

Hart, H.L.A. (1907-92)

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H.L.A. Hart was Professor of Jurisprudence at Oxford from 1952 to 1969. Influenced in his early work by the 'ordinary language' philosophy of J.L. Austin, Hart is widely credited with having revitalised Anglophone philosophy of law. In *The Concept of Law* (1961), he argues that a legal system is a system of rules which belong to that system because they meet conditions set by the system's 'ultimate rule of recognition'. This rule is always customary, never legislated. It is made by the accumulated acts of officials (mainly judges) who think they are applying the rule of recognition but in the process gradually and accidentally develop it. This is sometimes said, not least by Hart himself, to be a 'legal positivist' view. However, the label can mislead. 'Legal positivism' is often associated with the idea that all law is legislated, i.e. deliberately and explicitly made. Hart attacks this idea. Yet he agrees that all law is made. His point is that some law is made accidentally and/or implicitly.

Since people are morally fallible, one implication of Hart's view is that there can be immoral laws and immoral legal systems. This implication affronts the idealistic self-image of some lawyers. It was the main subject of Hart's long debate with Harvard law professor Lon Fuller. Fuller argued that there is a moral ideal of legality, calling for rules that are (inter alia) clear, open, and prospective. He also claimed that nothing qualifies as a legal system except by meeting, to some extent, these moral desiderata. Hart resisted this second claim. Nevertheless he was unsure how far to take the thesis that legal systems can be immoral. Some of his work suggests that even immoral law has a redeeming moral value, however modest, that comes of the fact that law is a system of rules. This has led to another line of

criticism. Hart is portrayed as having concealed an ideological position, an enthusiasm for the liberal ideal of legality, behind the value-neutral facade of his explanation of the nature of law.

Hart was troubled by the idea that his explanation of the nature of law might not be value-neutral. But he was not troubled by the suggestion that he was an enthusiast for liberal ideals, including the ideal of legality. His books *Law, Liberty, and Morality* (1963) and *Punishment and Responsibility* (1968) were works of political philosophy in the tradition of Bentham and Mill. They doubled as manifestos for liberalising law reform. In the 1963 book Hart renewed Mill's case against various (but not all) kinds of 'legal moralism' and made influential arguments for the decriminalisation of homosexuality. In the 1968 book, he defended a 'mixed' theory of punishment which combined a Benthamite (crime-minimising) rationale for punishing with a separate principle for distributing punishments. The law should act as a 'guide', not a 'goad' and so should attend, in distributing punishments, to the choices and capacities of the accused. Even when this would not assist with crime-minimising, thought Hart, it would assist with freedom-maximising.

Through these works Hart played a major part, complementary to that of his friend John Rawls, in the late twentieth-century revival of Anglophone political philosophy. Whereas Rawls focused mainly on the demands of justice under conditions of perfect compliance, Hart was more interested in the demands of justice under the conditions of imperfect compliance that typically confront the law courts.

SEE ALSO: Austin, J.L.; Bentham, Jeremy; Law; Mill, John Stuart; Punishment; Rawls, John; Rule of Law

References and Suggested Readings

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