The Concept of Law

Third Edition

H. L. A. HART

With an Introduction by Leslie Green

CLARENDON LAW SERIES

THE CONCEPT OF LAW

THIRD EDITION

By

H. L. A. HART

With a Postscript edited by
Penelope A. Bulloch and Joseph Raz
And with an Introduction and Notes by
Leslie Green

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 1961
Second Edition published in 1994
Third Edition published in 2012
2

British Library Cataloguing in Publication Data
Data available
ISBN 978–0–19–964469–8 (Hbk)
ISBN 978–0–19–964470–4 (Pbk)
Printed in Great Britain by
Clays Ltd, St Ives plc

CLARENDON LAW SERIES

Natural Law and Natural Rights (2nd edition)
JOHN FINNIS

Philosophy of Private Law
WILLIAM LUCY

Law in Modern Society
DENIS GALLIGAN

Criminal Justice
LUCIA ZEDNER

Contract Theory
STEPHEN A. SMITH

Law of Property (3rd edition)
F. H. LAWSON AND BERNARD RUDDEN

Legal Reasoning and Legal Theory
NEIL MACCORMICK

Playing by the Rules
A Philosophical Examination of Rule-Based Decision-Making
FREDERICK SCHAUER

Precedent in English Law (4th edition)
RUPERT CROSS AND J. W. HARRIS

Conflicts of Law and Morality
KENT GREENAWALT

An Introduction to Roman Law
BARRY NICHOLAS

Land Law (2nd edition)
ELIZABETH COOK

Administrative Law (5th edition)
PETER CANE

Discrimination Law (2nd edition)
SANDRA FREDMAN

An Introduction to the Law of Trusts (3rd edition)
SIMON GARDNER

Introduction to Company Law (2nd edition)
PAUL DAVIES

Equity (2nd edition)
SARAH WORTHINGTON

Atiyah's Introduction to the Law of Contract (6th edition)
STEPHEN A. SMITH, P. S. ATIYAH

Unjust Enrichment (2nd edition)
PETER BIRKS

Public Law
ADAM TOMKINS

Employment Law (2nd edition)
HUGH COLLINS

The Conflict of Laws (2nd edition)
ADRIAN BRIGGS

International Law
VAUGHAN LOWE

Intellectual Property
MICHAEL SPENCE

An Introduction to Tort Law (2nd edition)
TONY WEIR

CLARENDON LAW SERIES

Edited by
PAUL CRAIG

TO J.H.

PREFACE

My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law. The lawyer will regard the book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy. More over, at many points, I have raised questions which may well be said to be about the meanings of words. Thus I have considered: how 'being obliged' differs from 'having an obligation'; how the statement that a rule is a valid rule of law differs from a prediction of the behaviour of officials; what is meant by the assertion that a social group observes a rule and how this differs from and resembles the assertion that its members habitually do certain things. Indeed, one of the central themes of the book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called 'internal' and 'external' and which can both be made whenever social rules are observed.

Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena'.

I am heavily and obviously indebted to other writers; indeed much of the book is concerned with the deficiencies of a simple model of a legal system, constructed along the lines of Austin's imperative theory. But in the text the reader will find very few references to other writers and very few footnotes. Instead, he will find at the end of the book extensive notes designed to be read after each chapter; here the views expressed in the text are related to those of my predecessors and contemporaries, and suggestions are made as to the way in which the argument may be further pursued in their writings. I have taken this course, partly because the argument of the book is a continuous one; which comparison with other theories would interrupt. But I have also had a pedagogic aim: I hope that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it is held by those who read, the educational value of the subject must remain very small.

I have been indebted for too long to too many friends to be capable now of identifying all my obligations. But I have a special debt to acknowledge to Mr A. M. Honoré whose detailed criticisms exposed many confusions of thought and infelicities of style. These I have tried to eliminate, but I fear that much is left of which he would disapprove. I owe to conversations with Mr G. A. Paul anything of value in the political philosophy of this book and in its reinterpretation of natural law, and I have to thank him for reading the proofs. I am also most grateful to Dr Rupert Cross and Mr P. F. Strawson, who read the text, for their beneficial advice and criticism.

H. L. A. HART

EDITORS' NOTE

(Written for the Second Edition)

Within a few years of its publication *The Concept Of Law* transformed the way jurisprudence was understood and studied in the English-speaking world and beyond. Its enormous impact led to a multitude of publications discussing the book and its doctrines, and not only in the context of legal theory, but in political and moral philosophy too.

For many years Hart had it in mind to add a chapter to *The Concept of Law*. He did not wish to tinker with the text whose influence has been so great, and in accordance with his wishes it is here published unchanged, except for minor corrections. But he wanted to respond to the many discussions of the book, defending his position against those who misconstrued it, refuting unfounded criticism, and—of equal importance in his eyes conceding the force of justified criticism and suggesting ways of adjusting the book's doctrines to meet those points. That the new chapter, first thought of as a preface, but finally as a postscript, was unfinished at the time of his death was due only in part to his meticulous perfectionism. It was also due to persisting doubts about the wisdom of the project, and a nagging uncertainty whether he could do justice to the vigour and insight of the theses of the book as originally conceived. Nevertheless, and with many interruptions, he persisted with work on the postscript and at the time of his death the first of the two intended sections was nearly complete.

When Jennifer Hart asked us to look at the drafts and decide whether there was anything publishable there our foremost thought was not to let anything be published that Hart would not have been happy with. We were, therefore, delighted to discover that for the most part the first section of the postscript was in such a finished state. We found only hand-written notes intended for the second section, and they were too fragmentary and inchoate to be publishable. In contrast the first section existed in several versions, having been typed, revised, retyped, and rerevised. Even the most

recent version was obviously not thought by him to be in a final state. There are numerous alterations in pencil and Biro. Moreover, Hart did not discard earlier versions, but seems to have continued to work on whichever version was to hand. While this made the editorial task more difficult, the changes introduced over the last two years were mostly changes of stylistic nuance, which itself indicated that he was essentially satisfied with the text as it was.

Our task was to compare the alternative versions, and where they did not match establish whether segments of text which appeared in only one of them were missing from the others because he discarded them, or because he never had one version incorporating all the emendations. The published text includes all the emendations which were not discarded by Hart, and which appear in versions of the text that he continued to revise. At times the text itself was incoherent. Often this must have been the result of a misreading of a manuscript by the typist, whose mistakes Hart did not always notice. At other times it was no doubt due to the natural way in which sentences get mangled in the course of composition, to be sorted out at the final drafting, which he did not live to do. In these cases we tried to restore the original text, or to recapture, with minimum intervention, Hart's thought. One special problem was presented by Section 6 (on discretion). We found two versions of its opening paragraph, one in a copy which ended at that point, and another in a copy containing the rest of the section. As the truncated version was in a copy incorporating many of his most recent revisions, and was never discarded by him, and as it is consonant with his general discussion in the postscript, we decided to allow both versions to be published, the one which was not continued appearing in an endnote.

Hart never had the notes, mostly references, typed. He had a hand-written version of the notes, the cues for which were most easily traced in the earliest typed copy of the main text. Later he occasionally added references in marginal comments, but for the most part these were incomplete, sometimes indicating no more than the need to trace the reference. Timothy Endicott has checked all the references, traced all that were incomplete, and added references where Hart quoted Dworkin

or closely paraphrased him without indicating a source. Endicott also corrected the text where the quotations were inaccurate. In the course of this work, which involved extensive research and resourcefulness, he has also suggested several corrections to the main text, in line with the editorial guidelines set out above, which we gratefully incorporated.

There is no doubt in our mind that given the opportunity Hart would have further polished and improved the text before publishing it. But we believe that the published postscript contains his considered response to many of Dworkin's arguments.

Penelope A. Bulloch
Joseph Raz
1994

PREFACE TO THE THIRD EDITION

The Concept of Law is based on introductory lectures in jurisprudence that Herbert Hart gave to law students at the University of Oxford. After its first publication in 1961, it quickly became the most influential book in legal philosophy ever written in English. Scholars in law, in philosophy, and in political theory continue to develop, build on, and criticize its arguments. At the same time, it remains a widely used introduction to its subject and is read by students, whether in the original or in one of its many translations, around the globe.

As the fiftieth anniversary of the first publication of the book approached, Oxford University Press approached me about the possibility of preparing a new edition. A posthumous second edition, published in 1994 under the editorship of Penelope Bulloch and Joseph Raz, included a Postscript based on Hart's unpublished replies to Ronald Dworkin. That edition set off a new wave of debate about Hart's theories and about jurisprudence in general. After several more reprints, it was time to correct a few errors in the text and to redesign the book. This opened the door to the possibility of including some new material.

Although *The Concept of Law* needs no apology, after half a century it is no longer true that it needs no introduction. In the one that follows I highlight some main themes, sketch a few criticisms and, most important, try to forestall some misunderstandings of its project. Hart had added notes giving references, elaborating points, and suggesting further readings. These have been left intact. But many of those readings have been superseded and many later books and articles take up his arguments. A fresh set of notes has therefore been added to point students in the direction of some key debates. Finally, although earlier works do give citations to the pagination of the first edition, fewer and fewer copies of that edition are still in circulation. (And fewer and fewer people familiar with its pagination are still in circulation.) I therefore decided to follow the pagination of the second edition.

The Introduction draws on material previously published in my paper 'The Concept of Law Revisited' (1997) 94 *Michigan Law Review* 1687. I am very grateful to Alex Flach of Oxford University Press, who first proposed this project and who gave valuable advice at many points. My colleague John Finnis helped with corrections to Hart's text; Tom Adams assisted with research for the Notes: warm thanks to both of them. And thanks especially to Denise Réaume, who read and commented on the Introduction.

Leslie Green
Balliol College, Oxford
Trinity 2012

INTRODUCTION

Leslie Green

I. HART'S MESSAGE

Law is a social construction. It is an historically contingent feature of certain societies, one whose emergence is signalled by the rise of a systematic form of social control administered by institutions. In one way law supersedes custom, in another it rests on it, for law is a system of primary rules that direct and appraise conduct together with secondary social rules about how to identify, enforce, and change the primary rules. A set-up like that can be beneficial, but only in some contexts and always at a price, for it poses special risks of injustice and of alienating its subjects from some of the most important norms that govern their lives. The appropriate attitude to take towards law is therefore one of caution rather than celebration. What is more, law sometimes pretends to an objectivity it does not have for, whatever judges may say, they in fact wield serious power to create law. So law and adjudication are political. In a different way, so is legal theory. There can be no 'pure' theory of law: a jurisprudence built only using concepts drawn from the law itself is inadequate to understand law's nature; it needs the help of resources from social theory and philosophic inquiry. Jurisprudence is thus neither the sole preserve, nor even the natural habitat, of lawyers or law professors. It is but one part of a more general political theory. Its value lies not in helping advise clients or decide cases but in understanding our culture and institutions and in underpinning any moral assessment of them. That assessment must be sensitive to the nature of law, and also to the nature of morality, which comprises plural and conflicting values.

These are the most important ideas of H. L. A. Hart's *The Concept of Law*, one of the most influential works in modern legal philosophy. Like some other important books, however, Hart's is known as much by rumour as by reading. To some who know

of it, but do not really know it, the precis I just gave may sound unfamiliar. What they have heard makes them wonder: doesn't Hart think law is a closed logical system of rules? Doesn't he think law is a good thing, a social achievement that cures defects in other forms of social order? Doesn't he think laws are mostly clear and to be applied by courts without regard to moral values? Doesn't he think law and morality are conceptually separate and to be kept apart? And doesn't he think jurisprudence is value-free, and that its truths can be established by attending to the true meaning of words like 'law'?

The short answer is 'no', Hart does not think any of those things. These garbled versions of Hart's message have three sources. The first is a difficulty familiar throughout philosophy: the problems he addresses are complex, and the space between truth and falsehood is often a subtle, or easily overlooked, distinction. (For example: to claim that law and morality are separable is not to claim that they are separate.) The second is historical: after half a century, the book's language and examples feel socially, and sometimes philosophically, remote. Not many of us would still refer to customary social orders as 'primitive', or call an account of the nature of something an 'elucidation' of its concept. The third has to do with the audience's expectations. Each book has, as they say, an 'implied reader': Hart's is someone who is philosophically curious about the nature of one of our major political institutions and about its relations to morality and coercive force. That is not always his actual reader. Some turn to jurisprudence looking for practical help—for instance, they want to know how we should interpret constitutions, or what kind of people to choose as judges. They imagine that a book on the theory of law will stand to law as a book on the theory of catering might stand to catering—a general 'how-to' applicable to a range of different occasions.

Hart's book is clear enough to need no summary, but an exploration of some of its themes might help guard against misunderstandings like those. I'm going to examine his views about the law and social rules, coercion, and morality, and then briefly glance at some methodological points. I make no effort to remain neutral: Hart's theory of law is correct in part, mistaken in part, and, here and there, a bit obscure. But what follows is

not an assessment. I highlight areas where people tend to go, or to be led, astray, and I make critical comments on a few points; but an appraisal is work for the reader.

2. LAW AS A SOCIAL CONSTRUCTION

Laws and legal systems are not matters of nature but artifice. We might say they are social constructions. Does that mark any contrast worth mentioning? Some think law is a social construction because they think everything is: '*il n'y a pas de hors-texte*', Derrida used to tease. Were that intelligible it would be irrelevant. Imagine someone said 'race is a social construction', only to follow up by clarifying, 'just like truncheons and prisons'. It would be like being told God doesn't exist, only to find out that the interlocutor doesn't believe in the existence of dogs either. When I say law is a social construction, I mean that it is one in the way that some things are *not*. Law is made up of institutional facts like orders and rules, and those are made by people thinking and acting.[1] But law exists in a physical universe that is not socially constructed, and it is created by and for people who are not socially constructed either. Perhaps this is banal. One might, to sound trendy, talk about the 'social construction of etiquette', but there isn't much point, since everyone already knows that manners are conventional.[2] They depend on common practice, they have a history, and they vary from place to place. Isn't it blindingly obvious that law is like that too? Well, consider this famous summary of a Stoic 'natural law' view:

> True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting... [T]here will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times....[3]

[1] See eg. John Searle, *The Construction of Social Reality* (Allen Lane, 1995); and Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007).

[2] Cf. Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999).

[3] Cicero, *De Re Republica* III. xii. 33, tr. C. W. Keyes (Harvard University Press, Loeb Classical Library, 1943) 211.

This eternal and universal law isn't something anyone made up and, we are told, it isn't something anyone can change. Natural law is not a matter of will but reason. It is hard to find legal theorists who still believe all of this,[4] but there are many who believe some of it. Ronald Dworkin, for example, argues that our law includes not only norms found in treaties, customs, constitutions, statutes, and cases, but also moral principles that provide the best justification for the norms found there.[5] On his account the *things justified* by moral principles are socially constructed, but the justifications themselves are not. It is important to bear in mind that a justification is not an event; it is an argument. Believing, or accepting, or asserting a justification are events. But Dworkin does not say that law consists of the constructed stuff plus things people believed to be, or accepted as, or asserted to be justifications for it. He says it consists of the constructed stuff plus moral principles that *actually are* justifications for it. If you believe that it is sufficient for something to be law that it is, or follows from, the best moral justification for something else that is law then, just as much as Cicero did, you believe there is law that owes its status to the fact that it is a requirement of 'right reason'. Since nothing we do can turn a justification that is sound into one that is not, you are also committed to the existence of law we cannot change. And since whether a moral principle justifies some arrangement does not depend on anyone knowing or believing that it does, there can be law—lots of law—that no one has ever heard of. Depending on the prospects for moral knowledge, there can be law that is not even knowable.

Hart's approach rejects all that. Anything in the law is there because some person or group put it there, either intentionally or accidentally. It all has a history; it all can be changed; it is all either known or knowable. Some of our laws have good justifications, some do not, and justifications do not anyway suffice to make law. To do that, we need actual human intervention:

[4] Perhaps John Finnis comes closest, in his *Natural Law and Natural Rights* (2nd edn., Oxford University Press, 2011).

[5] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), chap. 4; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), chaps. 2–3.