

BOOK REVIEW

Keren Lloyd Bright, Senior Lecturer in Law, The Open University

Silva, H.J.F. (2015) *Understanding Conceptions of Law*, Colombo, Royal Institute of Colombo ISBN 978-955-42312-0-7

Joe Silva sets out the purpose of his book in the opening sentences of the preface:

This book is an introduction to the understanding of Professor H.L.A. Hart's Concept of Law. It also aims at explaining other jurisprudential theories discussed or mentioned in brief by Hart.

(Silva, 2015, p.ix)

It is then crystal clear from the start that this is a book designed to introduce the novice, typically an undergraduate law student, to jurisprudence or legal philosophy through the lens of Hart's treatise – and it does 'what it says on the tin'. Jurisprudence is in essence a discourse on the question: 'What is law?'. Professor H. L. A. Hart's *Concept of Law*, which was first published in 1961, is widely regarded as one of the most important and influential works in the English speaking world on legal philosophy in the twentieth century – and this is why Hart's work forms the basis for Silva's book.

It has no doubt been observed that, in their respective book titles, Hart uses the word 'concept', while Silva uses 'conceptions'. This was not by happenstance, but by the delicate exercise of semantics. In his first chapter, Silva explores the distinction between the two words, drawing on the work of the prominent jurists Neil MacCormick and Ronald Dworkin. Silva describes 'concept' as a commonly accepted idea or principle, and 'conception' as an understanding of how or what something is – which is invariably more controversial. Hart in his work was searching for concepts, while Silva is instead seeking to set out the different contesting theories and debates in jurisprudence.

Another way in which Hart's *Concept of Law* and Silva's *Understanding Conceptions of Law* may be contrasted is in their pedagogic aim. In the preface to his book, Hart states that he hopes the mode in which he has chosen to write his book 'may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain' (Hart, 1997, p. vii). Silva, in order to encourage and enthuse the novice, has written a book on legal theory which does precisely that.

The treatment of the Command Theory in each respective book provides an illustration of this. Hart, in a little under ten pages, sets out an analysis and critique of varieties of imperatives and law as coercive orders, referring primarily to Austin but also in passing to

Kelsen. Hart either assumes his readers come to his book with an extensive knowledge of jurisprudence – or, if they do not have it, has the expectation that his readers will go away and acquire this knowledge if they wish to comprehend the full weight of scholarship which sits behind his analysis (and indeed Hart points the way in his detailed ‘Notes’ at the end of his book). Silva, by contrast, first lays out the stall of the Command Theory with a chapter on the thinking of Hobbes, Bentham and Austin (the latter in some detail as much of Hart’s *Concept of Law* is concerned with ‘the deficiencies of a simple model of a legal system, constructed along the lines of Austin’s imperative theory’, as Hart states at the start (Hart, 1997, p.vii)). This chapter in Silva’s book is then followed by another on Hart’s critique of the Command Theory, which includes an analysis of the ‘Orders backed by threats’ model, ‘Duty imposing rules’, ‘Power conferring rules’ and the likely influence on Hart of the Hohfeldian analysis of rights. Kelsen’s theory of law is the subject of another chapter still.

Thus Silva in part adopts the role of Hart’s translator and abridger in setting out Hart’s critical thinking, but he also provides considerable context for Hart: those philosophers who came before, his contemporaries and those who came after – and so he covers a lot of ground. Moreover, he interweaves other philosophical ideas, including Hindu and Buddhist, and commentary from other sources, to produce a richer whole.

Silva’s many years spent teaching law at universities in Sri Lanka and the UK is highly evident in this book: the language used is simple and accessible; the reader is led step by step through subtle ideas; and the chapter and section headings clearly mark the route through the subject. This is the work of someone who is fascinated by the subject; who has reflected upon it at length; who has taught it to undergraduate students; and who now wishes to communicate his accumulated learning and teaching experience via the medium of a book. Silva aims to make jurisprudence comprehensible by establishing a firm foundation of knowledge and understanding upon which further studies can rest - and he particularly has international students for whom English is a second language in mind.

There are a number of chapters in Silva’s book which are directly comparable in content to Hart’s, only the relative weighting of the subject matter is different owing to Silva’s decisions concerning what to explain, what to contract and what to expand. These directly comparable chapters include those on the theory of rules, the rule of recognition, the open texture of law, the concept of justice, law and morals, and international law.

Other chapters in Silva’s book aim to chart the evolution in jurisprudence since the first publication of Hart’s book in 1961 in order to provide his readers with a more complete understanding of the subject discipline. One example is the chapter entitled ‘Hart’s postscript and Ronald Dworkin’. Silva introduces the relationship between the two as follows:

After a brilliant studentship, both at Harvard and Oxford, Hart himself recommended Dworkin to be his successor as the Professor of Jurisprudence at Oxford. However, he later turned out to be a leading critic of the works of his former Professor.

(Silva, 2015, p.239)

In this chapter, Silva charts the battle of ideas between these two heavyweights of jurisprudence. Dworkin concurred with certain elements of Hart's analysis, but attacked many of Hart's distinctive theses.

Another chapter which charts developments in jurisprudence post-Hart is that concerned with feminist legal theory. In this chapter Silva outlines the political, social and economic circumstances in Western Europe which created the environment in which feminist scholarship and feminist jurisprudence would flourish. He defines four types of feminist thought (liberal, socialist, radical and cultural), before discussing key areas of concern for feminist jurists: domestic violence and rape, including marital rape.

In his final chapter, 'Some concluding thoughts', Silva assesses the extent to which Hart was successful in achieving his aims and purposes in *The Concept of Law* by drawing together the points and arguments from earlier chapters. After indicating various innovations and shortcomings - and the critique of Hart's treatise by other jurists - Silva concludes:

Hart's work is a masterpiece, as it cleverly opens the door to all the major strands in jurisprudential thought. As seen from this text, Hart has subtly introduced the reader to the works of legal positivists, natural law thinkers, realists, sociological perspective of law, and anthropologists ...This text while introducing the salient features of Hart's work, has also attempted to present in outline the major doctrines of these schools, in order to forward a better understanding of Hart's ideas.

(Silva, 2015, p.349)

Silva serves to remind us, should reminder be necessary, that law degrees which focus solely on the 'black letter law' and the technician's approach to legal study, to the exclusion of jurisprudence and discursive approaches to law and law-making, are much the poorer for it. Those coming to the study of jurisprudence for the first time should find Silva's book an accessible, clear and thought-provoking introduction. The next step, as Silva himself suggests, is to read Professor H.L.A. Hart's *Concept of Law*. A possibly better alternative would be for both books to be read side by side, in much the same way as a commentary on a Shakespearian play or other work of literature.

References

Hart, H. L. A. (1997) *The Concept of Law*, 3rd edn. (paperback), Oxford, Oxford University Press, ISBN 0-19-876123-6