

Formalism and Sources of International Law: A Theory of the Ascertainment of Legal Rules

Jean d'Aspremont

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Jean d'Aspremont's *Formalism and Sources of International Law* provides a comprehensive study of formalism as the theoretical underpinnings of sources of international law. While most traditional text books on international law will merely refer to Article 38(1) of the *Statute of the International Court of Justice* when discussing sources of law, this book adds a better theoretical understanding behind the black letter law. However, d'Aspremont is not writing in a historically unbiased method; *Formalism and Sources of International Law* is an apologia for using formalism in ascertaining sources of law. As such, much of the book is focussed heavily on expanding and explaining formalism.

D'Aspremont starts by clarifying what exactly he means by formalism. He argues that a formalistic understanding of law is that norms become law if they meet predefined formal criteria. These criteria of law are grounded in social conventions according to Hart's *The Concept of Law*.¹ In terms of detailing his concept of formalism, it is made quite clear that he is referring to formalism only at the level of ascertaining sources of law. It is not advocated as a general solution to all jurisprudential issues. D'Aspremont also is careful not to equate positivism with formalism although he admits that they are often fellow partners.

He then meticulously traces the history of the jurisprudence regarding sources of international law from Hobbes onwards. He ends up explaining the current schools of thought such as the Legal Realists and the New Haven School whom he claims have deformed international law by looking at processes and actions of states rather than sources of law. Subsequently he defends formalism against these other theories and questions whether they can actually achieve their objective of expanding international law and increasing compliance without a formal system of law in place. Nonetheless, he ultimately rejects the traditional version of formalism as a satisfactory theory for sources of international law and suggests a new type of formalism.

His suggested rejuvenation of formalism is a new look on Hart's source and social thesis. He argues that current source thesis (where the aim is to find the source of a legal norm) is still deficient as it focuses on the intent

¹ HLA Hart, *The Concept of Law* (Clarendon Law Series, 1997).

of the parties who drafted the law. Looking at the intention of any instrument defeats the whole purpose of formalism as intention itself is a non-formal criterion. Instead, what should be taken to determine formal criteria of laws are any linguistic pointers whether oral or written. As to the determination of what linguistic indicators shape the legality of a norm, this depends on the social thesis.

Following on from that, d'Aspremont draws on Wittgenstein in order to ground his version of the social thesis. Intention does not need to be examined since Wittgenstein has now eliminated private internal language. As is now often said to be the summary of Wittgenstein's *Philosophical Investigations*, the meaning of a word is in its use. Thus we look at the conduct of community in order to clarify the linguistic pointers. It is the way that communities use language which is the key to linguistics and not the hidden intent in the writer's mind. D'Aspremont terms this 'communitarian semantics' and argues that communities do not require absolute agreement on terminology but just a shared feeling of the words in question.

This book is excellent at both educating the reader on formalist theories and at the same time suggesting an original new jurisprudential theory. It is a useful guide for those interested in theoretical work on sources of law especially in international law. What is especially beneficial is the historical method of studying those theories. It not only covers the contemporary debate but also the backdrop to those arguments. This historical backdrop thus equips the interested reader to understand how current theorists developed their ideas and informs them as to what they were responding to. Additionally, the author does not shy away from addressing formalism's critics and presents a defence to as many of the broad range of competing theories as possible. However, it is aimed at informed readers as it requires some basic knowledge in jurisprudence and philosophy and can become technical at parts. Nevertheless the philosophical aspects are not overly technical and are limited to a few areas in the book.

The primary drawback of this book is that a mere two chapters are devoted to d'Aspremont's new formalism, which leaves certain topics underdeveloped. An example of this is whether looking at linguistic indicators may actually work in practice. Also, while Wittgenstein did eliminate private language, it is not clear that looking at meaning from its use reduces any of the deformalisation that alternative theories allegedly involve. It is not convincing that observing how society uses a word will give the certainty that d'Aspremont hopes formalism will achieve. Additionally, the shared communitarian feeling of the social thesis is vague and could have been further developed. Since this work is not a text book but instead is aimed at proposing a new theory, perhaps less

time could have been spent on the history of formalism and more focus given on streamlining the new theory.

Overall, *Formalism and Sources of International Law* is an interesting and detailed exploration into theories regarding sources of international law. It is particularly important as sources in international law are not as well defined as in domestic law where courts just examine case law and statute. This ambiguity is further worsened as the justification of Article 38(1) as an authority for sources in international law is usually just that the International Court of Justice decides on international matters and 'all members of the United Nations are *ipso facto* party to the Statute'.² This book readily supplies more guidance as to how law ascertainment should actually work as opposed to how it just currently works. Hence it is an excellent resource on perhaps one of the more overlooked areas of international law

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² Malcolm Shaw, *International Law*, (Cambridge University Press, 6th ed, 2008) 71.

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