account of judicial discretion, a topic on which Hart has touched in what must seem to lawyers a most cavalier way; and to this he adds an equally interesting discussion of the extent to which law making *should* be in the hands of judges, demonstrating that a sense of history is essential for both analysis and criticism of law.

After a short discussion of the role of sanctions in a legal system, MacCormick returns to the topic with which he began, the close connection between Hart's analytical jurisprudence and his substantive social democratic liberalism:

[T]he reason for insisting on the distinctness of legal validity and moral value is a moral reason. The moral reason is the principle that every order of positive law or positive morality ought always to be subjected to the critical judgement of an enlightened morality which seeks to make rationally coherent and explicit the values and principles inherent in moralities as such.

The last point is Hart's last word on the issue of the law's place in practical reasoning. I agree with it. It is the basis of the social democratic liberalism intrinsic to Hart's thought. It accounts for the fact that, in addition to being an analytical philosopher of the first rank, his writings have made no mean contribution to the politics of his time.<sup>14</sup>

MacCormick's book is first rate both as an elucidation and criticism of Hart's theories and as an independent contribution to the philosophy of law.

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<sup>14</sup> *Supra* note 2, at 162.