

Hart's Concept of Law: Positivist Legal Theory or Sociology?

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This paper will consider the extent to which HLA Hart can be said to have turned the positivist tradition of legal thought from positivism to a sociology of law. Hart's claim to be engaging in 'descriptive sociology' is first considered, followed by the submission that Hart's gesture towards natural law is distinctly sociological. The significance of the 'critical reflective attitude' is then discussed and, finally, the sociology of secondary rules will be examined. This paper will conclude that, while Hart infused his theory with sociology in an attempt to circumvent what he saw as the restrictive nature of Austinian formalism, he remained true to the core tenets of positivism, and, ultimately, expounded a positivist theory, not a sociology, of law.

Locating or formulating definitions of the concepts discussed herein, such as 'positivism' or 'sociology of law', is difficult. For example, "legal positivism... has been variously evolved and... shows signs of excessive pluralism and theoretical fragmentation... so much so that nothing we can say about [it] can be agreed to by all positivists."¹ Yet such definitions are necessary in order to place Hart's theory on the theoretical spectrum. Given that this paper is concerned with these concepts at a general level, determining where Hart's theory lies in the broadest sense, general definitions will suffice.

Cotterrell offers such a definition.² He suggests a distinction between normative and empirical theories of law, corresponding to jurisprudential theories and sociologies of law respectively. The former is a "theory which seeks to explain the character of law solely in the terms of legal doctrine [and other legal concepts]";³ the latter "seeks to explain the character of law in terms of historical and social conditions and treats... law as... explicable in terms of their social origins and effects."⁴

Raz's definition of positivism is helpful as it seeks to identify the essence of traditional positivist theories, rather than a specific definition.⁵ Raz notes that "[three] major theses have been traditionally associated with legal positivism": the reductive semantic thesis, which "proposes a reductive analysis of legal statements according to which they are non-normative, descriptive

¹ Letsas, 'H.L.A Hart's Conception of Law' [2000] UCL Jurisprudence Review 187-194, 187.

² Cotterrell, 'The Sociological Concept of Law' (1983) 10 J of L & Society 241-255, 241. However, note Moore, 'Description and Analysis in the Concept of Law: a Response to Stephen Perry' (2002) 8 Legal Theory 91-114, 99 suggesting that even Cotterrell's general framework may be unhelpful.

³ Ibid.

⁴ Ibid.

⁵ Raz, 'The Purity of the Pure Theory' in Penner, Schiff and Nobles (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (OUP, Oxford 2005) 202.

statements”;⁶ the contingent connection thesis, which states that “there is no necessary connection between law and moral values”;⁷ the sources thesis, that “the identification of the existence and content of law does not require resort to any moral argument.”⁸ Freeman suggests that sociological theories of law generally involve a rejection of the uniqueness of law and of law as a closed logical order, a focus on the law in action and use of sociological methods.⁹

Hart's 'Descriptive Sociology' Claim

An obvious starting point for this assessment is Hart's ‘notorious’¹⁰ hope, expressed in the preface to *The Concept of Law*,¹¹ that his work “may also be of use to those whose chief interests are in... sociology, rather than in law” and that “[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology”.¹² Adding to the definitional woes outlined above, Hart fails to define what he meant by ‘descriptive sociology’. As Krygier notes, “[a] sympathetic critic can be sceptical about the claim... because the idea of a descriptive sociology of law is not developed”,¹³ suggesting that perhaps Hart's failure to define descriptive sociology itself shows that he was not too concerned with this aspect of his theory. It is clear that Hart was referring to a subset of sociology generally and it is sufficient therefore to determine whether Hart's theory is sociological in the more general sense identified by Cotterrell.

There are three angles from which to approach Hart's claim to descriptive sociology: the first is textual, analysing the formulation of Hart's claim; the second is biographical, looking to Hart's background in an attempt to discern whether he was genuinely committed to his sociological claim; the third is an overview of the path that Hart's theory took, ascertaining whether he followed through with his claim.

As for the first approach, whilst remaining aware of the danger of putting too fine a point on Hart's choice of words at the expense of understanding his overall project, it should be borne in mind that Hart said his work “*may also*”¹⁴ be considered a work of descriptive sociology, suggesting that it was

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Freeman, ‘Law and Sociology’ (2005) 8 Current Legal Issues 1-15, 1.

¹⁰ Twining, ‘Schauer on Hart’ (2006) 119 Harvard L R Forum 122-130, 127.

¹¹ Hart, *The Concept of Law* (2nd edn OUP, Oxford 1994).

¹² Ibid preface.

¹³ Krygier, ‘The Concept of Law and Social Theory’ (1982) 2(2) OJLS 155-180, 157

¹⁴ Hart (n 11) (emphasis added).

primarily intended to be a work of jurisprudence that could be interpreted in a sociological light. He also stated that his theory “may be *of use*”¹⁵ to other disciplines, suggesting that, while sociologists and anthropologists could gain insights from his work, to paraphrase Krygier, he was not ‘doing what they do’.¹⁶

Lacey has written extensively on Hart's life,¹⁷ and her observations Hart's background illuminate the extent to which Hart intended to engage in sociology. She notes that, given the low status of the social sciences at the time,¹⁸ that Hart was “a philosopher by training as well as by deepest disposition”,¹⁹ and considering his criticism of sociological method,²⁰ his claim is surprising. However, as Hart was “never a man to use words lightly”,²¹ Lacey concludes that we must “assume that the Preface's claim was a considered one.”²² Hart who harboured “an Oxonian antipathy towards sociology”²³ (though he regretted this later)²⁴ would not have made this unusual claim had he not fully intended to do so.

Hart's “determination to move beyond the conceptually rigid positivisms of Austin and Kelsen”²⁵ compellingly confirms that we should take Hart's claim seriously. Hart's extensive attack on Austin was partly based on Hart's assertion that Austin's formalism was unduly restrictive. It is in the context of solving this problem that the sociology in Hart's account arises, as “law's social being serves to reveal the inadequacy of the reigning positivist conception of law”,²⁶ that of Austin. In the preamble to *The Concept of Law*, Hart expresses his wish to break from Austinian linguistic analysis by referring to the “social context” of words.²⁷ Nevertheless, Hart still emphasises, quoting Austin, using “a sharpened awareness of words to sharpen our perception of the phenomena.”²⁸

¹⁵ Ibid (emphasis added).

¹⁶ Krygier (n 13) 159.

¹⁷ Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (OUP, Oxford 2004).

¹⁸ Lacey, ‘Analytical jurisprudence versus descriptive sociology revisited’ (2006) 84(4) *Texas L R* 945-982, 948.

¹⁹ Ibid 948.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Twining (n 10).

²⁴ See D Sugarman, ‘Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman’ (2005) 32(2) *J of L & Society* 267-293.

²⁵ Lacey (n 18) 949.

²⁶ Fitzpatrick, *The Mythology of Modern Law* (Routledge, London 1992) 6.

²⁷ Hart (n 11).

²⁸ Ibid.

Hart's intention appears both confused and confusing, but, overall his intention did not appear to be to offer a sociology of law: he was not intending to "explain the character of law in terms of historical and social conditions."²⁹ Hart states that his work is "primarily designed for the student of jurisprudence"³⁰ and emphasises the importance of analysis and linguistic philosophy. Hart's philosophical background and initial contempt for sociology further emphasise this. Nevertheless, it is clear that Hart would not have referred to sociology had he not intended to use it in some way.

Finally in relation to the preamble, it must be considered whether Hart actually attended to this claim. In this regard Fitzpatrick³¹ draws Hart along a 'sociological drift',³² arguing that a commitment to sociology would have led Hart along a different path. Fitzpatrick argues that the theory is "bolster[ed] with desperate metaphor rather than sociolinguistic or sociological observation."³³ Weight is added by Letsas, who laments the "hypothetical linguistic convergence"³⁴ employed by Hart, who "assumes that there is some linguistic convergence about the use of legal vocabulary",³⁵ rather than adducing evidence. Cotterrell agrees that this is "not descriptive sociology, [but] speculative philosophy."³⁶

Letsas goes further by asserting that the very fact that Hart is attempting to answer such "persistent questions"³⁷ as 'What are rules?' is "already a step away from the descriptive approach... because [such questions] are not constituted by virtue of something that can be described but by something that puzzles us for non-empirical reasons."³⁸ Lacey agrees, arguing that "the structural features of Hart's theory... prevented him from building upon his [sociological claim]."³⁹

From this brief selection of criticisms of Hart's sociological claim it can be seen that he had much to elaborate on if he was to meet the expectations created by his statement in the preface. Hart's reaction is superficially satisfying, but deeper inquiry shows them to be particularly awkward. In his

²⁹ Cotterrell (n).

³⁰ Hart (n 11).

³¹ Lacey, 'Modern Positivism: HLA Hart and Analytical Jurisprudence' in Penner (n 5) 171.

³² Cotterrell has also used this term. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Butterworths, London 1989) 94–96. Lacey notes that Finnis has also identified this argument. Ibid.

³³ Fitzpatrick (n 26) 198.

³⁴ Letsas (n 1) 193.

³⁵ Ibid.

³⁶ Cotterrell (n 32) 95.

³⁷ The title of the first chapter of *The Concept of Law* (n 11).

³⁸ Cotterrell (n 36).

³⁹ Lacey (n 18) 946.

postscript, Hart's defence was that "sociological and historical questions were not the ones that he set out to answer":⁴⁰ such matters were "irrelevant to his concerns"⁴¹ and his "allusion to descriptive sociology was an... attempt to signal his move away from [Austin and Kelsen]."⁴² Further, when responding to Bodenheimer's criticism that he had neglected disciplines other than philosophy, Hart further emphasising the philosophical nature of his project.⁴³

These rebukes would be comfortingly conclusive to the present inquiry if Hart had not then "insisted with ever greater vehemence on the essentially descriptive nature of his project"⁴⁴ in answering the natural law critiques. This insistence, while providing some answer to his natural law detractors, left him open once again to the sociological critiques that he had initially dismissed as not being central to his method. Hart seemed to back himself into a corner with no way out. Hart could not maintain both positions and thus, succinctly put, this "new position... made the inchoate nature of the 'social' aspect of his original theory still more vivid."⁴⁵

Having considered the text of the preamble to the concept of law and Hart's background, and having inquired as to whether Hart followed through with the approach that he claimed to be taking, it is appropriate to consider the elements of his theory, and determine to what extent these elements may affect the classification of Hart's theory as a positivist one.

The Critical Reflective Attitude

Hart thought Austin's account of the citizen as habitually following a sovereign to be deficient as it "ignores the various social uses of rules."⁴⁶ Hart, "[b]y contrast with those who stress the importance of 'habits' [denied] the possibility of explaining rules solely by reference to external regularities of behaviour"⁴⁷ and thus distinguished his theory from Austin's by arguing that the citizen takes an internal viewpoint to rules,⁴⁸ "accept[ing] them as formulating requirements for conduct of a group

⁴⁰ Lacey (n 17) 230.

⁴¹ Twining (n 10) 127.

⁴² Lacey (n 17) 230.

⁴³ Bodenheimer, 'Modern Analytical Jurisprudence and the Limits of Its Usefulness' (1956) 104(8) U of Pennsylvania L Rev 1080-1086. Hart, *Analytic Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodenheimer* (1957) 105(7) U of Pennsylvania L R Rev 953- 975.

⁴⁴ Lacey (n 18) 955.

⁴⁵ Ibid.

⁴⁶ Fitzpatrick (n 26) 4.

⁴⁷ MacCormick, *H.L.A. Hart* (Jurists, Profiles in Legal Theory, Stanford University Press, Stanford 1981) 30.

⁴⁸ Hart (n 11) 88-9.

and adopt[ing] a critical, reflective attitude toward... them.”⁴⁹ Hart, by “paying some regard to sociolinguistic usage”,⁵⁰ thereby inserted a sociological element into his theory: the internal viewpoint of those governed by the law.⁵¹

Problematic, if arguing that Hart moves toward sociology, is that, having inserted this sociological element, Hart then appears to remove it by suggesting that it is the officials in a system that determine validity of rules, and therefore only their internal viewpoint is of importance. The most outspoken critic of Hart in this connection is Fitzpatrick. In a scathing attack, Fitzpatrick makes the assertion that Hart inserted this sociological element of his theory to displace Austin,⁵² but then proceeds to erase it and “reaffirms the positivist equation of law with official authority...”⁵³ thus excluding the populace from law and relegating the citizen to “a state of Austinian inertness.”⁵⁴

This criticism can best be understood by considering the position of the citizen under each theory. In Hart’s theory, citizens generally accept and obey the rules, determined by official authority, having considered them with a critical reflective attitude, otherwise there is general disobedience and the system ceases to exist.⁵⁵ In Austin’s theory, citizens habitually obey the commands of a sovereign, or the system ceases to exist. By comparing these two positions it can be seen that, despite Hart acknowledging the citizen is more than a mere automaton when following rules, ultimately he accords them no greater position in a legal system than Austin; citizens under Hart’s theory can no more determine the validity of the rules, or the existence of the system itself, than those in Austin’s theory. Thus, as Fitzpatrick concludes, while Hart is able to depose Austin from the throne of positivism using this sociological element, he himself then eliminates that same element. The internal attitude of the citizen therefore no longer serves a function when elucidating a concept of law; law remains, as in Austin’s theory, the obedience of citizens to the rules proffered by an ultimate authority. The impact of this criticism can only be heightened by Hart’s acknowledgment that, even having been endowed with a critical reflective attitude, the citizen can passively follow the

⁴⁹ Bayles, *Hart’s Legal Philosophy: An Examination* (Kluwer Academic Publishers, Dordrecht 1992) 53-45.

⁵⁰ Fitzpatrick (n 26) 4.

⁵¹ An interesting aside is that John Finnis found that one of Hart’s volumes on Max Weber had been heavily annotated, a sign of close reading and a strong suggestion of “a Weberian undertow in *The Concept of Law*”. Lacey (n 17) 230.

⁵² Ibid 4, 201

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ See Hart’s minimum conditions for the existence of a legal system. Hart (n 11) 116.

rules, making it possible that the internal viewpoint can become confined to the official world.⁵⁶

Hart anticipates concern with this dichotomy, asserting that “[w]e need not be surprised by this duality”,⁵⁷ because it is “merely the reflection of the composite character of a legal system”, as compared with a pre-legal system of only primary rules, where “the rules must be widely accepted as setting critical standards of behaviour”, a function performed in a legal system by officials.⁵⁸ This, however, does not answer the criticism that Hart, did not ultimately accord any more importance to the internal viewpoint than Austin did, thus nullifying the sociological implications of his original insight. It also seems to show that Hart acknowledged that he made what Fitzpatrick calls a “mystifying shift” in relation to the introduction and eradication of the internal viewpoint.⁵⁹

Hart's Sociological Gesture toward Natural Law

In a rare concession to natural law, Hart acknowledges that all legal systems must have a “minimum content of natural law”⁶⁰ as “[r]eflection on some very obvious... truisms concerning human nature and the world in which men live, show that... there are certain rules of conduct which any social organisation must contain if it is to be viable.”⁶¹

While more usually grist for the 'law and morality debate' mill, the concession is relevant here as a uniquely sociological gesture towards natural law. Hart asserts that there is a universal moral core to law that does not derive from a higher source or deity. This assertion is sociological because Hart suggests that the moral core of law derives from the inherent sociological function of a legal system: facilitating the survival of human societies.

Hart also noted that “the definition of [these truisms] in purely formal terms, without reference to any specific content or social needs, has proved inadequate”,⁶² again alluding to the sociological underpinnings of his minimum content theory. In addition, this statement seems directed toward the incapacities of Austin and Kelsen's theories, criticising their inability to account for these sociological truisms due to their formalistic nature, further evidencing Hart's intention to move away from strict formalism and toward a more socially informed legal theory.

⁵⁶ Hart (n 11) 117.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Fitzpatrick (n 26) 4.

⁶⁰ Hart (n 11) 193.

⁶¹ Hart (n 11) 192-193.

⁶² Hart (n 11) 199.

While this is a sociological concession to natural law, it is clear that it does not turn Hart's positivism into a natural law theory, or, more importantly for the present inquiry, into a sociology of law. Hart maintains the positivist 'sources thesis', as the existence and content of his natural law emanating from human beings, and the 'contingent connection' thesis, as Hart does not acknowledge a necessary connection between law and morality, only that some moral content is inevitable in any legal system with the social function remains one of facilitating human survival.

The Sociology of Secondary Rules

Hart's conception of a legal system as the union of primary and secondary rules is yet another example of a sociological thread in his theory. Hart's discussion is rooted in the social context that he thought necessary for explaining the law and he discusses this notion with reference to the social situations of the human beings and societies that rules apply to. He starts by asserting that "only a small community closely knit by ties of kinship... could live successfully by... a regime of unofficial rules" and that larger societies require secondary rules to cure the defects that arise from such a regime.⁶³

The sociological implications of Hart's conception of secondary rules have been most thoroughly explored by Colvin and Fallers.⁶⁴ Colvin has used Hart's conception of the union of primary and secondary rules as a conceptual framework for analysing primitive legal systems, illustrating how this union is sociological in nature and, in the process, gathering the kind of empirical sociological evidence that Fitzpatrick thought to be missing from *The Concept of Law*. For instance, he analyses Hoebel's observations of Eskimo 'law', specifically the way that the Eskimo deal with a two-time murderer by executing him following interviews with the community.⁶⁵ Colvin views this, rather than through the lens of coercion, as Hoebel's work is often viewed,⁶⁶ but through the Hartian lens of primary and secondary rules. He notes that the procedure is "[a] socially recognized privilege of applying physical force[;] a rudimentary secondary rule of enforcement."⁶⁷ Furthermore, Colvin notes the sociological origin of what "seems to be a rule of recognition based on custom."⁶⁸

What is most interesting about Colvin's idea that Hart's union of primary and secondary rules can be

⁶³ Hart (n 11) 92.

⁶⁴ Colvin, 'The Sociology of Secondary Rules' (1978) 28 University of Toronto Law Journal 196-214. Fallers, *Law without Precedent* (University of Chicago Press, Chicago 1969) using Hart's conception of law as the union of primary and secondary rules to highlight distinctions between different societies.

⁶⁵ Hoebel, *The Law of Primitive Man* (Harvard University Press, Harvard 1954) 25-6.

⁶⁶ Colvin (n 63) 206.

⁶⁷ Ibid.

⁶⁸ Ibid.

used as a conceptual framework to organise information about different legal systems is that this, rather than being a stretching of Hart's theory,⁶⁹ appears to be the use Hart intended to be made of his theory. Hart suggested that this union constitutes "a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist",⁷⁰ and, having "accepted that his claim to have produced a 'descriptive sociology', as opposed to a model which could be used by sociologists, had been misplaced",⁷¹ thought that a better formulation of his theory would be that it provides the "normative concepts required for a descriptive sociology."⁷² This appears to suggest Hart had the broader aim of facilitating complementarity between jurisprudence and sociology, and "an aspiration that jurisprudence be of use to social scientists and sociolegal scholars."⁷³ Colvin and Fallers, in utilising Hart's theory as a conceptual framework to better describe and understand primitive societies and legal systems, used Hart's normative concepts in order to expound a descriptive sociology, a use of Hart's theory that Hart himself would surely have advocated.

Hart's Concept of Law: Positivist Theory or Sociology?

To return to the definitions at the beginning of this paper, Hart's theory is difficult to place at one of the distinct positions in Cotterrell's framework: it is not wholly internal, because it does contain strands of sociology and looks to inform an understanding of law with social context, yet neither is it a sociology of law, seeking to explain law in terms of social origins and effects. In any case, it is arguable that such a clear distinction between conceptual and empirical accounts is unhelpful at the level of concept formation, as "[a]t that level we are always in the intermediate position of examining phenomena and trying to capture their substantial differences in our definitions";⁷⁴ this certainly seems to be the case here. Indeed, Hart's theory of law, as discussed, contains elements that can rightly be characterised as sociological and these elements do distinguish Hart's theory from those of positivists generally, who, like Austin and Kelsen, reject sociology altogether.⁷⁵

Both the acclaim and criticism that Hart's theory attracted is partly a consequence of this position; a positivist jurisprudential theory, which nonetheless attempted to incorporate elements of sociology and acknowledge the rigidity and failings of prior positivists in eliminating all extra-legal elements

⁶⁹ As Colvin himself suggests that it may be. Ibid 196.

⁷⁰ Hart (n 11) 98.

⁷¹ Lacey (n 17) 233.

⁷² Written in a notebook of Hart's. Lacey (n 18) 949.

⁷³ Ibid.

⁷⁴ Moore (n 2).

⁷⁵ "In Kelsen's view a science of law... presents legal reasoning as a realm of thought and understanding wholly apart from sociological observation." Freeman (n 9) 8.

from jurisprudence. The “protracted, inconclusive and sometimes unedifying debate”⁷⁶ that Hart’s theory caused is a testament to its unusual position, which is well illustrated by now returning to Raz’s definition of positivism.⁷⁷

Hart’s theory fits squarely within the latter two tenets of positivism enumerated by Raz, while at the same time infusing these theses with sociological elements. For instance, Hart’s gesture toward natural law is a positivistic one, yet at the same time it is sociological, deriving natural law from the social context of the human beings that use it. Hart also maintained the ‘contingent connection’ thesis in holding that “the existence and content of law does not require resort to any moral argument”,⁷⁸ but instead can be “objectively ascertained by reference to social facts.”⁷⁹ The reductive semantic thesis is not followed, but, as Raz himself notes, the three theses are “logically independent and one is free to accept any one of them while rejecting the others.”⁸⁰ Far from suggesting Hart was offering a sociology of law,⁸¹ this rejection is simply a manifestation of Hart’s wish to break free of the confines of reductive semantic statements, used by other positivists,⁸² appealing instead to social facts and context.

While showing that Hart incorporated elements of sociology, it is important not to overstate them and to bear in mind the limited extent to which Hart followed up on his ‘descriptive sociology’ claim. Considering Hart’s theory in light of Freeman’s tenets of sociological theories of law further illuminates the fact that Hart’s theory did not move particularly far toward becoming a sociology of law. Hart did not reject the uniqueness of law,⁸³ nor did he focus on the law in action, but instead the concept of law itself, and he did not use sociological methods.

Hart did seem to suggest he was aiming to make a greater move toward sociology when he insisted on the descriptive nature of his project in answering natural law critiques. However, the “inchoate nature”⁸⁴ of this sociology and his realisation that his reference to ‘descriptive sociology’ was deficient, as it overstated the extent to which his theory involved sociology and did not properly

⁷⁶ Lacey (n 18) 946.

⁷⁷ Raz (n 5).

⁷⁸ Ibid.

⁷⁹ Ibid 203.

⁸⁰ Ibid.

⁸¹ In this connection it is worth noting that Kelsen also rejected the reductive semantic thesis, though for different reasons, yet Kelsen’s theory is most definitely a positivistic one. Ibid 202-3.

⁸² Ibid.

⁸³ See Hart (n 11) 1, commenting on law’s uniqueness.

⁸⁴ Lacey (n 18) 955.

reflect his intentions and, further confirms that Hart's was a positivist jurisprudential theory of law, seeking only to be informed by social context. Hart himself, with hindsight, thought that a better formulation would have been to say that the book provided the "normative concepts required for a descriptive sociology", ⁸⁵ a formulation more in line with his theory being of use to sociologists than being sociology itself.

Conclusion

Hart's theory has undoubtedly been the catalyst for an unprecedented level of interdisciplinary dialogue, inspiring new theories involving jurisprudential and sociological thought.⁸⁶ However, it is clear that Hart was not offering such a interdisciplinary theory himself: he was merely weaving some sociological threads into an essentially positivist theory, intending to place law in its social context and break free, with a "fresh start", ⁸⁷ from the excessive formalism of the past. Hart did not intend his finished project to be a sociology of law or turn the positivist tradition of legal thinking from a legal theory into a sociology of law and nor did he foresee that *The Concept of Law* would be subject to such "intense scrutiny and lively criticism".⁸⁸ It is thus submitted that critical analyses of Hart's theory as sociology should be laid to rest and instead his "much more straightforward"⁸⁹ intention, that his theory would provide the normative framework for a descriptive sociology, should be adopted.

⁸⁵ Lacey (n 18) 949.

⁸⁶ See, for example, Routledge & Keagan Paul plc (tr), Luhman, *A Sociological Theory of Law*, (OUP, Oxford 1985); Bankowska and Adler (trs), Bankowski (ed), Teubner, *Law as an Autopoietic System*, (The European University Institute Press Series, Blackwell, Oxford 1993); Cotterrell, *Law's Community* (1995); Tamanaha, *A General Jurisprudence of Law and Society* (OUP, Oxford 2001); Ross, *Law as a Social Institution* (Hart Publishing, Oxford 2001)

⁸⁷ Hart (n 11) 79.

⁸⁸ Lacey (n 17) 229. "What he conceived as a student text was gradually being reconstructed by its reception as his *magnum opus*." Lacey (n 17) 233.

⁸⁹ Lacey (n 17) 231

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