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Hart and the Oxford Jurisprudence Circle

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Hart and the Oxford Jurisprudence Circle

Rediscovering the Lost Legacy of Customary Law

PhD thesis

to obtain the joint degree of PhD at the
University of Groningen and the University of Antwerp

on the authority of the
Rector Magnificus of the University of Groningen
Prof. C. Wijmenga,
and of the Rector of the University of Antwerp
Prof. H. Van Goethem,

and in accordance with
the decision by the College of Deans of the University of Groningen.

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Preface

‘Philosophy involves a great deal of articulation of what is initially inarticulate. [...] Successful articulation frequently requires – though it never simply reduces to – recovering previous articulations which have been lost.’¹

The truth of this statement dawned upon me after having completed the *Odyssey*, the journal of which lies before you and which I undertook with the aim of developing new insights, maybe even a new, more intricate understanding of the workings of International Law. The journey began when I looked for inspiration, on theoretical aspects of international law, within the works of those considered to be the pioneers of general jurisprudence, theory, and, more specifically, positivism. In this respect, just two notably stand out: Hans Kelsen and H.L.A. Hart. While Kelsen’s approach to international law revealed many interesting insights, it is Hart’s approach which captivated me by its intricate simplicity.

At the outset I will say that I found within Hart’s words a workable, analytic framework which has much to contribute to international legal scholarship, and jurisprudence in general. I will admit that Hart’s chapter on International Law seemed to provide the most suitable starting point for my enquiry. Nevertheless, choosing Hart’s work turned out to be a greater challenge than I could have anticipated. While I understood Hart’s work on international law to encompass a fruitful position, most international theorists seem to begin from the *assumption* that there is something wrong with it. Further, those who actually argue against it, yield contradictory and perplexing results; completely contrary to the impression which I initially received when reading it.

The more I pulled on this thread, the more it unravelled and it turned out that this controversy is of a paramount nature, not only for international legal theory, but for general Hartian scholarship as well. Indeed, it seemed that so many inarticulate premises and assumptions haunted the reception and interpretation of Hart’s work, that I first had to address them. While engaging with them, I discovered that an important part of the intellectual history and context in which Hart’s writings originated was systematically neglected, ignored or simply deemed irrelevant. Indeed, many previous articulations had been lost! Articulations which are of vital importance, not only for an understanding of international law, but of law as such. The rediscovery of these lost traces ultimately became the theme of this book.

As such, while the present work was always meant to be a work about international law, and while it has a lot to give international legal theory/jurisprudence, the sole focus of the study became the clarification of Hart’s view on the legality and structure of (international) law. From this perspective, it would be correct to say that this is a thesis about H.L.A. Hart and his legacy; or *better yet* it is a thesis about the legacy that H.L.A. Hart belongs to. Let us, though, take things one step at a time, and explain properly the trajectory through which the study has developed. And, most importantly, how one matter led to another, and to another; while the answer turned out to lie in a matter one might not have thought relevant to begin with.

Further, precisely because the aim of this thesis is to clarify Hart’s work by re-reading it through the prism of a forgotten history of ideas that the reader might not be familiar with, reclaiming this history is an inescapable task. For this reason, the work is filled with direct quotations from works that defined English jurisprudence between the time of Austin and Hart. Moreover, and in order to make the eventual relations between these various jurisprudential works more apparent, within the quotations: a) attention is drawn to certain concepts, words and phrases by using bold letters; and b) certain sentences are highlighted by underlining them. Any italics within the quotes belong to the original text.

¹ C Taylor, ‘Philosophy and its History’ in R Rorty *et al* (eds), *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge, Cambridge University Press, 1984) 18.