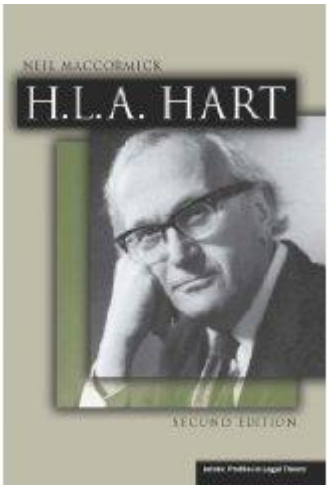
The Concept of Law: HLA Hart



HLA Hart, the major exponent of analytical school of jurisprudence came with revolutionary method to understand jurisprudence of law. The filed before him was highly influenced by the philosophy of law by J. L. Austin and Ludwig Wittgenstein. Hart brought the tools of analytic, and especially linguistic, philosophy to analyze the central problems of jurisprudence of law. His method was a combination of careful analysis of twentieth-century analytic philosophy with the jurisprudential tradition of Jeremy Bentham. Hans Kelsen influenced Hart. However, Hart criticized Kelsen and his positivist idea on law that law necessarily requires sanctions. Also, he rejected the neo-Kantian idea that a normative social phenomenon could not be explained purely in terms of social facts.

The Concept of Law is an analysis of the relation between law, coercion, and morality, and it is an attempt to clarify the question whether all laws may be properly conceptualized as coercive orders or as moral commands. Hart says that there is no logically necessary connection between law and coercion or between law and morality. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality.

He also explains that to conceptualize all laws as coercive orders or as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. He argues that to describe all laws as coercive orders is to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application. Laws are rules that may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals.

Laws may require individuals to undergo punishment for injuring other individuals. They may also specify how contracts are to be arranged and how official documents

are to be created. They may also specify how legislatures are to be assembled and how courts are to function. They may specify how new laws are to be enacted and how old laws are to be changed.

They may exert coercive power over individuals by imposing penalties on those individuals who do not comply with various kinds of duties or obligations. However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them. Hart criticizes the concept of law that is formulated by John Austin in The Province of Jurisprudence Determined (1832) and that proposes that all laws are commands of a legally unlimited sovereign.

Austin claims that all laws are coercive orders that impose duties or obligations on individuals. Hart says, however, that laws may differ from the commands of a sovereign, because they may apply to those individuals who enact them and not merely to other individuals. Laws may also differ from coercive orders in that they may not necessarily impose duties or obligations but may instead confer powers or privileges. Laws that impose duties or obligations on individuals are described by Hart as "primary rules of obligation."

In order for a system of primary rules to function effectively, "secondary rules" may also be necessary in order to provide an authoritative statement of all the primary rules. Secondary rules may be necessary in order to allow legislators to make changes in the primary rules if the primary rules are found to be defective or inadequate. Secondary rules may also be necessary in order to enable courts to resolve disputes over the interpretation and application of the primary rules. The secondary rules of alegal system may thus include 1) rules of recognition, 2) rules of change, and 3) rules of adjudication.

In order for the primary rules of a legal system to function effectively, the rules must be sufficiently clear and intelligible to be understood by those individuals to whom they apply. If the primary rules are not sufficiently clear or intelligible, then there may be uncertainty about the obligations which have been imposed on individuals. Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether powers have been conferred on individuals in accordance with statutory requirements or may cause uncertainty as to whether legislators have the authority to change laws. Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether courts have jurisdiction over disputes concerning the interpretation and application of laws.

Primary rules of obligation are not in themselves sufficient to establish a system of

laws that can be formally recognized, changed, or adjudicated, says Hart. Primary rules must be combined with secondary rules in order to advance from the pre-legal to the legal stage of determination. A legal system may thus be established by a union of primary and secondary rules (although Hart does not claim that this union is the only valid criterion of a legal system or that a legal system must be described in these terms in order to be properly defined).

Hart distinguishes between the "external" and "internal" points of view with respect to how the rules of a legal system may be described or evaluated. The external point of view is that of an observer who does not necessarily have to accept the rules of the legal system. The external observer may be able to evaluate the extent to which the rules of the legal system produce a regular pattern of conduct on the part of individuals to whom the rules apply. The internal point of view, on the other hand, is that of individuals who are governed by the rules of the legal system and who accept these rules as standards of conduct.

The "external" aspect of rules may be evident in the regular pattern of conduct which may occur among a group of individuals. The "internal" aspect of rules distinguishes rules from habits, in that habits may be viewed as regular patterns of conduct but are not usually viewed as standards of conduct. The external aspect of rules may in some cases enable us to predict the conduct of individuals, but we may have to consider the 'internal' aspect of rules in order to interpret or explain the conduct of individuals.

Hart argues that the foundations of a legal system do not consist, as Austin claims, of habits of obedience to a legally unlimited sovereign, but instead consist of adherence to, or acceptance of, an ultimate rule of recognition by which the validity of any primary or secondary rule may be evaluated.1 If a primary or secondary rule satisfies the criteria which are provided by the ultimate rule of recognition, then that rule is legally valid.

There are two minimum requirements which must be satisfied in order for a legal system to exist: 1) private citizens must generally obey the primary rules of obligation, and 2) public officials must accept the secondary rules of recognition, change, and adjudication as standards of official conduct.2 If both of these requirements are not satisfied, then primary rules may only be sufficent to establish a pre-legal form of government. Moral and legal rules may overlap, because moral and legal obligation may be similar in some situations. However, moral and legal obligation may also differ in some situations. Moral and legal rules may apply to similar aspects of conduct, such as the obligation to be honest and truthful or the obligation to respect the rights of other individuals. However, moral rules cannot always be changed in the same way that legal rules can be changed.

According to Hart, there is no necessary logical connection between the content of law and morality, and that the existence of legal rights and duties may be devoid of any moral justification.3 Thus, his interpretation of the relation between law and morality differs from that of Ronald Dworkin, who in Law's Empire suggests that every legal action has a moral dimension. Dworkin rejects the concept of law as acceptance of conventional patterns of recognition, and describes law not merely as a descriptive concept but as an interpretive concept which combines jurisprudence and adjudication.

Hart defines legal positivism as the theory that there is no logically necessary connection between law and morality. However, he describes his own viewpoint as a "soft positivism," because he admits that rules of recognition may consider the compatibility or incompatibility of a rule with moral values as a criterion of the rule's legal validity. Legal positivism may disagree with theories of natural law, which assert that civil laws must be based on moral laws in order for society to be properly governed. Theories of natural law may also assert that there are moral laws which are universal and which are discoverable by reason. Thus, they may fail to recognize the difference between descriptive and prescriptive laws. Laws that describe physical or social phenomena may differ in form and content from laws which prescribe proper moral conduct.

Hart criticizes both formalism and rule-scepticism as methods of evaluating the importance of rules as structural elements of a legal system. Formalism may rely on a rigid adherence to general rules of conduct in order to decide which action should be performed in a particular situation. On the other hand, rule-scepticism may not rely on any general rule of conduct in order to decide which action should be performed in a particular situation. Formalism may produce such inflexibility in the rules of a legal system that the rules are not adaptable to particular cases. Rule-scepticism may produce such uncertainty in the application of the rules of a legal system that every case has to be adjudicated.

International law is described by Hart as problematic, because it may not have all of the elements of a fully-developed legal system. International law may in some cases lack secondary rules of recognition, change, and adjudication. International legislatures may not always have the power to enforce sanctions against nations who disobey international law. International courts may not always have jurisdiction over legal disputes between nations. International law may be disregarded by some nations who may not face any significant pressure to comply. Nations who comply with international law must still be able to exercise their sovereignty.

In any legal system, there may be cases in which existing laws are vague or

indeterminate and that judicial discretion may be necessary in order to clarify existing laws in these cases. Hart also argues that by clarifying vague or indeterminate laws, judges may actually make new laws. He explains that this argument is rejected by Ronald Dworkin, who contends that judicial discretion is not an exercise in making new laws but is a means of determining which legal principles are most consistent with existing laws and which legal principles provide the best justification for existing laws.

Dworkin says in Law's Empire that legal theory may advance from the "preinterpretive stage" (in which rules of conduct are identified) to the "interpretive stage" (in which the justification for these rules is decided upon) to the "postinterpretive stage" (in which the rules of conduct are reevaluated based on what has been found to justify them).6 A complete legal theory does not merely identify the rules of a legal system, but also interprets and evaluates them. A complete legal theory must consider not only the relation between law and coercion (i.e. the "force" of law), but the relation between law and rightfulness or justifiability (i.e. the "grounds" of law). Thus, Dworkin argues that a complete legal theory must address not only the question of whether the rules of a legal system are justified but the question of whether there are sufficient grounds for coercing individuals to comply with the rules of the system.

The Concept of Law

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by H. L. A. Hart

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H.L.A. Hart's treatise on legal philosophy, originally published in 1961, stands on a timeline between the works of Austin in the 19th Century and the thoughts of Dworkin in the late 20th and 21st Centuries. Hart clarifies (a little late in the book) that his aim is not to define the term "law" so that one could determine whether a rule is actually a law or not (213), although in many places he does just that. The broader purpose of the book, however, is admittedly to examine how "law" compares and contrasts with other things intertwined with what we consider "legal"—defining the *system* of law in order to determine a way to analyze it. The book is so titled: *The Concept of Law*.

Hart's first step is to criticize the description of law popularized by Austin that laws are no more than a set of rules set up by a sovereign who ensures the adherance to those rules by threats. Hart manages to contradict this notion by noting that, in modern legal systems, there is something called legitimacy that can exist separate from the sovereign. Somehow the legitimacy of laws seems to be maintained through the perpetuity of a system, through the changes in the actual ruling individuals or legislature. He also points out that some laws (again pointing to modern legal systems) do not necessarily bring about punishments if they are not followed, but instead describe the bounds of the legitimacy of other laws and the processes that should be used in the legal system.

While Hart pokes valid holes in the theory of laws as orders backed by threats, he fails to propose anything that could adequately explain adherance to laws. Although he notes that ideas of morality may urge adherance to laws in some cases, in others "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attidude; or the mere wish to do as others do" could serve the same purpose, as he states in passing towards the end of the work (203). Ideas of social construction and acceptance through conditioning are not explored (although hinted at (55)), and the acceptance of some laws because of their economic utility are towards the end given only a glance (223).

Instead Hart falls into the rut common in similar treatises (such as Hedley Bull's *The Anarchical Society*) of description rather than explanation. The crux of Hart's theory is that all laws are either primary laws, prescribing actions that must or must not be done; or secondary laws, prescribing how laws are made, how jurisdiction is determined, etc. Justice is the concept that these laws are fairly and evenly applied, and morality, though related to law, is a distinct concept.

The benefit of Hart's theory, if it could be called that, is not apparent. The fact he has disproved the Austinian notion of laws as order backed by threats is useful, as is shown by his analysis of international law, which in Hart's time looked less like anything that could be called "law". Hart shows that most objections to categorizing international law as "really law" stem from a mistaken Austinian belief that there must be something analogous to a sovereign that has ultimate power over states to force compliance with laws. In reality, the formation of and adherance to many international laws have analogs in domestic laws of individual states, especially those with advanced legal systems. Evolution of the states system and further globalization since the book has been written show these analyses to have some validity.

There remains unanswered the question of why states adhere to international laws, although Hart dismisses the theory that obligations at the international level arise solely out of contractual arrangements. He also dismisses their being any international "basic norm" (233) for want of defining what that norm is, although later regime theorists could surely take a stab at describing several such norms.

For its descriptive aspects, *The Concept of Law* is invaluable. The description of formalism in Chapter VII could stand on its own as an outstanding introduction to rule-based as opposed to case-based law. Hart's work was apparently an essential step away from Austinian thought and provided the basis for other formulations such as found in Dworkin's*Law's Empire*. Perhaps it set the terms for many discussions about legal concepts, and provided new methods of analysis and discussion. It provides appropriate terms to use when discussing what the concept of law is, but instead of providing a theory answering "why law is" or "why law is accepted", *The Concept of Law* seems to leave that step to others.

Notes

- "[I]t is not a peculiarity of complex terms like "law" and "legal system" that we are forced to recognize both clear standard cases and challengeable borderline cases. It is now a familiar fact... that this distinction must be made in the case of almost every general term which we use in classifying features of human life and of the world in which we live" (4).
- One "cardinal issue latent in the question 'What is law?'" is, "How then do law and legal obligation differ from, and how are they related to, orders backed by threats" (7)?
- "What then is the crucial difference between merely convergent habitual behaviour in a social group and the existence of a rule of which the words 'must', 'should', and 'ought to' are often a sign" (10)?
- Hart notes that some critics think that there is nothing in the rule that "binds us to do certain things and guides or justifies us in doing them", but that instead we only *think*such a thing exists, making that binding something "an illusion even if it is a useful one." These critics think that, "All that there is, over and above the clear ascertainable facts of group behaviour and predictable reaction to deviation, are our own powerful 'feelings' of compulsion to behave in accordance with the rule and to act against those who do not. We do not recognize these feelings for what they are but imagine that there is something external, some invisible part of the fabric of the universe guiding and controlling us in these activities" (11).
- Hart quotes J. D. March, "Sociological Jurisprudence Revisited", 8 *Stanford Law Review* (1956), p. 518, in saying that the true meaning of the Fifth and Fourteenth Amendments to the US Constitution, providing that no person shall be "deprived of life liberty or property without due process of law" is that "no *w* shall be *x* or *y* without *z*where *w*, *x*, *y*, and *z* can assume any values within a wide range" (13).
- Hart says that if we claim the law "addresses" people, "we may both fail to notice an important difference between the making of a law and giving a face-to-face order, and we may confuse the two distinct questions: 'To whome does the alaw apply?' and 'To whom has it been published'" (22).
- Hart seems to characterize Austin's argument (18) as that "simple, though admittedly vague, notion of general habitual obedience to general orders backed by threats" is

"enough to reproduce the settled character and continuity which legal systems possess" (24).

- Hart seems to think that "wherever there is a legal system", it must be independent of other systems and everything under it must be subordinate (24-25), giving examples of the Queen in Parliament and law in the USSR. This examination seems very temporal, ignoring medieval sovereignty and not looking to the prevalence of international norms to come in the future in the modern concept of globalization. Perhaps Hart would not see overlapping sovereignty or the development of modern international law as true legal systems.
- Hart makes a distinction between "rules imposing... legal duties" and "those conferring judicial powers on [a judge] and defining his jursdiction. For the concern of rules conferring such powers is not to deter judges from improprieties but to definethe conditions and limits under which the court's decisions shall be valid" (29). "If an order is reversed [by a superior court for a lower court's lack of jurisdiction], it is because what the lower court has said either about the law applicable to the case or the facts, is considered wrong.... It is not *what* the judge in his lower court has said or ordered that is wrong, but *his* saying or ordering of it" (30).
- Power-conferring rules could be viewed, as Kelsen would say, as fragments of laws. Kelsen's "Law is the primary norm which stipulates the action" intepreted by Hart means that "There is no law[, for example,] prohibiting a murder: there is only a law directing officials to apply certain sanctions in certain circumstances to those who do murder. On this view, what is ordinarily though of as the content of law, designed to guide the conduct of ordinary citizens, is merely the antecedent or 'if-clause' in a rule which is directed not to them but to officials, and orders them to apply certain sanctions if certain conditions are satisfied. All genuaine laws, on this view, are conditional orders to officials to apply sanctions. They are all of the form, 'If anything of a kind X is done or omitted or happens, then apply sanction of a kind Y'" (35-36). "'All rules' [such a] theorist might claim, 'are *really* rules directing officials to do certain things under certain conditions.' The rules that certain motions after hitting the ball constitute a 'run', or that being caught makes a man 'out', are really just complex directions to officials; in the one case to the scorer to write down 'a run' in the scoring-book and in the other to the umpire to order the man 'off the field'. The natural protest is that the uniformity imposed on the rules by this transformation of them conceals the ways in which the rules operate, and the manner in which the players use them in guiding purposive activities, and so obscures their functions in the co-operative, though competitive, social enterprise which is the game" (40).
- If one takes the view that laws are rules given by a sovereign, "If there is to be [the right and presumption that a new ruler's laws will be obeyed] at the moment of succession there must, during the reign of the earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habit of obedience: there must have been the acceptance of the rule under which the new legislator is entitled to succeed" (55).
- Austin characterized the idea of an obligation subjective feelings such as a person's beliefs, fears, and motives, "but in terms of the *chance* or *likelihood* that the person having the obligation will suffer a punishment ... in the event of disobedience" (83). Hart says many have taken this as a "revelation" to take the idea of obligation out of metaphysics and into science, but he discredits it in part by noting that in many instances an obligation is considered essential even if there is no chance of getting caught.

- "If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal systm, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist" (98).
- Hart analyzes the concept of obedience in a legal system by comparing other situations with what he calls a "normal" case that he understands to be a legal system (112), which seems to automatically preclude some scenarios, such as international law, from having the status of law. He sees in this system that obeying rules many times does not involve explicit thoughts during acting that the behavior is "right", although some may only follow rules because they have an "external" view of the system and see the rules as obligations (115). Hart seems to think that an essential element of a legal system is that most people instead have an "internal" view of the system and follow the obligations without thinking of them as obligations—which is almost the probability-based explanation he rejected to begin with. "There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials" (116).
- Even though a rule may seem to have less of an "open texture" than case law, "the language of the rule seems [after analysis] only to mark out an authoritative example, namely that constituted by the plain case" (127).
- "Natural languages like English are when [used for communicating matters of fact using general classifying terms] irreducibly open-textured .... [But] we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods" (128).
- The rule-sceptic notes the open texture of rules and that "the fact that deviation from the rules will not draw down on the judge a physical sanction" to conclude that "'rules are important so far as they help you to predict what judges do. That is all their importance except as pretty playthings.'" (139, quoting Llewellyn). Hart later describes a game that has an official scorer, in which case all other statements as to the score are irrelevant. "But these very obvious facts would be distorted if the players' statements were classified as predictions of the scorer's rulings, and it would be absurd to explain the neglect of these statements, when they conflicted with the scorer's rulings, by saying that they were predictions of those rulings which had turned out to be false" (143). The official scorer is somewhat close to the rules, though, so the game is not "scorer's discretion," in which case unofficial scores *would* be mere predictions.

  What Hart seems to be saying is that the only reason why in familiar systems rules are not merely predictions is because the officials follow the rules. " "But the standing possibility of [authorities openly rejecting rules] does not show that the system now is what it would be if the transformation took place" (146).

- Hart notes the seeming paradox of "courts exercising creative powers which settle the ultimate criteria by which the validity of the very laws which conver upon them jurisdiction as judges, must itself be tested," but brushes it off by saying that although "every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points" (152). The one case, perhaps, in which it would not be open to doubt is in the authoritative example of the plain case (127).
- "Hence justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often forumlated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'" (159).
- Hart says that many moralist want to add to the idea of morality a criterion that nothing be recognized as morality "unless it could survive rational criticism in terms of human interests .... Some might even go further, and refuse to recognize as moral any principle or rule of conduct, unless the benefits of the forbearances and actions i required were extended, beyond the boundaries of a particular society, to all who were themselves willing and able to respect such rules" (181). Hart, however, in his analysis takes a broader view of morality to reflect the common usage of the term.
- Hart tries to say that human vulnerability brings out of necessity proscriptions against murder, for example, without which a society could not function. That seems to pressupose our own particular society.

  Hart also says that the functioning of society seems to necessity rules of approximate equality. "Again, things might have been otherwise. Instead of being approximately equal there might have been some men immensely stronger than others and better able to dispense with rest, either because some were in these ways far above the present average, or because most were far below it. Such exceptional men might have much to gain by aggression and little to gain from mutual forbearance or compromise to others" (195). "If some men were vastly more powerful than others, and so not dependent on their forebearance, the strength of the malefactors might exceed that of the supporters of law and order. ... In these circumstances instead of social life being based on a system of mutual forbearances, with force used only intermittently against a minority of malefactors, the only viable system would be one in which the weak submitted to the strong on the best terms they could make and lived under their 'protection'" (198). Hart tries to use such an example to say that the "character [of] municipal law" and the way it is "operating as an organized coercive system" somehow inherently contains the notion of approximate equality. Hart fails to realize, though, that through his far-fetched example he unwittingly describes the situation that has existed for thousands of years between males and females (and was surely quite alive in Hart's day), with full recognition of the law, based upon even small differences. Here also the idea of approximate equality seems less as something "inherently" moral or necessary for a legal system than something that has evolved separately, for whatever reasons.

- Hart realizes that there might be many reasons that one would adhere to laws other than moral duty or fear of punishment: "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attidude; or the mere wish to do

as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so" (203). Such concepts as social conditioning should be explored further.

- Hart's central issue surrounding the interaction of law and morality is whether a rule that is morally wrong should fail to gain status as "law", or if one should instead say, '"This is law; but it is too iniquitous to be applied or obeyed"' (208). "It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower [former] concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law" (209).
- Though the idea of the union of primary and secondary rules has these virtues, and though it would accord with usage to treat the existence of this characterisitc union of rules as a sufficient condition for the application of the expression 'legal systm', we have not claimed that the word 'law' must be defined in its terms. It is because we make no such claim to identify or regulate in this way the use of words like 'law' or 'legal', that this book is offered as an elucidation of the *concept*of law, rather than a definition of 'law' which might naturally be expected to provide a rule or rules for the use of these expressions (213).
- "Chapter VII of the United Nations Charter [did not untroduce] into international law anything which can be equated with the sanctions of municipal law. ... [W]henever their use is of importance, the law enforcement provisions of the Charter are likely to be paralysed by the veto and must be said to exist only on paper" (217). It would be interesting to see if, after the Gulf War, Hart would maintain such a stance. It will be further interesting to see if the outcome of the debates in the Security Council in late 2002 and the subsequent actions by the United States will uphold or repudiate such notions.
- Toward the end of the book, in discussing international law, Hart introduces the notion that "... one of the typical functions of law, unlike morality, is to introduce [regulation rules] in order to maximize certainty and predictability and to facilitate the proof or assessment of claims" (229). This economics of law argument could represent a completely different analysis that could be performed on law, one that Hart neglects in the rest of the book.
- Hart notes that "Kelsen and many other modern theorists insist that, like municipal law, international law possesses and indeed must possess a 'basic norm', or what we have termed a rule of recognition, by reference to which the validity of the other rules of the system is accessed, and in virtue of which the rules constitute a single system." He goes on to counter that "It is notorious that those who have embarked on the task have found very great difficulties in formulating the 'basic norm' of international law" (233). An interesting study would analyze some of the later international regimes that have arisen since the book was published, such as those relating to the environment and the new importance of the GATT and now the WTO, and determine if the sets of rules accepted by those within the regimes (such as the benefits of free trade) have become anything close to a set of norms that have affected rule-making outside the regimes.