

YOUNG ACADEMICS

European
Legal Theory
1

Cameron Moss

In Defence of the Concept of Law



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Cameron Moss

In Defence of the Concept of Law

With a Foreword by Prof. George Pavlakos

Tectum Verlag

This publication was sponsored by the Frankfurt LLM programme in Legal Theory (Goethe University and European Academy of Legal Theory).

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

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Young Academics: European Legal Theory; Vol. 1

© Tectum – ein Verlag in der Nomos Verlagsgesellschaft, Baden-Baden 2024
ISBN 978-3-68900-214-5
ePDF 978-3-68900-215-2
ISSN 2944-3962

DOI: <https://doi.org/10.5771/9783689002152>

1st Edition 2024
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Onlineversion
Tectum eLibrary

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden



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Foreword

I am delighted to introduce the first volume of the Series *Young Academics: European Legal Theory*. This new series aims to fill a concrete but upsetting gap: at a time when research integrity, inclusion, and diversity are all the rage it was alarming to experience the lack of a publishing outlet for the work of young and early career scholars in the field of legal theory and philosophy. We are all in the debt of the European Academy of Legal Theory and Tectum Verlag for the pioneering initiative to source and publish the best graduate work of the Academy's Master programme in legal theory, around which an international community of scholars has formed over the past three decades initially in Brussels and later at the Goethe University in Frankfurt on the Main. Knowing how much I have benefited from the study of graduate work, untainted by the inevitable blinders of professionalised writing, I am confident that the Series will inspire future generations of graduate students and mature researchers alike.

Cameron Moss's monograph *In Defence of the Concept of Law* displays all the qualities aspired to by the Series. It is a rigorous and inspiring defence of the philosophical foundations of HLA Hart's theory of law, against some of the most serious criticisms that have been raised over the past 50 years or so. Mr Moss's choice of critical texts and authors is not random or driven by stardom but guided by a well-thought research design aiming to offer a fresh reading of important but neglected aspects in the account Hart developed in the *Concept of Law*. His exemplary writing and command of philosophical English makes the book a pleasure to read. Notably the clarity of his writing succeeds to make accessible the complex recent debates in analytical legal philosophy while demonstrating their philosophical significance

and drawing methodological lessons with considerable potential for guiding empirically oriented research in legal systems and institutions.

First comes Dworkin's critique based on his rejection of the possibility of second-order theorising about the law and the need to engage in evaluative interpretation of the law (Interpretivism). Although many others have defended Hart against these points Mr Moss applies a novel approach that places the emphasis on neglected aspects of Hart's theory: Hart's focus on legal systems allows us, pace Moss, to undercut the problems of theoretical disagreement which Dworkin alleges saddle the positivist account of Hart. Inviting us to understand disagreement about the law as uncertainty rather than indeterminacy, Moss shows that the Rule of Recognition – that lies at the centrepiece of Hart's account – can successfully operate as a general structure that governs a method for resolving uncertainties in the law. In addition, the prominent role assigned to legal systems shows that Dworkin's analysis has much weaker application in contexts and traditions outside U.S. law (e.g. civil law systems), a familiar point to some extent which however had not yet been stated as a direct result of the significance Hart places on legal systems. Turning next to Mark Greenberg's powerful critique of Hart, Moss suggests compellingly that Hart's account has resources to meet the demands of metaphysical explanation – posed by Greenberg's enquiry – by referring, again, to the structure of the legal system as organised by the Rule of Recognition. The argument here covers a lot of ground in showing that the Rule of Recognition specifies a mapping that makes it intelligible how the facts of a legal practice make the law. Finally, Hillary Nye's objections to conceptual analysis, as a building block of Hart's method, are decisively questioned by Moss in the last part of the paper, which proceeds to show that the epistemic gap between definitions of *law* and its nature can be bridged when the framework of the enquiry is appropriately adjusted (e.g., by shifting from *analytic* to *real* definition).

Throughout his discussion Cameron Moss proves his philosophical astuteness demonstrating deep familiarity with jurisprudential methods and competence in general philosophical argument and method. While

the essay is capably focussed on well-defined questions within jurisprudence, their treatment and the conclusions drawn benefit from a profound understanding of the wider philosophical issues and questions that underpin the bigger picture within which jurisprudence operates. This is a rare ability enviable even among more advanced scholars and academics in the field.

Finally, an added value of the piece is the close reading of the primary and secondary literature in which the author engages, such that allows him to shed new light on the interpretation of classical texts by Dworkin, Hart and Raz, but also utilise in a new key neglected ideas and arguments from the work of Hart. Not to put too fine a point on it, Cameron Moss has managed to convince me through this research that there are enough new materials for a revival of Hart's significance beyond the standard 'disciplinary quarrels' of analytical jurisprudence.

In a nutshell, the book has set a new standard for graduate work and will repay careful study by early career and advanced researchers alike.

Glasgow, 2 October 2024

George Pavlakos

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Preface

I am incredibly happy that my master's thesis was selected to be part of this series, not just to represent young academics but also to represent European legal theory. It is a great privilege to be able to say that one has contributed to such a long and varied tradition, with its roots dating as far back as Socrates, and the Sophists before him. While my thesis is concerned with defending HLA Hart's work and addressing contemporary challenges to it, I think many readers will be surprised and interested to find that some of the ways I do this involve ancient arguments with ancient roots. This is the case for much of my challenge to Dworkin's interpretivism. Where I rely on a significant charge of *peritrope* against his account, which Socratic philosophers used to dispute Protagoras' view that 'man is the measure of all things'. The same idea of *peritrope* runs through much of Descartes' work that I later mention when addressing some of the epistemic scepticism at play in Hilary Nye's work. I think sometimes we are prone to forgetting some of the great accomplishments of the old philosophers and legal theorists. I also think that occasionally legal theory loses sight of the bigger picture, and analytic principles, when faced with new challenges.

That is why I decided to address these challenges to Hart's theory. As time has gone past it seems that part of the objective of modern analytic legal theory became to find new ways to elucidate flaws in Hart's work, as a kind of rite of passage. Or to find ways to say that Hart actually supports some radical new line of theory. I do not believe that Hart's theory or analytic theory in general has been so exhausted so as to leave us in such 'all or nothing' positions these kinds of discussions would tend to. I genuinely think that there is a path forward to expand analytic theory, and it comes from the general and descriptive

framework elucidated by Hart. I know many will disagree with my view, and that is the best thing I could hope for. Hart's most ardent critics were his former students Dworkin, Finnis, and Raz. In much the same way Plato criticised Socrates, and Aristotle did Plato. From such disagreement good things have always followed.

I would like to express my thanks to Brian Flanagan at Maynooth University for his support and encouragement when I started my legal theory journey as an inquisitive student in his jurisprudence lectures – though I imagine he has some thoughts about how I have treated Dworkin. I would also like to thank George Pavlakos for supervising this ambitious project and pointing out early infelicities which would have been just a little bit disastrous. I am also very grateful to the European Academy of Legal Theory for making much of this possible.

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