Session 3 Hart, selections from *The Concept of Law*

Hart, like Austin, wants to retain the central tenet of *legal positivism*: the separation of the concept of "law as it is" from the concept of "law as it ought to be":

(1) The existence and content of laws is a matter of *social fact*.
(2) There is nothing in the nature of law as a social institution that guarantees its moral worth.

But Hart also sees it as an essential feature of legal systems that they are *normative*: they give rise to *obligations* of a sort, and generate (or are perceived to generate?) *reasons*.

This Hart saw as the essential seed of truth in Austin's theory: laws generate requirements that are in some sense non-optional.

But Hart is trying to occupy a somewhat slippery position: he wants to account for the (necessary) *normativity of law* while denying that laws (necessarily) have *moral content*. Can one account for the normativity of law without admitting that morality is "internal to law," in the sense the content of laws depends on the content of our moral requirements?

To see how Hart intends to answer this question, it's fruitful to begin by looking at what he sees as the short-comings of Austin's Command Theory (CT) of Law:

(1) The CT can't explain why/how laws bind their makers, too; and why not all commands issued by a legislator are laws.
(2) The CT is ill-suited to explain slaws that are *power-conferring*, rather than *duty-creating*: laws governing the making of wills, contracts, marriages, and more laws!
(3) The CT has difficulty recognizing as law any laws that aren't brought into being by explicit prescription (e.g., legal precedent).
(4) The CT has difficulty explaining the continuity of legal obligations across changes in sovereignty.
(5) The CT mistakenly conflates *being obliged* with *being obligated*: commands backed by sanctions may *oblige* us to act, but being *obliged* to at is neither a necessary nor a sufficient condition for being *obligated* to act. And I'm not released from a legal obligation just because I know I won't be caught/punished. (The notion of an obligation is *normative*. So the CT theory fails to adequately capture the sense in which laws are normative after all.)

We can imagine responses to these worries on behalf of Austin; they too are informative:

(1) Austin could claim that law-makers, in their capacity as *sovereigns*, issue commands that bind them in their capacity as *citizens*.
   - Hart would be sympathetic to this approach. But he asks: what allows us to differentiate these roles? In virtue of what does something a legislator does

count as making law? How are we to recognize when the legislator is acting as sovereign and when she is acting as citizen?

(2) Austin might try to stretch his command model to accommodate power-conferring laws.
   - One possibility is seeing laws governing, e.g., the making of a marriage contract as a command "Get married this way!", enforced by the sanction, "If you don't, you won't count as married!"
     - But if I choose not to get married, it seems a stretch to interpret me as having violated a legal obligation and so having to suffer the appropriate punishment: if I choose not to get married, not being married is no punishment!
   - Another possibility is interpreting the laws as commands, backed by sanctions, to public officials to treat people who have taken certain describable steps (filled out certain forms, etc.) in certain ways.
     - But Hart says this account has "no better claim to our assent than the theory that all the rules of a game are 'really' directions to the umpire and the scorer [score-keeper];" this account distorts the psychology of ordinary citizens who take the relevant rules to be applicable to them.

(3) Austin might suggest that laws that result from legal precedent, and other laws not explicitly issued, are *tacit* orders of the sovereign, because she doesn't explicitly repeal them.
   - But this seems overly simplistic. And such laws are law even if it's clear that the "sovereign" doesn't approve of them (think of the Supreme Court's recent campaign finance decision). What gives these laws their validity?

(4) Again, Austin might suggest that any law that is a hangover from a previous sovereign is binding in a new regime because, by not repealing it, the new sovereign has tacitly reissued it.
   - But this might misdescribe our intuitive sense of the source of validity of the law, and also can't explain why we feel immediately bound by the laws issued by the new authority, despite lacking the *habit* of obedience.
     - We may have a habit of obedience to the *role*, which now has a new occupant. But here Hart can return to his thoughts about question (1): what establishes the role as something distinct from its occupant?

(5) Finally, we wanted to explain the bindingness of laws even when we know we won't get caught/punished for breaking them. Austin has suggested that a law is a command backed by the possibility/probability of a sanction: that statements about legal obligations are really *predictions* about what will follow if we perform certain actions (how judges will rule, how authorities will act, etc.). This suggestion forms the backbone of a theory of jurisprudence (misleadingly) called *Legal Realism*, and it has some prominent adherents:

"Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend, the bad man, we shall find

that he does not care two straws for the axioms or deductions, but he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law". (Oliver Wendell Holmes, *Collected Papers*, New York, 1920, p.173).

- But this approach again distorts the attitude of citizens bound by the laws, and of judges and officials interpreting and enforcing them: how can judges' rulings be seen as predictions of how they themselves will act? And citizens see laws not just as reasons to *expect* that punishment will follow certain behavior, but as reasons *for* punishment to follows certain behavior.

All of these worries shape Hart's own version of legal positivism. Our concept of law should:

- allow us to represent the difference between legislators as *legislators* and legislators as *citizens*;
- allow us to represent the difference between *power-conferring* and *duty-establishing* rules;
- allow us to explain the validity of laws not issued by a sovereign
- reflect the distinction between being *obliged* and being *obligated*

For Hart, the central concept of law is not that of a command, but that of a *rule*:

The essential characteristic of a rule is that people who see themselves as bound by it see it as providing them with a *reason* to act (to obey, or to apply sanctions…). (*Question: can this properly distinguish rules from commands?*)

This is what Hart calls the *internal aspect of rules*:

It represents the difference between *rule-following* and merely habitual behavior. (The latter can be fully described from the extreme external perspective.)

Points of View:

- The *extreme external* PoV: can learn to see the red light as a *sign* that people will stop (that's how legal realists see jurisprudence).
- The *moderate external* PoV: can learn to see the red light as a *signal* to people to stop.
- The *internal* PoV: sees the red light as a *reason* to for people to stop.

The essential flaw of both the CT and the predictive model (Legal Realism) is that they do not recognize the *internal point of view.*

Mere *habits of obedience*: observable regularities.
Social rules: normative vocabulary used to draw attention to a standard of behavior and criticize/punish deviations from it.

Examples: Rising inflection when asking a question (norm) v. rising inflection in valleyspeak (habit).

Two Kinds (Levels) of Rules:

Primary Rules: forbid or require acts; generate duties or obligations.
Secondary Rules: rules *about* primary rules -- specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined; generate *powers*.

We can imagine a society governed only by primary rules: a society in which a certain set of restrictions and requirements have been organically adopted as binding on the society, by its members, as a matter of social fact. But that society will face *uncertainty* about what the rules are; it will be *static* – unable to respond quickly to changes in circumstances by changing the rules; and it will be *inefficient* – no good method to settle disputes about the proper interpretation of rules, or to enforce compliance with them.

Secondary rules, which, Hart thinks, bring a society from a *pre-legal* state to a state governed by a *legal system*, solve these problems:

Three kinds of secondary rules:

- *the Rule of Recognition* "specifies some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts." (p. 76)
  - The RR solves the problem of *uncertainty*
  - May recognize different ways of making laws, and grant some more authority than others in cases of conflict (e.g, written constitution, enactment by legislature, judicial precedent)
  - The RR identifies a particular source of law as "supreme", in the sense that rules identified by reference to it count as valid rules of law even if they conflict with rules identified by reference to other criteria. But this is not to say the power of that source of law is *unlimited* (as Austin imagined sovereign power to be).
  - The RR is a social rule – it *exists* simply in virtue of being generally accepted.

- *Rules of Change* empower individuals to introduce new primary rules or eliminate old ones.
  - Solve the problem of *stasis*
  - Explain the difference between the legislator as sovereign and the legislator as citizen.

- *Rules of Adjudication* establish proper procedures for settling *disputes* about the meaning of laws.
  - Help solve the problem of *inefficiency*

- Go hand in hand with a rule of recognition identifying adjudicators' judgments as "sources" of law (since their judgments are authoritative as to what the law is)

Hart says for a legal system to exist, we must (i) have primary rules that are valid according to the RR and are generally obeyed (though not necessarily seen by ordinary citizens as legitimate – ordinary citizens needn't take the internal PoV); and (ii) have secondary rules to which the officials designated *do* take the internal PoV.

Validity v. Efficacy:

To say that a rule is a *valid* rule of law is just to recognize it as passing all the tests for pedigree provided by the rule of recognition. To say a rule is *efficacious* is to say that it is generally obeyed. But a rule can be a valid law even if it is not generally obeyed, so long as it is identified as valid by the RR. (Some RRs may build an efficacy requirement into their criteria for validity, such as those that include a "rule of obsolescence".)

However, if there is a *general disregard* for all or most of the rules of a system, they may not turn out to be valid rules of law. That's because such general disregard for the rules would seem to indicate that no RR is generally accepted (at least not anymore).

Hart says the question of *validity* doesn't properly arise with respect to the RR. *Why not?*

- It is the *ultimate* source of validity – it establishes the criteria of validity of other rules; but there are no rules providing the criteria for the assessment of it's own legal validity.
- We can ask "is this the RR that is used by people in this society?" and "is it a good thing that they recognize this RR?". But these are not questions of *validity*; these questions are asked from the *external* perspective.
- People who take the internal perspective to a legal system presuppose an affirmative answer to these questions. To claim a particular rule is or is not a valid rule of law is to take the internal perspective to the system.
- The existence of the RR can be established from the external perspective (it is an empirical question), but the validity of a rule of law can only be established from the internal perspective.
- He says we should not say of the RR that it is "assumed to be valid" but rather that it is "presupposed to exist."
- Comparison to the meter stick: "[The RR] can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is "assumed by cannot be demonstrated," is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurements in metres is itself correct." (p. 83)
- Comparison to the "pre-legal" simple system of primary rules (Hart says the existence of the RR is like the existence of the primary rules in such a system…)
- Think also about the rules of a game…

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