Comment on Hilary Charlesworth, “Human Rights and the Rule of Law After Conflict”

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I Introduction

This colloquium is a stimulating invitation not only to look back at the Hart-Fuller debate\(^1\) fifty years on, but also to begin a conversation across different fields of law and legal developments about the debate’s actual or its potential impact half a century after it appeared in the Harvard Law Review. Intriguingly, some of the fields of law that Peter Cane proposed are, in fact, absent from the debate. Assigned to write on legal pluralism, Jeremy Waldron wittily borrows the curious incident of the dog that didn’t bark from Sherlock Holmes;\(^2\) and Hilary Charlesworth begins her paper on the Hart-Fuller debate and human rights with the observation that the debate takes no account of contemporaneous international human rights developments,\(^3\) which include the Universal Declaration of Human Rights (1948)\(^4\) and, for Hart, the European Convention on Human Rights (1950).\(^5\) Equally as challenging is for the non-legal philosophers among us to speak to the debate’s potential, as opposed to actual, significance for our fields insofar as expert knowledge is required to excavate such significance from the original exchange or the subsequent turns – of the screw, as Desmond Manderson might put it\(^6\) - in legal philosophy. Accordingly, my comments are both on Hilary’s fascinating paper and on what it invites of legal philosophers.

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\(^1\) H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593 and Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630.


\(^4\) Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71 (1948).


My rather disparate comments are unified in two ways. One is that they track what I understand to be the steps in Hilary’s argument. The other is through the overarching theme that Peter Cane captures among his choice of topics: namely, that the transnational is an important vantage point for the contemporary relevance of and challenges for the Hart-Fuller debate. By transnational, I mean not only international law, but also international human rights, transitional justice and legal pluralism – all places where law and ideas of law meet or cross borders. I will end by suggesting how this theme of the transnational might be taken further.

Hilary’s assigned theme of “human rights” could mean either the concept of human rights in the abstract or human rights law, as it exists in international or domestic form. Hilary takes it as international human rights law, while noting that Nuremberg and Nazi-era law form a conceptual human rights context for the Hart-Fuller debate. Her paper pairs the post-1958 rise of a global international human rights culture with another legal development relevant to the Hart-Fuller debate, the emergence of rule of law programmes as a major export to developing, post-conflict and transitional societies, and examines the two in light of one another and in light of the debate. Rather than examine the debate as a philosophical disagreement, Hilary fruitfully approaches it, as Nicola Lacey puts it elsewhere, as “a moral and practical disagreement about which institutional arrangements are likely to maximize the realization of valued social ends or ideals under specific social and historical conditions.”

The Hart-Fuller legacy that emerges from Hilary’s paper is unexciting or worse. She concludes with the somewhat scandalous observation that to a modern human rights lawyer, the two sides of the debate are more or less the same. But the gist of her argument is that not only don’t Hart and Fuller address human rights, their conceptions of the rule of law turn out to hinder others from addressing them in post-conflict societies. What can be said, or at least asked, to connect Hilary’s analysis differently with the Hart-Fuller debate?

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8 Lacey, supra note 7 at 1072.
II A Ready-Made Place for International Human Rights

Hilary is right, of course, that Hart and Fuller do not actually talk about international human rights and, as well, that human rights lawyers have reciprocated in not talking about Hart and Fuller. A qualification might be added here, insofar as Hart, in his animated discussion of the Utilitarians’ separation of law as it is and law as it ought to be, insists that “Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were in the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws.” Hart points out that one can identify in Bentham’s work all of the elements of the Rechtstaat and all of the basic civil rights. Indeed, we might read Hart as eager to show that positivism has historically gone hand in hand with the advancement of human rights.

It is an interesting question why neither Hart nor Fuller discusses human rights. One possibility is that the views of both were significantly shaped by private law. The only treatment of rights found in the debate is by Hart, and it is of private rights. In demolishing the Utilitarian theory that law is essentially a command, Hart criticizes the command theory for failing to give a place to rights, by which he means private rights. As for Fuller, David Luban attributes the waning of Fuller’s legacy in part to his being out of sync with the public law Zeitgeist of post-1960 legal theory in the United States, which prevailed even among scholars who shared his origins in private law. Indeed, Fuller considered polycentric disputes unsuited for adjudication and therefore argued against the “public law judges” who were the heroes of the US civil-rights era.

9 Hart, supra note 1 at 596.
10 Ibid. at 595.
11 Ibid. at 604-606.
Whatever the reason that this dog didn’t bark, it does not mean that the Hart-Fuller debate is not ready-made for international human rights. Over the course of the following fifty years, the role played by morality in the debate has sometimes been played by international human rights in the context of adjudication. Seen in this light, the debate is not simply silent on international human rights. Rather, it is set up for them.

In one such context, the winner of the debate may be neither Hart nor Fuller, but the third protagonist in their discussion of the Nazi “grudge informer” case: Gustav Radbruch. Radbruch conceived of law as containing in itself the essential moral principles of humanitarianism. Hence, for Radbruch, a law that violates this fundamental morality is not valid; it is no law at all. In a number of high-profile recent cases dealing with historical injustice, Radbruch’s argument has been framed in terms of international human rights, whether contemporaneous with the injustice or current. Consider the 1975 House of Lords decision in Oppenheimer v. Cattermole. The issue was whether Meier Oppenheimer was a national of the Federal Republic of Germany as well as a British subject and therefore exempt from income tax on his annual pension from the Federal Republic of Germany under a tax treaty between the two countries. Oppenheimer was a German Jew who had emigrated to England in 1939 to escape Nazi persecution and become a naturalized British subject in 1948. Under the infamous Nazi denationalization decrees of 1941, German Jews lost their nationality if they were ordinarily resident abroad at the date of the decree. Lord Cross of Chelsea wrote: “To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all.” Lord Salmon noted that “the Crown did not question the shocking nature of the 1941 decree, but argued quite rightly that there was no direct authority compelling our courts to refuse to recognize it.” However, describing the decree as “so great an offence against human rights that it ought not to be recognized by any civilised system of law,” he held that it should not be

13 The extent to which Radbruch’s formula has been used should not be overestimated. Indeed, in a recent paper, David Dyzenhaus explains that Hart and Fuller misunderstood the grudge informer case. See David Dyzenhaus, “The Grudge Informer Case Revisited” (2008) 83 NYU L. Rev. 1000.


15 Ibid. at 278.

16 Ibid. at 281.

17 Ibid. at 283.
recognized by the English courts for any purpose.\textsuperscript{18} In an intriguing commentary on the Hart-Fuller debate, David Fraser has shown that Oppenheimer is at odds with English and US judicial decisions rendered during the Nazi era, which did recognize German laws as law.\textsuperscript{19} My point here, however, is that Oppenheimer illustrates the rise of international human rights qua Radbruch. Historic injustice cases in which such international human rights arguments were made but unsuccessful include Canadian litigation by descendants of Chinese immigrants who claimed the return of a racially discriminatory head tax levied on Chinese immigrants to Canada between 1885 and 1923\textsuperscript{20} and an Australian High Court judgment on whether the removal of aboriginal children from their communities by the government that occurred from roughly 1925 to 1949, the last detention ending in 1960, contravened the international law on genocide.\textsuperscript{21} Each of these cases is complex, but suffice it to say that they illustrate broadly that morality in the Hart-Fuller debate was a ready-made place for international human rights that the latter has sometimes occupied.

\section*{III Exporting the Rule of Law}

The majority of Hilary’s paper is devoted to the provocative argument that rule of law, which she says Hart and Fuller do talk about, turns out to be an obstacle to international human rights in post-conflict and transitional societies, particularly to the introduction of international economic, social and cultural rights. Here we come to the meatiest roles played by Hart and Fuller in Hilary’s paper; namely, that neither Hart nor Fuller is part of the solution to this problem of undermining human rights. In addition, they do not help build a case for Hilary’s proposal to harness the power of rule of law and expand it to include human rights and, in particular, economic, social and cultural rights.

\textsuperscript{18} Ibid. at 284.

\textsuperscript{19} David Fraser, “‘This is Not Like Any Other Legal Question’: A Brief History of Nazi Law Before U.K. and U.S. Courts” (2003) 19 Conn. J. Int’l L. 59.


Hilary begins by associating Hart and Fuller weakly with the ideas of rule of law that have currency with international organizations, development agencies, scholars and other outsiders involved in rebuilding societies after conflict. By weakly, I mean that she does not argue that it is Hart’s or Fuller’s position that is being applied, but only that theirs can be related to what she calls rule of law discourse. Rule of law discourse encompasses a range of meanings for rule of law.

Hilary raises a number of problems with these rule of law projects, all of which may be described as problems of contingency. She does not come out against the idea of rule of law, but criticizes what she portrays as a technocratic, institution-building approach to its delivery by outsiders, the lack of attention to local political, economic, social and cultural conditions (part A), and the effect that its dominance as the vehicle for international assistance has had on the achievement of international human rights (part B).

A Template for Institutions: Would Hart and Fuller Agree?

Hilary describes the projects favoured by the international community as focusing primarily on the creation or strengthening of legal institutions and using these institutions as the measure of success. The result is a technocratic approach that leans toward exporting Western models of legal institutions. Hilary does not say whether Hart and Fuller are guilty of this approach. There is a good argument that Hart is not, if only because he did not extend his analysis to questions of institutional design. Indeed, this is among Fuller’s criticisms of Hart: “If all that the positivist school has to offer in … times [of trouble] is the observation that, however you may choose to define law, it is always something different from morals, its teachings are not of much use to us.”

Fuller, on the contrary, was very much interested in institutions. On the one hand, Jeremy Waldron’s paper for this colloquium reminds us that Fuller participated in the tendency Hilary observes among rule of law projects to sideline traditional or customary law. On the other, Fuller was also a critic of the law and development projects of the time:

22 Fuller, supra note 1 at 634.
23 Charlesworth, supra note 3 at 7.
Legal experts from the western nations, particularly the United States, are playing an important role in facilitating this transition [from tribal and customary law to enacted law in newly independent states in Africa and Asia]. Those who have performed this function have often regretted that they were not more adequately prepared for it by a deeper understanding of legal anthropology. If they had had a better training in that subject, they believe that they would have had a better comprehension of the meaning of customary law for those who live by it. … For those who have never attempted to create or live by a system of explicitly enacted rules … the neat geometry of legal positivism is not merely largely irrelevant, but becomes positively dangerous.  

Those more knowledgeable about Fuller’s life and work than I, will have a better sense of whether he was active or actively interested in law and development and whether he was part of the problem Hilary identifies (perhaps even whether his thinking was shaped by the postcolonial encounter). But at a general level, there is also support for the idea that he might be part of a solution. Fuller was interested in a great variety of legal structures, including mediation and even choosing by lot. Kenneth Winston describes a principal task of Fuller’s eunomics as describing such models of possible structures in detail – in both their structural and moral aspects – and assessing the possibilities for their realization in specific social contexts. The key point, though, is that Fuller’s inner morality of law concerns the qualities of law and the social conditions that these create for individual freedom, rather than particular legal institutions. Indeed, Martin Krygier’s view, to which Hilary is sympathetic, is that a better approach is to see the rule of law as a social outcome, which is consistent with this point.

B Silencing International Human Rights: Hart’s Positivism Abroad

Hilary’s main criticism of rule of law projects is their effect on human rights. Specifically, she argues that rule of law discourse has resulted in the “displacing, consuming or eviscerating” human rights analysis in the concrete context of post-conflict societies in which international organizations, foreign governments, NGOs or others have intervened to fund and implement various rule of law projects. While Hilary demonstrates thoroughly that much of the rule of law discourse applied to post-conflict societies by the outside does not encompass human rights or alternatively not economic, social and

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cultural rights, I was not sure whether this amounted to the full effect that she criticizes. If the claim about framing is not only that the rule of law framework generates, at best, a limited picture of human rights (thereby eviscerating them), but also that it crowds out other discourses of reform and attracts most of the resources available for reform (thereby displacing a human rights framework), then some further demonstration seems needed. I also wondered whether this monopolizing effect, if that is the argument, could be remedied other than by changing the content of rule of law to include human rights. In purely strategic terms, this seems like a risky move, as Hilary indicates when she says that it retains only “some of the oppositional and radical edge of human rights.”

Regardless, Hilary’s criticism returns us to Hart’s case for holding fast to the distinction between law and morality – and Bentham’s passion for reform. Recall that one of Hart’s justifications is moral, as opposed to analytical: separating law and morality avoids the mistaken belief that the law is always morally sound. Discussing Bentham, Hart writes that insistence on this distinction helps us steer clear of two dangers: “the danger that law and its authority may be dissolved in man’s conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test for conduct and so escape criticism.” But, as commentators have pointed out, underlying Hart’s moral argument is his view that citizens should be active in testing, evaluating and, if need be, resisting their laws. Obey punctually and censure freely, as Hart quotes Bentham. If positivism encourages a morally critical perspective on the law, perhaps Hart would say that international human rights law, absent ratification and implementation, now forms part of that morally critical perspective.

One way to understand Hilary’s paper in relation to the debate is as an empirical counter-example to Hart’s argument. If she is saying that in post-conflict societies, rule of law discourse has a silencing effect on human rights analysis, then she is also telling us that Hart’s moral argument for positivism is contingent on the existence of specific political and cultural conditions. Hilary does not make this point and for it to hold, we would need to learn more about the exact dynamics of the silencing, but these consequences are significant for the Hart-Fuller debate.

26 Charlesworth, supra note 3 at 11.
27 Hart, supra note 1 at 598.
28 Ibid. at 597.
IV A Case for Economic, Social and Cultural Rights as Part of the Rule of Law: Fuller’s Inner Morality of Law

Hilary’s conclusion that economic, social and cultural rights should be added to the concept of rule of law rests mainly on their importance. Because their achievement is harmed by being left out of the rule of law and, implicitly, because rule of law rhetoric is elastic, she argues that we should and could add them. Can her proposal also be justified in non-instrumental terms; that is, in terms of the rule of law? Hilary observes that neither Hart nor Fuller offers such an expanded concept of the rule of law and additionally that nothing in the Hart-Fuller debate might provide a justification for one. Here, however, recent scholarship on Fuller has a contribution to make. At first glance, Fuller looks somewhat unpromising on economic, social and cultural rights. In his reply to Hart, he writes disapprovingly of incorporating a host of economic measures into the constitution. He suspects that the reason for their inclusion is to entrench aims that are not generally shared and thereby remove them from “the vicissitudes of an ordinary exercise of parliamentary power.” Fuller is also an enthusiast of free markets, although for reasons of participation. Yet deeper analysis by David Dyzenhaus, Evan Fox-Decent, Kristen Rundle and others suggests that the relationship between Fuller’s inner morality of law and the agency of the legal subject may support an argument that the rule of law includes human rights and possibly even economic rights. I cannot do justice to these arguments, but want to flag them as another important point of contact between the Hart-Fuller debate and Hilary’s proposal.

As Hilary notes, Hart provides a set of cautions against her proposal. But a practical caution that she does not take up comes from the earlier analysis in her paper. One of her paper’s strengths is its sensitivity to how concepts get used and appropriated and how they can go wrong on the ground. So long as we are adding economic, social and cultural rights to a concept of rule of law controlled

29 Fuller, supra note 1 at 643.
30 David Dyzenhaus, “The Juristic Force of Injustice” in Dyzenhaus & Moran, supra note 20 at 256.
32 Doctoral work in progress.
33 Charlesworth, supra note 3 at 8-9 (discussing Nicola Lacey’s “modest, positivist proposal which Hart defended against Fuller.”).
primarily by international organizations, foreign aid agencies and private foundations, then how can we be assured that adding them will not subject them to the same problem that Hilary registers for the current rule of law projects sans economic, social and cultural rights? Will they be subject to a technocratic and Western approach and will they, in turn, silence other important forms of justice seeking?\textsuperscript{34}

V Transnational Terrain

As Hilary’s paper compellingly shows, the Hart-Fuller debate has shifted onto transnational terrain; in this case, the international traffic in ideas of the rule of law. By way of concluding comments, I note first that Hart and Fuller already had a foothold on transnational terrain and then suggest a few additional ways in which the transnational is important terrain for the determination of their legacy.

In the 1958 debate, the Nazi grudge informer case, of course, is not an example from Hart’s and Fuller’s own legal systems (and the extent to which that matters is a bone of contention between them). Both are also alive to international law. Indeed, Hart’s disengagement of positivism from the command theory of law has long come to the aid of international lawyers bedeviled by Austin, and Hart’s later account of international law as law, rather than morality, can be found in international law casebooks and anthologies. Whereas Hart in \textit{The Concept of Law} works outwards from the standard case of law to write about international law as a non-standard case,\textsuperscript{35} Fuller works inward. In his reply to critics in \textit{The Morality of Law}, Fuller uses the uneasy place of international law in legal positivism to criticize its conception of law as a unidirectional assertion of control over human behaviour.\textsuperscript{36} Interestingly, Fuller’s work has recently attracted interest from international lawyers Jutta Brunnée and Stephen Toope, who are working at the interface of international law with international relations theories of constructivism and seek an account of what distinguishes an international norm as legal. Fuller similarly uses private international law, specifically the example of interpreting the law of another jurisdiction, to

\textsuperscript{34} Women’s rights might be an example - see work by Kerry Rittich on gender and law and development?


\textsuperscript{36} Fuller, \textit{The Morality of Law}, supra note 24 at 233.
make his point against Hart’s idea of the core and penumbra that it is not enough to know the text of the law, we must also understand the shared assumptions that go into its making and interpretation.\footnote{Ibid. at 231-232.} Hart applies, whereas Fuller anthropologizes, arguing that we need a more adequate anthropology of our own legal system as well as others.\footnote{Ibid. at 235.}

This having been said, transnationalism changes, first of all, the terrain of their 1958 debate. The rule of law is not produced by a single legal system, but by complex interactions between systems. Take Fuller’s conception of the inner morality of law, which includes the availability and understandability of the law. Law must be capable of being followed - but it operates in societies that increasingly include not only citizens and residents, but transmigrants, seasonal workers, traders, foreign students, tourists and others who are \textit{de passage}. Moreover, law affects those who have never entered the country. Two examples serve to illustrate how law is produced when the legal subject is a foreigner. In public international law, one of the arguments for recognizing the right of a foreigner who is detained or arrested to be informed of her right to notify her consulate as a human right\footnote{See Inter-American Court of Human Rights, Advisory Opinion OC-16/99, available at \url{http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf}} is that the legal process would otherwise not be intelligible to a foreigner. (We might think that this should be the host state’s responsibility and not the state of nationality’s, especially in the context of labour migration from developing countries that may not have the resources to staff consular offices abroad, however, my point is simply the descriptive one that the rule of law is a joint enterprise here.) Private international law offers another possible example. In a Supreme Court of Canada case\footnote{Beals v. Saldanha, 2003 SCC 71.} about whether to recognize a Florida default judgment that had mushroomed to over a million dollars from a minor dispute about a small vacant lot, one of the dissenting opinions held that the Florida rules of civil procedure were so obscure to a Canadian that if the plaintiffs wanted to enforce the judgment in Canada, it was up to them to make the steps in the process sufficiently intelligible to the Canadian defendants that they could decide whether to defend the case or not.\footnote{Ibid at para.256 (LeBel J., dissenting): “A foreign plaintiff who expects to have a judgment in his or her favour enforced by a Canadian court has a responsibility to ensure that the defendant is in a position to make an informed decision as to whether he or she will contest the judgment.”}
Second, the transnational may give the edge to Hart over Fuller or the other way around. Consider the rules on statutory interpretation, for instance. The old rule in Canada on how to interpret a statute that implements an international treaty was that the judge could only look to the treaty if the meaning of the statutory provision was unclear. If we were in Hart’s “core” and the statutory provision was clear, the treaty was irrelevant; if we were in the “penumbra,” it guided the determination of meaning. The Supreme Court of Canada has since held that reference should be made to the treaty at the very outset of the inquiry to determine whether there is any ambiguity, even latent, in the statute. If there is, it must be resolved in favour of the treaty. In addition, simplifying slightly, there is a presumption that all statutes conform with the state’s international legal obligations. These rules of interpretation lend support to Fuller’s rejection of Hart’s distinction between core and penumbra. On the other hand, this also causes some difficulties for Fuller’s inner morality of law, because it is unlikely that a citizen reading the statute will know enough, or even be able to know enough, of Canada’s international legal obligations to read the statute such that it complies with them as far as possible.

Third, the Hart-Fuller debate may turn out to engage to the transnational in unexpected ways. What can it tell us, for instance, about the interactions and conflicts between legal systems generated by transnationalism? Jeremy Waldron’s paper on the Hart-Fuller debate and legal pluralism flags the connections between this issue and the issue of transnational law, although his interest is in Hart’s and Fuller’s attitudes towards non-state law and legal pluralism. Waldron does not explore these connections and footnotes William Twining’s remark that such topics were not dreamt of in Hart’s legal philosophy or those of most of its followers. But we could say quite the opposite: that the Hart-Fuller debate was precisely about conflicts between systems. These were law and morality, rather than the laws of two states or state and non-state law. Yet the forms are the same. Hart, Fuller and Radbruch echo the doctrines found in private international law. The difference between Hart and Radbruch is the decision about how to respond. If the defendant can show that the plaintiff failed to discharge that responsibility, the court should refuse to enforce the judgment on the basis that the defendant was deprived of proper notice, a basic condition of natural justice. In this case, the Florida claimants should have notified the appellants of the steps they could take after new versions of the Amended Complaint were filed and, more importantly, of the consequences of not taking those steps. Because they failed to do so, the appellants were unaware of the danger that their defence would lapse.”

42 Waldron, supra note 2 at 1.
public policy exception to choice of law in private international law. Fuller’s concern with the legal system arises when a court decides whether to let a foreign court hear the case in question or when a court decides whether to recognize a foreign judgment. In fact, *Oppenheimer v. Cattermole* transforms the German cases on Nazi-era law about the *past* into an English case about Nazi-era law as *foreign* law. As Mayo Moran has demonstrated, private international law brings doctrinal distinctions to the analysis that prove illuminating when used, in turn, to think through historic injustice cases.\(^{43}\) François Rigaux makes a similar point.\(^{44}\) Thus, the transnational can shed new light on central issues in the Hart-Fuller debate as well as potentially vice versa.


\(^{44}\) François Rigaux, *La Loi des Juges* (Paris: Éditions Odile Jacob, 1997) at 120.