Chapter V – Expanding Analytic Theory

Legal theory post-Hart has gone awry. Not in every way, but in important ways. This essay began by setting out its objective to defend Hart's concept of law as an elucidation of legal systems and not of law *simpliciter*. It was shown in the criticisms of Dworkin and Greenberg against Hart that this point has been deeply misunderstood. Perhaps even more misunderstood however is the way and method in which Hart came to argue about law. This was observed most clearly in Raz's practice theory which completely went against what Hart actually said. Hart outlined in the beginning of *CL* that law is a social phenomenon or socially constructed phenomenon, to this then Hart asked what makes legal rules different to social rules when considering if law is an affair of rules. To these questions Hart worked through them until he settled on the idea that legal rules have an 'official' component to them, thus differentiating legal and social rules even though they are both social. Hart also offers explanation as to how this official aspect of rules can come to be. Even in Hart's inaugural lecture when formulating what it means to say one has a right Hart included the condition 'there is in existence a legal system'.[276] How can Raz fairly categorise Hart's 'practice theory of rules' and leave out the legal system as a criteria along with everything Hart depicted in *CL* which showed how to identify a legal system?

The answer plainly and without exception is that no categorisation of Hart in *CL* can be considered a fair one if it excludes legal systems, since that was the whole point of the book and the majority of Hart's

276 HLA Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford UP 1983) 35.

work in general. Greenberg is one of the only critics of Hart to even question or doubt the practice theory's representation of Hart, which is quite a dire situation because even others who have tried to defend Hart's project have often conceded this point. In general this situation stems from a lack of attention to Hart's work about definitions in legal theory, which is how Hart came to argue that law comes from legal systems. This points to another flaw in the practice theory, and of Greenberg and Dworkin's critique of Hart, which is that definition does not directly provide reasons for action.

Definitions can be a reason for acting indirectly if a person acts based on the information provided by a definition but notice nothing specific is outlined about the permissible ways one can act based on the information, this is left open. This allows for the division of first-order and second-order discussions about law, whereby there is no *necessary* correlation between the discussions of each order.[277] Dworkin, Raz, Greenberg and others seem to focus much of their efforts into inquiring about specific ways that it is permissible to act, in terms of reasons for action. These sorts of inquiries are valid, they can be done, but only in the proper way. The single most important defect of these criticisms in their present form is their lack of attention to the place the legal system has in making practices and arguments 'legal' rather than merely social. Dworkin for instance works from the starting point that judges in courtrooms are legal *ab initio*, rather than asking 'are judges in courtrooms legal?' Similarly, Dworkin acknowledges there is more to the 'legal drama' than just the judiciary but proceeds over many years to criticise Hart's depiction of law as being parochial and not general, arguing that it takes sides in disputes and such. These arguments are much removed from a search for a definition but Hart still took the time to note the flaws of this line of thought, though admittedly not always with the same clarity as *CL*.

Even in the simple legal system where what 'Rex I says is law', one can observe that Dworkin's interpretivism does not apply. For one

277 Though there is necessarily *some* connection between them.

thing in this legal system there are no judges, only the king's court and so it seems ruled out by Dworkin in *LE* and later work by saying the argument is restricted to being about judges. Even if one moves past this restriction and decides to apply interpretivism anyway it is clear that it cannot succeed. For Rex I could say 'take only as law what I say in exact and literal terms, where there is doubt as to my meaning return and seek clarity', here there is no room for any sort of interpretation. An attempt to do so and not return to Rex I and ask for clarity would be a violation of the law. This point was elucidated in relation to the various interpretation acts passed in common law jurisdictions.

Greenberg's analysis likewise suffers the same sort of problem by excluding legal systems from consideration. Greenberg would likely respond that his restriction on legal systems included ones in which legal practices did not determine the content of the law, in which case this Rex I example would be excluded. It might be rightly asked then in what jurisdictions can the argument actually apply, what is its utility? In chapter III it was argued that Greenberg's argument does not even apply in America, which is where one of his only examples is given. Why not say that what makes a model the 'correct model' for legal practices making legal content the way it is, is the already accepted rules of the legal system? For instance, those rules accepted which make the federal courts operate by rules of the common law, e.g. *stare decisis*. Such rules entertain certain possibilities of making legal content the way it is and deny others, in this connection why not suppose these rules to form an argumentative framework like Sartor suggests? If this is accepted not only would examining legal content potentially benefit from techniques of formal logic for these legal systems, but it provides for a more straightforward assessment of 'what makes the legal content the way it is'. It is mystifying to speak of 'models' which explain what makes the legal content the way it is when such explanations already stand to provide clear insights, and without making the analysis more difficult by adding in questions about what is right and wrong in terms of reasons for action.

This environment created by misunderstanding Hart as proposing a theory of reasons for action led to a situation where Nye's challenge questioned the foundations of legal theory. An important point in this challenge was that in order for the Romans to do conceptual analysis they would need to know about future institutions which did not exist. While constructing this point Nye was trying to fit self-understanding within the argument, it still nonetheless questions how general legal theory is possible. All of this has been considered by Hart particularly in his early work on definitions, the *CL* was a major breakthrough that followed this work in that by saying that all laws come from legal systems one could define the necessary conditions needed to say a legal system exists and thus laws. Additionally by saying that laws come from legal systems Hart managed to avoid the problems outlined by Austin in saying anything called "law" is the explanandum of legal theory but also allowed that law may have any content as Kelsen argued.[278] Certainly one cannot give fair scope to this feature of law if the inquiry is taken only from the point of view of practices, this is far too narrow and it does not well allow for capturing the differences between power-conferring and duty-imposing rules – since the existence of a practice is likely due to a power-conferring rule of some sort. By leaving the content of law open-ended and focusing on whether the rules come from a legal system one can construct a general theory of law.

With this in mind it is definitely possible to do general legal theory, though one should not view the process as a 'one and done' attempt. Rather continual progress is made in order to better understand different aspects of the nature of law. Asking questions like 'what provides access to the nature of a thing?' or 'how does one know if they know the nature of a thing?' while interesting in some respects are not generally the sort of propositions that legal theory has proceeded upon. The epistemic background at play in Hart at least is one of empiricism with awareness of modern developments in philosophy of language. What is at play in Raz is a rather different question, one which Nye

278 On Kelsen, Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) 161.

is rightly pointing out, for it seems Raz's arguments imply some of these unorthodox questions that Nye posits. Thus, it would not be fair to say that Raz's account of what it means to do legal philosophy should be taken as a representative of legal positivism in general – the Razian school of thought is much different in its methodology to other forms of legal positivism.[279] Likewise Nye's challenge does not have the wholesale scope that it implies.

Some may argue that a return to discussions of structures and institutions is undesirable since the idea is that legal theory may move beyond these recurring debates onto new material. This would be misplaced. There is much work that still needs to be done in order to advance analytic theory into other areas of legal theory. Hart later said that he should have described *CL* as 'providing the tools for descriptive sociology' rather than 'as an essay in descriptive sociology'.[280] Hart thus envisioned that analytic theory would be used to facilitate other areas of legal theory, like legal sociology, but this has not played out as Hart anticipated. Instead after *CL* there was 'a dramatic shift to investigating problems of value – things like justice, liberty, etc.'[281] There remains a crying need for analytic theory in these other areas.

Sociology is a pertinent example where legal pluralists have for a while argued that mainstream analytic theories are inadequate for use in sociology of law.[282] This has progressed to the point where legal pluralists have begun to propose their own conceptions of law, which would be fine but it has led to proposals like that of Tamanaha,

279 Hart once echoed a similar point, HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) 153.

280 David Sugerman and HLA Hart, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32(2) J of L and Society 267, 291.

281 Leslie Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) liv.

282 For instance, John Griffiths, 'What is Legal Pluralism?' (1986) 24 J of L Pluralism and Unofficial L 1; Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) L and Society Rev 869; Jorge L Fabra-Zamora, 'The Conceptual Problems Arising from Legal Pluralism' (2022) 37(1) Canadian J of L and Society 155. My view of how analytic theory can engage with legal pluralism and how Hart's theory can contribute is set out here, Cameron Moss, 'The Embryology of Legal Systems & Legal Pluralism' (2024) 4 Plassey LR 75.

who recently published a book which proposed that 'law is whatever people collectively view as law within social communities'.[283] But this would admit that any further investigation may have to consider "laws" that are not social in nature, precisely as Austin warned against.[284] A similar conclusion was reached by another author writing about comparative legal history, holding that 'legal history may modify or even metamorphosise into another tradition when its premise – a set of assumptions about law – changes.'[285] The problem of what is 'law' has also arisen in comparative law, creating methodological problems and difficulties in constructing comparative law as its own discipline.[286] An analytical focus on these problems in legal theory is long overdue. But notice that no talk of 'law as interpretation' or of the 'correct model' explaining what makes the legal content the way it is will be of any use in providing answers to these disciplines of legal theory as to what they should isolate as part of their phenomena of study. Likewise, Raz's views on self-understanding appear only tenuously relevant for these other disciplines, if at all.

Hart's theory however has the potential to aid in outlining how to address these issues. For legal sociology and history the questions that need to be asked are along the lines of 'does this society have primary and secondary rules?' For comparative law the 'legal' aspect can be supplied by asking 'is this rule one that comes from the legal system?' or if the comparable rule under investigation appears to be social ask 'is there an interplay between this social rule and the legal regime?' It

283 Brian Z Tamanaha, *Legal Pluralism Explained: History, Theory and Consequences* (Oxford UP 2021) 175.

284 This concern is shared, Cormac Mac Amhlaigh, 'Book Review: *Legal Pluralism Explained: History, Theory, Consequences*' (2022) 49 J of L and Society 430, 433.

285 Adolfo Giuliani, 'What is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in Olivier Moréteau, Aniceto Mansferrer and Kjell A Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 76.

286 For instance, Catherine Valcke, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52(3) The American Journal of Comparative Law 713, 713–720; Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 165–178.

is not strange to suppose that a legislature might legislate around social customs it does not wish to intrude on or have time to debate. Thus there would be legal relevance in the social background of the regimes under comparison. Further than this Hart fashioned the internal and external point of view for use *inter alia* in these sorts of inquiries, moving past the objection that talking about the laws of a jurisdiction was to take part in them and the resulting theoretical difficulties this would cause.

A further rejoinder to this objection is the legal historical aspect to legal theory, for it is patently absurd to say that a documentation or discussion of the laws of ancient Egypt, Greece, or China means that one is engaging in the legal systems of long extinct regimes. Bearing these other areas of legal theory in mind it seems that the 'the reasoned choice between theories of law' will naturally be towards whichever theory aids in explaining the conundrums and theoretical difficulties of non-analytic areas of legal theory since it furthers theoretical inquiry overall. Inquiries into values such as morality and the like are of course included in this wider purview of legal theory, but in recent times it has overshadowed other areas and often remained ignorant of them. Those who disagree are challenged to show that their inquiries help rather than obscure these non-analytic areas of legal theory. For now at least Hart's theory is clearly the reasoned choice over rival theories to begin examining the nature of law in respect of non-analytic areas of legal theory, perhaps in time these areas may develop an analytic framework.