

# The Phenomenon of Law<sup>1</sup>

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It is ungenerous to pick holes in *The Concept of Law*. It is a great work. Its clarity is luminous, and its argument sustained and convincing. Hart is eminently successful in rescuing the concept of law from the Legal Realists, the Positivists, and the Formalists, who attempt to straitjacket it within schemata which are too narrow or too vague to give an adequate elucidation of it. But sometimes Hart is not carried along by his arguments as far as he should. He makes too many concessions to his opponents, and his own account of the law is, in consequence, too formalist, in spite of having himself adduced cogent considerations elsewhere for rejecting the purely formalist line of argument. The rule of recognition, although important, is not fundamental. We should, rather, see law as a social phenomenon, to be distinguished from other social phenomena, but intelligible only in a social context, and not—as lawyers are too ready to suppose—an autonomous discipline which can be explained and understood entirely in its own terms.

Hart elucidates law in terms of rules. He argues, quite convincingly, against the positivist programme of taking an entirely external attitude to the law. It cannot be explained either in terms of mere *habits* of obedience or as a purely predictive enterprise. It is, rather, a rule-governed activity. Almost all officials, and indeed most other citizens, are primarily concerned with the internal aspect of rules, regarding them as guides for action, and using them as the basis for their own justifications and criticisms. Hart is quite right to stress the internal aspect of the law, but the word 'rule' suffers from an unfortunate ambiguity. It may mean a rule explicitly formulated in words, or it

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<sup>1</sup> I have benefited greatly in writing this from discussions with Professor R. S. Summers of Cornell University, and from a class given in Lincoln College many years ago by A. W. B. Simpson and the late H. H. Cox.

may mean a rule implicitly revealed in action. In Chapter VII Hart shows how much of contemporary jurisprudence has arisen from the desire of legal philosophers to operate with one consistent concept of rule, and argues that the two concepts of rule are complementary, and therefore both necessary. But elsewhere he tends to assume that rules are explicitly formulated rules, whereas what his argument against the positivists has established is that people in behaving lawfully have a *reason* for so acting, whether or not they can cite a formulated rule—they are acting *μετά λόγου*, as Aristotle would have said, and not necessarily *κατά τὸν ὀρθὸν λόγον*.<sup>2</sup> This has an important bearing on the need for legislation and the separation of law and morals. If law is rule-governed behaviour in the sense of being in accordance with explicitly formulated rules, then the role of that body which formulates the rules becomes central to our concept of law, and there is no incoherence in supposing rules being promulgated that run counter to every tenet of morality. If, however, law is a sort—a sort yet to be characterized—of rational response by a man to his social situation, then the simple legal systems which Hart stigmatizes in Chapter VI as being pre-legal will seem much more fully legal in spite of their lack of sophisticated adjuncts, and the interplay between law and morals will become much easier to understand.

Hart lays great emphasis on another distinction among rules. In Chapter V he distinguishes primary from secondary rules, and believes that this distinction furnishes him with 'the key to the science of jurisprudence'. But the distinction is uncharacteristically unclear. It seems to be a conflation of at least three different distinctions. There is a distinction between rules imposing duties and rules conferring powers; there is a distinction between simple legal rules and somewhat more sophisticated meta-rules; and there is the ghost of a positivist distinction between rules concerning actions involving physical movement or changes, and those which lead to the creation of duties or obligations.<sup>3</sup> It is easy to see why Hart has run these three distinctions together. Primary rules thus characterized are the closest analogue he can offer to the gunman situation of Austinian analysis, and, by going along with Austin thus far, he is enabled to point out the more convincingly its defects, and accommodate within his own theory its insights. Nevertheless, it is misleading. Not only are secondary rules awkwardly heterogeneous, but it accommodates

<sup>2</sup> *Nicomachean Ethics*, VI. 13. 5, 1144<sup>b</sup> 26-7.

<sup>3</sup> *The Concept of Law*, p. 79.

one characteristic feature of law, that it is enforced by sanctions, at the cost of distorting other features, equally characteristic, which bring out the resemblances between law and other aspects of social life.

The distinction between operations that lead merely to physical movement or change, and those that lead to the creation of duties or obligations, is a difficult one, and not really very relevant to Hart's purposes. It is important to the positivist, because he believes in the former, while he suspects the latter of being metaphysical; and therefore if primary rules of law concern *pukka* positivist behaviour, they provide a way into legal concepts which the positivist can follow. But Hart is not in this sense a positivist, and should start not from the merely physical but from the social. Laws seldom characterize actions by reference to mere physical movement, but construe them in a social context and often with reference to the agent's intention. Stumbling into you differs from banging into you only in that I didn't mean to: if I swat the horse-fly that is about to feast on your sun-bathing thigh, I have not assaulted you, although I may have hurt you as much as if I had been administering corporal punishment: and physical actions which would be quite illegal if performed by me on you, would be entirely lawful if done by a policeman on a suspected criminal resisting arrest. Or, to take a very different case, my obligation to pay taxes derives from a rule Hart would reckon as primary, since it requires men to do certain actions whether they wish to or not, and yet is characteristically discharged by my signing a cheque, which varies the duties and obligations of my banker. It is a mistake to try to peel off the social or legal characterization of actions from a basic description in behaviouristic terms. Most of our actions are social actions, undertaken for social reasons in a social context, with social consequences and often endowed with a social significance. One very fundamental human action is that of giving. To give is not just to hand over, but to authorize the recipient to retain and use, and if he so chooses to dispose of, what is given, and to extinguish one's own rights to do likewise. Giving cannot be understood except with regard to these rights and powers—else how should we distinguish giving from lending?—and these rights and powers only make sense in a social setting and cannot be explicated in purely physical terms. It may, of course, still be useful in jurisprudence to distinguish actions, such as promising, signing a cheque, or going through a marriage ceremony, whose primary significance is that they are meant to

alter the legal situation, from those, such as eating, hitting, or travelling, which are normally performed for other than social reasons and whose social consequences, if any, are only contingently caused by them and are not part of the significance of the act. But it is not a very fundamental distinction, and will not unlock for us a way into the central features of a legal system.

The distinction between rules which impose duties and rules which confer powers likewise softens under scrutiny. Not that it is a useless distinction—it remains a valuable tool for analytical jurisprudence—but it is neither as fundamental nor as directed as Hart supposes. In spite of the inadequacies he perceives in Austin's analysis, and the ways in which having a legal obligation cannot be reduced to being obliged by the threat of sanctions to act in a particular fashion, Hart tends to assume that having an obligation is more fundamental than having a power, so that rules imposing the former are primary, and those imposing the latter only secondary. But really the rules are correlative. The rules proscribing my driving a self-propelled vehicle on the public highway, unless I and it are licensed, and the rules prescribing the procedure for obtaining a driving and a vehicle licence interlock. I cannot explain the one except with reference to the other. So, too, although less obviously, with Hart's favourite examples of solemnizing a marriage or making a will. The laws prohibiting rape, adultery,<sup>4</sup> seduction, and fornication, are clearly primary rules in Hart's view, but equally clearly presuppose an already intelligible concept of marriage—no man, however attractive, can ever hope to seduce his own wife. Equally, the laws against theft presuppose laws of property, including therefore laws defining the conditions under which property may be disposed of. If after Aunt Agatha's funeral I walk out of her house with her Sèvres dinner service, I am stealing it *unless* she left it me; and whether I had stolen it or not might turn on whether her will leaving it me was valid or not—on whether she had signed it at the top, instead of the bottom (cf. *The Concept of Law*, p. 12) or whether the witnesses have seen her sign it only in a mirror, not being visibly present to her (as in Dorothy Sayers's *Unnatural Death*). These examples are, I shall argue, typical. Every primary rule is correlative with some secondary rules, and vice versa. For rules imposing duties apply only in certain circumstances and subject to some exceptions, and since I have some control of circumstances, I can take steps to put myself beyond the scope of the rule or within the

<sup>4</sup> See H. L. A. Hart, *Law, Liberty, and Morality* (Oxford, 1963), pp. 26-7.

ambit of some exception, and thus possess the power of making it lawful for me to do what I want to do. To take the most favourable case to Hart's thesis, even the rule prohibiting homicide does not apply to soldiers in time of war, persons defending themselves against violent attack, or executioners carrying out judicial sentence of death. Jesebel was able to compass Naboth's death under due form of law. Laws can be manipulated. Even straightforward prohibitions can be read as giving guide-lines on how the desired action may be performed without breaking the law, and thus as conferring powers to restyle the legal position so as to accomplish one's purposes. Of course, in some cases such purposes can be achieved only by devious or dishonest manoeuvres, and the rule is correctly seen as imposing a duty rather than conferring a power, but in other cases the emphasis is reversed. So the distinction is valuable. But just as rules conferring powers would have no point unless somewhere down the line a person could by their aid bring about some alteration in the bearing on someone of some rule imposing a duty, so rules imposing duties create also a web of interlinked rights and powers, which they implicitly confer on various people. Any system, whether of law or of morality or of social custom, which imposes duties will also confer rights and powers, and he cannot reasonably regard the rules imposing the former as more primary than those conferring the latter.

Nevertheless, Hart has a point. Although rules imposing duties are not more basic than those conferring powers, it is, among other things, in the enforcement of duties that a legal system is to be distinguished from a system of morality or a set of social customs. Hart's account is illuminating and persuasive. Legal and moral rules differ from rules of grammar and etiquette in being insistently demanded of us, and differ among themselves in that legal rules are enforced, if need be, by sanctions, even physical sanctions. Although men are invited to regard a legal rule from an internal point of view—and indeed many do so—if a man refused to acknowledge the claims of the law, he will be made to comply none the less, because there are annexed to non-compliance consequences sufficiently disagreeable to make compliance the preferable course. With morals there is an ultimate emphasis on authenticity—no moral merit attaches to the right thing being done for the wrong reasons. But with the law the ultimate emphasis is on conformity—the lawyer would far prefer that a man should discharge his legal duties for the wrong reasons than that

he should not discharge them at all, even though he might regard it as still more preferable that his reasons as well as his actual actions should be the right ones. This distinctive feature of law shows itself directly only with regard to duties. With regard to powers, I can tell only indirectly whether they are legal or moral or social powers, by following out the consequences until some question of duty is in issue. If we fail to have a properly ordained priest to marry us, we run the risk of being punished for adultery if we honeymoon in America, and being made to pay Capital Transfer Tax in Britain when one of us dies. It is therefore a legal rule we have failed to follow. If a man tells me he is leaving me his house in his will, and I undertake to live in it and not to sell it, then he has exercised a legal power in leaving me his house, because in due course the bailiffs will uphold my being in the house rather than anybody else, whereas I have exercised only a moral power in making a promise, because if I subsequently sell the house, the courts will not intervene, although my conduct will be regarded as reprehensible by my friends and at the bar of my own conscience. We need to be careful, as Hart is, not to make the connection between a rule's having the status of law and its being enforced by sanctions too rigid. Sometimes, especially in developed legal systems, there may be duties which cannot be enforced, perhaps for procedural reasons, e.g. a statute of limitations. Where the body of rules is sufficiently organized to constitute a system, it is of the system as a whole, rather than of isolated parts of it, that we ask the question whether it is a legal system or a system of morality or social custom. And a system is a legal system if, should arguments and appeals to self-respect and enlightened self-interest fail, recourse is had to more external and tangible pressures to ensure that its rules imposing duties are generally observed.

Enforceability is a feature that characterizes not only a fully developed legal system but what Hart calls a 'pre-legal' regime. The difference between a pre-legal regime and a fully developed legal system is that the latter possesses a number of meta-rules which the former lacks. These meta-rules do not necessarily impose duties but provide for the authoritative adjudication of disputes, the effective enforcement of sanctions and the deliberate alteration of laws. Hart therefore regards these meta-rules as secondary rules, along with rules conferring powers. But it is evident that pre-legal regimes, even though they lack meta-rules, have rules regulating the solemnization of marriage, which Hart takes as paradigms of secondary rules. The

distinction between rules and meta-rules, although not the same as that between rules imposing duties and rules conferring powers, is nevertheless of great importance to the philosophy of law, and Hart's discussion of the demerits of pre-legal regimes is illuminating and profound. We see why pre-legal regimes need to develop into full-blown legal systems. Hart may be right in regarding a certain degree of sophistication as essential to a regime's being a proper legal system, but a strong case could be put forward the other way for regarding primitive legal systems as genuinely legal, and not merely pre-legal. In either case it is important not to allow the specific differences between the pre-legal regime and the fully developed legal system to obscure their generic similarities. Legal and pre-legal regimes differ in sophistication, but both have the hallmark of enforceability which distinguishes them from systems of morality and social custom, and both share with morality, but not etiquette, a high degree of seriousness. Hart's emphasis is different. He stresses the difference between a fully developed legal system and a pre-legal regime. The important thing, according to him, about a legal system is that it has certain meta-rules, notably a rule of recognition, and that the system as a whole is enforced. The effect of this emphasis is to play down the connection between a fully developed legal system and its roots in a pre-legal regime and other systems of social control, and to make law appear a much more abstract and autonomous discipline than it really is. Marriage is not, as one might suppose from *The Concept of Law*, an institution created by law, nor do wills exist because Henry VIII passed an Act enabling us to make them. Rather, marriage is a social institution, and laws about marriage do not so much constitute the state of matrimony as specify the procedure for getting married and the rights and duties of husband and wife. If the law did not facilitate the making of wills, it would be necessary to invent ways of bequeathing property, as the Romans did in ancient days<sup>5</sup> and Britons have been doing since the imposition of death duties. The social institution or business arrangement comes first, and only later, when there are disputes, does the law have to spell out the respective rights and duties of the various parties. (Indeed, once the law has reached a certain stage of sophistication, and enables people to enter into contracts and create trusts, further legislation is unnecessary. I tell my solicitor what I want, and he devises means to give legal effect to my wishes.) The function of the law is not to initiate forms of life

<sup>5</sup> Sir Henry Maine, *Ancient Law* (Oxford, 1931), Ch. VI, pp. 169-78.

but to obviate and resolve disputes. It does not create institutions, but gives them definition, tidying up the exact conditions under which they obtain and determining various rights and duties arising from them, so that if we fall out, and cannot resolve disagreements amicably, a solution can none the less be obtained. The law provides a skeleton, which needs to be fleshed out by the social arrangements of our everyday life. It is reasonable for professional purposes to abstract this skeleton, and study the law without overmuch concern with its social setting: but for a philosophical understanding of law, we shall misconstrue it if we abstract too much, just as if we were to study anatomy on its own, without reference to the physiology of the bodies in which the bones are built.

Hart is at his unhappiest in his controversy with Professor Fuller over the legal status of wicked edicts enacted by an iniquitous regime.<sup>6</sup> If the defining property of a law is that it should satisfy the rule of recognition of a regime whose laws are generally enforced, then the decrees of the Nazis were valid law, and the only question left is whether it should none the less be disobeyed. But this is to abstract too much and put on the rule of recognition more weight than it can properly bear. It is, after all, only a meta-rule, and, as Hart himself points out,<sup>7</sup> not always fully formulated, and sometimes itself an object of controversy. The rule of recognition need be neither explicit nor clear. It was only very gradually that it changed in England, and shifted sovereignty from the monarch to parliament.<sup>8</sup> It was not clear for centuries what the fundamental law of the land was, but laws were made, applied, and enforced none the less, because for the most part king and parliament were working together rather than in opposition. Legal disputes were much more about the scope or application of laws rather than their validity. The rule of recognition is implicit rather than explicit, and rests upon a number of tacit understandings about the way in which various functionaries will cooperate and will be guided by public interests rather than private purposes. It may be a matter of considerable difficulty to say exactly what the rule of recognition is. It therefore may be not a very usable criterion of validity. Moreover, meta-rules, however useful they may be in remedying the inadequacies of a pre-legal regime, are 'in some

<sup>6</sup> 71 *Harvard Law Review* 593-672 (1958); reprinted in F. A. Olafson, *Society, Law and Morality* (Englewood Cliffs, N.J., 1961), pp. 439-505; see also *The Concept of Law*, pp. 204-7, 254-5.

<sup>7</sup> *The Concept of Law*, pp. 149-50.

<sup>8</sup> J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955).

sense parasitic upon<sup>9</sup> primary rules and cannot stand on their own. Hart makes the point very clear by his analogy with a scorer in a game. We may, for good reasons, have a scorer and may have the meta-rule that his decision is final, but this meta-rule operates, and can operate, only against the background that scoring is something which players by and large can do themselves, and that the scorer is trying to do the same thing as the players are, and on the whole succeeding. Else the game is different, and becomes what Hart illuminatingly describes as the game of 'scorer's discretion'.<sup>10</sup> Exactly similar arguments apply to the rule of recognition. It makes sense only as a development of a pre-legal regime in which most people know most of the time what their legal rights and duties are, and look to the civil authorities only to enforce them if need be and to adjudicate the relatively rare cases of dispute. Provided, but only provided, that the developed legal system satisfies these requirements, its various meta-rules will serve a social function and be generally accepted. But if we divorce the meta-rules from the substantive rules of social intercourse, they no longer fulfil their role and so cease being the rules they were. So long as rulers are trying to do the same thing, in regulating social behaviour, as the ordinary members of society are, and on the whole succeeding, we can make sense of their activity, and see a developed legal system as an improved version of a pre-legal regime. But once the tacit understandings which direct the rulers' activities on lines congruous to the aims of ordinary citizens are dissolved, and the sole requirement for legal validity is that it should conform to the rule of recognition, the game has been changed, and we are no longer faced with a legal system, but a potentially disastrous analogue of scorer's discretion.

'Scorer's discretion' is as much a pathological case of a legal system as breakdown due to unenforceability—indeed more so, for since most laws are mostly obeyed without their having actually to be enforced, they may continue to be obeyed even though no longer backed up by the coercive powers of the state; whereas 'scorer's discretion' has an essentially different view of rules, which no longer can be viewed from an internal aspect at all, but only an external one. But law, although it has its external aspect, in which it differs from morality and social custom, has much more importantly an internal aspect, in which it resembles them. They all give guidance. Most of

<sup>9</sup> *The Concept of Law*, p. 79.

<sup>10</sup> *Ibid.*, p. 139.

us most of the time, once we know what the law is, do not, in the absence of special reasons for doubting its obligatoriness, ask a further question of why we should obey it, but obey it in the same unthinking way as cricketers abide by the rules of cricket. Just as the rules of cricket are shared rules which cricketers all acknowledge and internalize, so the laws of a society are ones which each member shares and can, by and large, act on by himself. This is why medieval men contrasted being governed by law with being governed by will and 'sought liberty by enlarging the number of rules under which they lived'.<sup>11</sup> The long-held belief that law not only is not opposed to freedom, but positively constitutes it, makes sense only if law is regarded primarily from the internal point of view. The law makes me free because it enables me to know of myself what to do, without having to be told by a superior on each particular occasion. It makes me a full member of the community, able to embody communal standards in my own actions and my own approbation of the actions of others. The maxim 'Ignorance of the law is no excuse' makes sense if law is part of the common stock of the community which we all share in and make part of our daily lives, whereas it is manifestly absurd if the law is viewed entirely externally as what the scorer is going to decide. Hence the position of the unofficial scorer is stronger than Hart allows.<sup>12</sup> It is not merely that he is doing in an unofficial and non-authoritative way the same as what the official scorer does, but that it is an essential condition of the intelligibility of the official scorer's activity that he is doing, only in an official and authoritative way, the same as the unofficials are doing, and what they are doing is something which, although for convenience sake made the responsibility of an official scorer, can essentially be done by unofficials at large.

One lesson which Hart draws from his discussion of 'scorer's discretion' is that the scoring rule 'has a core of settled meaning . . . which the scorer is not free to depart from, and which, so far as it goes, constitutes the standard of correct and incorrect scoring . . . The same is true in law.'<sup>13</sup> In particular it is true of pathologically wicked regimes. We can criticize the iniquitous edicts of the Nazis in just the same way as Hart allows that we could criticize a scorer whose aberrations became frequent or who repudiated the scoring rule. Although within a certain game the scorer's rulings are final,

<sup>11</sup> R. W. Southern, *The Making of the Middle Ages* (London, 1953), p. 108.

<sup>12</sup> *The Concept of Law*, p. 140.

<sup>13</sup> *Ibid.*, p. 140.

they are—and are *necessarily*, I would add—not infallible, and if they are often wrong, 'there must come a point when either the players no longer accept [them] or, if they do, the game has changed'.<sup>14</sup> It is a conceptual necessity. It applies to systems of law just as much as to games. And it applies to systems of law whose aberrations are evil just as much as to those which are merely randomly wrong. The rule of recognition cannot override great substantive wrong. It is only a meta-rule, subsidiary to the system of substantive rules, often unformulated and depending on the substantive rules for its real significance. A German under the Nazi regime was in the same position as a cricketer when the umpire starts giving all black men out and awarding sixes to all Australians over six feet tall. It is not any longer cricket. He can either continue to play cricket and take no notice of what the umpire says, or if that is inexpedient—if the umpire is armed—humour the umpire but recognize that what he is doing is not playing cricket, and gives rise to no cricketing obligations, rights, or privileges. So too the German who was not in a position to resist the Nazis might obey them to save his skin, but could not claim that rulings of the Hitler regime had any legal validity, even though Hitler's original appointment to office, like the umpire's, had been legally valid.

Hart does not apply his arguments of Chapter VII to the problems of Chapters VIII and IX. He is very cautious in allowing moral considerations any entry into legal argument, perhaps for fear of a too easy identification of the two. Clarity is served if we maintain the distinction, and allow the conceptual possibility of a law's being morally wrong, and in need of reform or resistance. But although the connection between law and morality is not an analytic one, it is not merely a contingent one either. Hart more or less concedes this in the case of a pre-legal regime, but claims that in a developed legal system it is much easier for the law to be out of line with morality.<sup>15</sup> And so indeed it is. But once we see a developed legal system as a pre-legal system, only in a developed form, we shall be ready to recognize the connection between law and morals, although attenuated with growing sophistication, as stemming from a fundamental common concern. We are concerned about what to do in the various situations of our everyday life. To a large extent we acquire by a form of social osmosis a knowledge of how to behave. From this general know-how some principles can be distilled, and we could justify

<sup>14</sup> *Ibid.*, p. 141. <sup>15</sup> *Ibid.*, pp. 165, 197-8.

either those principles or particular decisions in part by giving the reasons for them and in part by referring to the customs of our society. Thus far law and morals overlap. Both are rule-governed activities, in the wide sense of 'rule' (noted above, pp. 85f.), in which it can be more or less equivalent to 'reason'. Hart instances four features of morality which particular laws need not manifest,<sup>16</sup> but it is worth looking at the distinction from the opposite side, not how morality differs from law, but how law differs from morality. In addition to the fundamental criterion of enforceability, I shall note two others: conventionality and impersonality.

There is great social utility in conventions. Often they are obviously matters indifferent in themselves, but with great importance attaching to everyone's abiding by the same convention, as with the rule of the road. In other cases the convention may not be a *mere* convention, and there may be dispute whether some other convention than that actually observed would not be better; nevertheless, unless and until a new convention is adopted, it is better that we should all be guided by the existing one than that some people should be out of step with everybody else. Even questions of justice are often not fully determinate, and have to be decided in the context of the reasonable expectations of each party, which themselves depend on previous decisions arrived at in comparable cases. Hence the rule of precedence, and hence also the considerable element of artificiality in case law. The law rapidly becomes very complicated, in which the layman is lost, and the expertise of the lawyers can diverge a long way from the deliverances of morality.

Although the law becomes very complicated in one way, it remains coarse-grained in another. Justice is, in an important sense, no respecter of persons. It treats like cases alike, not like persons. There are many morally relevant features, particularly those concerning purity of motive, which the law cannot take cognizance of. The bad man has his rights as well as the good, and often will be able to manipulate the law to serve his own fell purposes. As a legal system develops, therefore, it comes to contain many rules for which no convincing rational justification can be offered, and will often yield results repugnant to our moral sense. These are rationally opaque, but nevertheless enforced by the powers-that-be. And in some cases we may well want to say, with Hart,<sup>17</sup> 'This is law; but it is too iniquit-

<sup>16</sup> *The Concept of Law*, pp. 169-76.

<sup>17</sup> *Ibid.*, p. 203.

ous to be obeyed.' But such cases, although too common, are relatively rare. For the most part the law, as it is popularly understood, either is a specification of morality or at least congruous with it, and the legal system as a whole can, therefore, 'carry' the cases which seem to be morally wrong. Where they occur, they are felt to be a blot, not merely a moral blot, but a legal blot, on the legal system. For many centuries the Court of Equity sought to remedy legal iniquity, and judges avoid reaching unconscionable decisions not simply because they are nice men or because, as in Switzerland,<sup>18</sup> they are directed to do so by statute, but because the law, they believe, ought to be congruous with morality, and would be legally less good law if it were not.

In writing *The Concept of Law*, Hart set out to rehabilitate the concept in the aftermath of positivism. He succeeded brilliantly. The tough-minded sceptic is forced to recognize problems he cannot dismiss, and cannot solve so long as he takes up an exclusively external point of view. He has to recognize the internal aspect of the law, if he is to understand how it functions, at least so far as officials are concerned. And the tough-minded sceptic is the readier to be led by Hart to this recognition in as much as Hart is evidently sympathetic to the aims of the Austinian analysis, and anxious to go along with it so far as possible. His criticisms are telling, because they are reluctant. In the end the sceptic is forced to concede that laws must be construed as rules of conduct, and that jurisprudence must be, as Vinogradoff terms it,<sup>19</sup> a moral science, to be understood and reasoned about from the inside. This point once adequately established, Hart goes on to elucidate many of the difficulties which have hitherto beset philosophers who have sought to expound the nature of law. But he draws back from giving full weight to the internal aspect of law, and is led, largely owing to the confused distinction between primary and secondary rules, to place too much emphasis on a rule of recognition too formally construed, and to deny the conceptual connections between law on the one hand and morality and social custom on the other. The distinction between rules imposing duties and rules conferring powers is not one between primary and secondary rules properly so called, but is one that throws enforceability into focus as the characteristic feature of a legal, as opposed to a moral or social, system. The distinction between rules and meta-rules is a distinction

<sup>18</sup> § 1 of Civil Code of 1907.

<sup>19</sup> P. Vinogradoff, *Common Sense in Law* (Oxford, 1946), p. 13.

between what is primary and what is secondary. It serves to characterize what Hart counts as a legal, in contrast to a pre-legal, system, but implies that the centre of gravity of a legal system is not in its meta-rules, but in the primary rules of the pre-legal system and the social *mores* it embodies. If we concentrate too much on formal meta-rules, we shall abstract too much. If we concern ourselves only with formal criteria of legal validity, we shall fail to see that these arise out of the law's fulfilling a social function, and presuppose that the substantive law is in line with social customs and moral principles. Moreover, even if we wanted to, we could not give an entirely formal definition of law, for whereas rules imposing duties and rules conferring powers may be explicitly formulated in words, and usually become more fully formulated with the passage of time and the growing sophistication of a legal system, meta-rules, and especially the rule of recognition, are not, and cannot be, fully formulated, but must always be at least in part implicit in a diffused recognition of what is rationally acceptable. They thus cannot provide completely adequate criteria of legal validity, since the crucial question—whether the meta-rules are operated in such a way as to produce results that are by and large rationally acceptable—is one that no formal decision-procedure can always settle. The concept of law, therefore, cannot be given too tidy a definition. It can be elucidated, but only as a social phenomenon that arises when men, who are rational but not very rational, and moral but not very moral, live their lives together.