

A Life of H.L.A. Hart

Review of *A Life of H.L.A. Hart. The Nightmare and the Noble Dream*, by Nicola Lacey, Oxford University Press 2004

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H.L.A. Hart is indisputably one of the most influential legal philosophers of the English-speaking world. His general descriptive theory of law, which draws on J.L. Austin's philosophy of language, remains a powerful contribution to jurisprudence, in general, and to legal positivism of the last fifty years, in particular. Unlike Hart's work which has commanded interest from lawyers and philosophers alike, his private life has attracted little, if any, scholarly attention over the years. As a result, we have known very little about Hart as a person and even less about how his inner thoughts and personality influenced his theoretical work. Admittedly, Neil MacCormick, one of Hart's students and a prominent philosopher of law in his own right, published a biography of Hart in 1981, but this was more concerned with Hart's work than with Hart as a person.¹ However, the recent biography of Hart, written by Nicola Lacey, a professor of legal theory at the London School of Economics, fills this knowledge gap and, by doing so, adds a whole new dimension to the works of Hart.

Lacey portrays Hart as an »outsider on the inside«, a person who was tormented by profound sense of insecurity, internal anguish and a feeling of being excluded. By drawing on Hart's unpublished diaries and letters, and by interviewing some of those who knew him, Lacey reveals Hart's complex inner life and his tortured personality. At the same time, Lacey retraces the development of philosophy and jurisprudence of the 1950s, 1960s and 1970s in Oxford and narrates a coherent story, which for the first time explains how Hart's private life influenced his philosophical work.

This biography consists of four chronologically organized parts. The first part starts with an account of Hart's background. Herbert Lionel Adolphus Hart (1907-1992) was born in Harrogate, the son of Rose and Simeon Hart, Jewish furriers and dressmakers of German and Polish origin. Hart was educated at Cheltenham College, Bradford Grammar School and New College, Oxford, where he began to read for the *Literarum Homaniorum* degree, a mixture of Greek, Latin, Ancient History and philosophy, in 1926. On leaving Oxford a few years later, he became a Barrister and practised at the Chancery Bar from 1932 to 1940. During World War II, being unfit for active service, he worked with

¹ MacCormick, Neil, *H.L.A. Hart* (London, Edward Arnold, 1981).

MI5, a division of British military intelligence. The second part narrates how Hart changed his life dramatically at 38 by leaving the Bar and returning to Oxford to pursue an academic career. We are also told about his meeting with Jenifer Williams, whom he later married. Part three describes how Hart experienced the Oxford Law Faculty. In 1945, Hart was appointed a tutor at New College, Oxford. Seven years later, in 1952, he was selected the Professor of Jurisprudence at the University of Oxford. This part also discusses Hart's major works in jurisprudence and his visits to Harvard, California and Israel. Part three, the final part of the book, focuses on Hart's life after he resigned his chair in 1969. Even as professor *emeritus*, he was as active and productive as ever, working as Principal of Brasenose College, Oxford, and carrying on with his research and replying to his critics, among them Ronald Dworkin who had succeeded to his chair.

The alienation and frustration which Hart felt started early on when he attended the Cheltenham College, where he became a »victim of class snobbery« and was stigmatised as a Jew (p.18). Lacey writes that he never forgot the three very unhappy years he spent there. Not only he found the teaching dull and the school obsessed by the importance of athletics, he also »resented the school's snobbery and class consciousness« (p. 18). He objected to being labelled and segregated as a Jew, even though the segregation was by choice, and never identified himself with the people who constituted the school, or with the culture that the school represented.

These early experiences left a deep emotional scar on Hart's personality, a scar

which he tried, and perhaps succeeded, in hiding from others. After leaving school, and especially after his experiences at Cheltenham College, Hart found the Oxford atmosphere on the whole congenial to his intellectual needs. But the problems which he had encountered at school continued to taunt him in more subtle forms later at Oxford. At that time the overwhelming majority of the students in Oxford came from the middle and upper classes and were selected more for their prestigious elite public school² education, than for their academic achievements or potentials. Hart came from a lower class family and was educated at a grammar school. Also, religion and race played an important role in the life of the University, which was why he never openly publicised his Jewish background. As Lacey explains, »in the mid-1920s, there were only about 40 Jews among over 4,000 students at Oxford« and »Jews were specifically excluded from many Oxford clubs of the time« (p. 34).

Once Hart had established himself at Oxford, he came to be regarded and treated as the typical »insider« by all who knew him. He even adopted an academically arrogant and an »Oxford-centred view of the world«, which is the trademark of many Oxford academics (p. 160). Yet, the early experiences of alienation continued to haunt him and despite his unparalleled success as a legal philosopher, he continued to feel as an »outsider« in Oxford. He was constantly tormented by doubts about his academic potential, the quality of his work, his ability

2 In Britain, »public school« means private school.

to manage his high-profile job and his capacity to form close relationships. As if these were not enough, Hart struggled with his sexual identity describing himself in a letter to one of his friends as a »suppressed homosexual« (p. 61).

Hart became an intensely private man and consciously kept his intimate thoughts and feelings secret. This obviously raises ethical questions which Lacey addresses under the section on methodology at the outset. Do we have the right to bring into light aspects of Hart's life which he kept out of the limelight? Lacey's reply is that she received Hart's private papers from his wife Jenifer and none of Hart's family members had any reservation about the use she, subsequently, put these documents to. This does not prove that Hart would have approved of the use of his private papers in this way, but goes some way towards defending Lacey's biography.

The other somewhat related question is why we need to know about Hart's private life, inner thoughts and desires. What new insight can we gain from knowing, for example, that Hart was a suppressed homosexual? Does such an insight help us to understand the origins and intentions of his work better? The answer to this question is yes. Hart's achievements need to be placed and analysed in their right social, political, cultural but also personal (i.e. psychological) context of his life, if we are to form a deeper understanding of them. These new insights can help us to understand the background to Hart's writings on abortion, on the legalization of homosexuality and prostitution, and on capital punishment, all of which left their marks on the policy debates of the 1960s.

Hart's inner thoughts could, for example, explain his uncomfortable relationships with the legal profession. Although he started his career as a successful barrister and was soon regarded by his peers as a gifted lawyer, he decided not to return to the Bar after World War II. It was in parts because legal practice did not satisfy his intellectual needs – he saw himself as a philosopher – but also because he felt ambivalent towards his chosen vocation. He was uncomfortable about »working for wealthy clients, the merits of whose claims did not command the conviction of his 'inside' feelings« (p. 48). This reveals Hart's critical understanding of the law and experience of legal practice.

His ambivalent attitude towards law and his »contempt for orthodox academic lawyers« (p. 213) influenced his relationship with the members of the Law Faculty later when he was appointed the chair of jurisprudence in Oxford. In a letter to Isaiah Berlin he writes that he is trying to adjust himself with »the strange atmosphere of the Law Faculty« with its many cocktail- or tea-parties »at which Danish judges of zero interest are feted«. Then he goes on to say:

Of course what is odd about the whole faculty (there are 4-5 exceptions) is that they regard themselves as a pack of failed barristers and a weak version of the Real Thing in London. It's as if the philosophers regarded themselves as merely propaedeutic to the Civil Service and the Stock Exchange. Hence the odious veneration and bootlicking attitude to the judges. So I think what they most need is self-respect. Shall I give it to them? You must hold a class with me one day (Hegel?) and so help. (p.157).

Hart objected strongly to the »bootlicking« culture which pervaded the Law Faculty and regarded it as anti-intellectual. As a re-

sult of his objection to the professional culture of the Law Faculty, he sought little contact with most of his colleagues. He was, in fact, not concerned with what lawyers thought of his work and instead regarded »the judgement of his philosophical peers as the true measure of his achievement« (p. 214). After the publication of *Causation in Law*,³ which had been reviewed favourably by philosophers, he writes to a friend that he was not concerned by the fact that its reception among lawyers had been poor and agrees with his friend that »the lawyers won't understand the analytical part until they are shown by someone who does« (p. 214).

Lawyers such as Hart, who are uncomfortable with how legal academics define and present themselves and question the taken-for-granted values of the legal profession, often, but evidently not always, seek refuge in sociology and socio-legal research. But this was not the case with Hart. Hart was in many ways an open-minded scholar, but there were limits to his theoretical openness. For one thing, he strongly believed that »philosophy, and not history or the social sciences, was the foundational intellectual resource for legal theory« (p. 162). Lacey writes:

From the outset and throughout his life Herbert not only believed that analytical jurisprudence was an autonomous intellectual terrain of distinctive importance to lawyers, but also thought that Oxford was best advised to build on its relevant intellectual strengths and traditions. These were primarily philosophical, and – to the consternation of

his American counterparts – he admitted to being afflicted by the »Oxford disease« of 'an excessive distrust' of sociology. (p. 162)

Lacey tells us, however, that Hart's annotations in the margins of a volume of *Max Weber on Law in Economy and Society*, tell a different story.

On one occasion John Finnis consulted one of Herbert's volumes of Max Weber and found it heavily annotated... Finnis later asked him on two separate occasions about Weber's influence on his account of 'internal aspects of rules'. Herbert denied that any such influence existed ascribing the origins of the idea instead to Peter Winch's *The Idea of a Social Science*. Finnis felt unable to respond to his denial by saying that he has seen the counter-evidence in his copy. (p. 230)

The copy in question is now kept at the Library of Hebrew University in Jerusalem and, according to Lacey, »suggests strongly that there was a Weberian undertone in the concept of law« (ibid.). But Hart, notwithstanding (or perhaps because of) his inner insecurities was unable to admit his indebtedness to Weber.

In many occasions, Hart made it clear that he was not keen on sociology and had little time for The sociology of law of his time, which in the Englishspeaking world was heavily influenced by Roscoe Pound. Hart met Pound during his visit to Harvard (1956-7) and said to have liked the man and had »friendly conversations with him«. Yet, he thought that Pound had little to offer which could be of any intellectual value to him (p. 187). As it regards Pound's work, Hart thought that it was written in an unnecessarily lengthy style with »inexcusable analytical imprecision« (p.181).

3 Hart, H.L.A. and A. M. Honoré, *Causation in the Law* (Oxford, Clarendon Press, 1959).

Paradoxically, Hart claims in the preface to *The Concept of Law*⁴ that his work, which is in essence a contribution to analytical jurisprudence, »may also be regarded as an essay in descriptive socio-logy«. One might, indeed, interpret his reference to *descriptive sociology* as a way of emphasising that the most basic legal rules, i.e. the rules of recognition, are *social* rules. However, Hart knew only too well that a mere recognition of the social roots of the authority of law hardly amounted to adopting a sociological approach. In addition, in *The Concept of Law*, Hart ultimately analyses law as a body of doctrine rather than as institutional and social practices (pp. 217-8). So why does Hart, who would otherwise not as much as admit the influence of Weber on his work, make such a claim? Was this Hart's way of pointing out (perhaps to the followers of Roscoe Pound) that *this* was the sort of sociology legal analysis needed?

A more important issue concerns Hart's preference for Austin's rather than Wittgenstein's philosophy of language. In *Causation in Law*, which he co-authored with Tony Honoré, he argued against »causal minimalism« and explored the judicial language to discover the basic principles of causation in law. He showed that the scientific concept of »cause« was of no use to lawyers and that causation was about »causation talk« in particular contexts. Hart and Honoré identified the »context« and the different contextual factors which often interact with each other, as decisive for how causal language is used and causal concepts

developed within law. However, they stopped short of explaining the distinctive properties of the *legal* context, and simply pointed out that, in contrast with science, legal context dealt with »particulars« (p. 216). Lacey wonders how greater a contribution to jurisprudence Hart could have made, had he and Honoré abandoned their Austinian approach in favour of the Wittgensteinian concept of context, which includes a whole range of variables from individual mind to social institutions and social practices. Why did Hart not opt for a Wittgensteinian approach? Lacey suggests that it was probably Hart's loyalty to Austin, who was the professor of philosophy in Oxford and a friend of Hart, and perhaps his »desire to please him«. In addition, Hart found Wittgenstein's work scandalously obscure« (p. 218). However, as Lacey points out, there might be a more personal and intellectual reason for Hart's neglect of Wittgenstein:

It is that when fully pursued the Wittgensteinian message – as Wittgenstein himself saw – undermines the pretensions of philosophy as the 'master discipline' which illuminates our access to knowledge about the world. For once the notion of 'context' is broadened out, the inexorable conclusion is that the illumination of legal practices lies not merely in an analysis of doctrinal language but in a historical and social study of the institutions and power relations within which that usage takes place. A full acceptance of Wittgenstein, in other words, would have threatened Herbert's idea of Herbert as a philosopher. (p. 219)

What Lacey demonstrates here is that an appreciation of the socio-historical forces which shaped the context of Hart's life, combined with an understanding of Hart as a person, can help us to gain a deeper un-

4 Hart, H.L.A., *The Concept of Law* (Oxford, Oxford University Press, 1961, reprint 1994).

derstanding of Hart's work. In this way, her biography brings legal philosophy and theory down to earth and provides a backdrop against which to re-read and re-interpret Hart's work. Lacey's meticulously research-

ed and eloquently presented biography of Hart is an important scholarly work of the highest quality, which will hopefully bring about a greater degree of critical self-assessment and debate within jurisprudence.
