

## Lecture Notes – Hart’s Legal Positivism, Primary and Secondary Rules

- Last class we examined the legal positivism of John Austin. Command theory.
  - Austin sees laws as general rules, which are a species of command.
    - They obligate or compel compliance by way of the threat of sanction for non-compliance.
    - They are commands issued by a sovereign to those governed.
  - I want to wrap up discussion of Austin by noting two things.
    - First, Austin and the Natural Lawyers seem to be relying on two very different conceptions of practical reasoning.
      - Discuss the seeming rejection of any obligatoriness that doesn’t originate from an individual’s own desires, own motivational set.
      - All reasoning is means end, instrumental reasoning.
      - HUME: “Reason is, and ought only to be, the slave of the passions.”
    - Second, Austin seems to run into serious trouble in making sense of laws that don’t seem to be commands:
      - As regards Austin's “command” model, it seems to fit some aspects of law poorly (e.g., rules which grant powers to officials and to private citizens—of the latter, the rules for making wills, trusts, and contracts are examples), while excluding other matters (e.g., international law) which we are not inclined to exclude from the category “law.”
      - More generally, it seems more distorting than enlightening to reduce all legal rules to one type. For example, rules that empower people to make wills and contracts perhaps can be re-characterized as part of a long chain of reasoning for eventually imposing a sanction (Austin spoke in this context of the sanction of “nullity”) on those who fail to comply with the relevant provisions. However, such a re-characterization misses the basic purpose of those sorts of laws—they are

arguably about granting power and autonomy, not punishing wrongdoing.

- Now let's turn our attention to Hart.
  - Hart aims to revive legal positivism and uses Austin as his argumentative foil.
  - **Obliged vs. Obligated**
    - Hart first takes aim at Austin's understanding of obligation.
      - Recall – for Austin, obligation is to be understood entirely in terms of the threat of sanction. One is obligated to act if one faces a credible threat of a severe enough sanction.
      - Hart argues – one is *obliged* in such a case...we can say in the gunman scenario that the man was obliged to hand over his wallet.
        - To say this is to say that “he believed that some harm or other unpleasant consequences would befall him if he did not hand it over and he handed it over to avoid those consequences.”
        - It would be strange to say, however, that “he had an obligation” or a “duty” to hand it over.
        - To say that is not to say that he believed some harm would befall him if he didn't hand it over; it is not to say anything at all about his beliefs...his believing some harm would befall him is not even necessary for him to be obligated.
        - “The statement that a person had an obligation, e.g., to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience.”
      - So what is it to say that one is obligated?
        - Is it a prediction of his chances of incurring punishment?
          - That can't be right.

- Failure to do what one is obligated to do is not just grounds for predicting some harm will befall him but grounds or *justification* for those harms (sanctions).
  - It is not contradictory to claim that someone had an obligation but faces no threat of sanction...he had successfully bribed the police, e.g.
- Obligations exist only where there are **social rules**
  - Such rules “make certain types of behavior a standard.”
  - And, the distinctive function of “obligation” statements is to apply such general rules or standards to a particular person by calling attention to the fact that his case falls under the standard.
  - **“There is involved in the existence of any social rules a combination of regular conduct with a distinctive attitude to that conduct as a standard.”**
- Is the existence of social rules and their application to particular individuals sufficient for understanding obligation?
  - No. Consider rules of etiquette or grammar. It would be strange to claim that one has an obligation to use the soup spoon only for soup or that one has an obligation not to say “ain’t”
    - These are things you shouldn’t do, but not things you have a duty not to do.
- So, what makes the difference for obligation???
- “Rules are conceived and spoken of as imposing obligations when the general

demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”

- When the pressure comes in the form of verbal manifestations of disapproval or appeals to respect for the rules and engages shame, remorse, and guilt, we’re dealing with moral obligation.
- When the sanctions are physical, we are not wrong to say we are dealing with a primitive version of law.
- What matters is the importance and seriousness of social pressure behind the rules.
  - These are rules that are believed to be necessary to the maintenance of social life or some prized feature of it.
  - Conduct required by these rules may conflict with what the individual may wish to do.
    - Standing possibility of conflict between obligation and interest.
  - **Distinction between feeling obligated and having an obligation.**
- **Internal vs External aspect of rules**
  - Distinction between being concerned with the rules merely as an observer or as a member of the group which accepts and uses them as guides to conduct.
  - From the external perspective: the observer gives a description of group life that need not refer to rules at all. It will be in terms of

observable regularities of conduct, predictions, probabilities, and signs.

- A “violation of a rule” will be a natural sign that one is about to incur a penalty.
  - MISSES the fact that it is a signal for others to sanction.
- From the internal perspective, a violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.
  - Of course, not everyone accepts the rules as guiding in this way. There will be tension between those who voluntarily do and those who merely act to avoid sanction.
- **The Elements of Law**
  - Once we have this idea of obligation in place, we can note that law is primarily a matter of **primary rules of obligation**.
    - We can imagine a primitive society in which the only means of social control is the general attitude of the group towards its own standard modes of behavior. They use social pressure to enforce them.
      - They would necessarily have rules against the free use of violence, theft, and deception.
      - Majority must freely follow the rules.
  - This arrangement could only exist in a close knit, small group in a stable environment. It will suffer from deficiencies:
    - **Uncertainty:** Without systematicity, there is no way of **settling doubt about what the rules or are the precise scope of a given rule**. We’ll need rules for this procedure.
    - **Static:** No means of deliberately adapting the rules to changing circumstances by added or removing rules. We’ll need rules for this.
    - **Inefficiency:** Diffuse social pressure is an inefficient way of enforcing rules. Smoldering vendettas might arise from “Self-help in the absence of official monopoly on sanctions.”
  - Need to supplement primary rules of obligation with **Secondary Rules**

- This effects the conversion from primitive or pre-legal social rules to legal rules.
- We need rules *about* the primary rules: how they can be ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.
  - Remedy for Uncertainty: **Rule of Recognition**
    - Specify some feature or features possession of which by a rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by social pressure.
      - Recognition of some mark as authoritative, proper way of disposing of doubts.\
    - Can take a variety of forms: edicts of a king, inscriptions, publication in the Federal Register, written in the majority opinion of the court
    - Unifies a legal system: idea of legal validity
    - Like a scoring rule of a game: In the course of a game the general rule defining the activities which constitute scoring are rarely is seldom formulated; instead it is *used* by officials and players in identifying particulars phases which count toward winning. *Implicit in practice*
    - Can take a variety of forms: edicts of a king, inscriptions, publication in the Federal Register, written in the majority opinion of the court
      - There will be an order of subordination between these sources:
        - Custom and precedent are subordinate to legislation.
      - Rule of recognition is the **Supreme** criterion of legal validity if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, but not vice versa.

- Rule of recognition is **ultimate** when there is no way to go any further. It settles the validity of other rules, but no rules settle its validity.
    - At this point, if we want to push further, we can only take up the external perspective again and ask whether this system of rules achieves some worthwhile end. Are there prudential reasons for supporting it?
  - RULES OF RECOGNITION allow us to state from the internal perspective that a given rules exists as a rule of law.
- Remedy for Static: **Rules of Change**
  - Empowers an individual or body of persons to introduce new primary rules or eliminate old ones.
    - Legislative enactment and repeal are to be understood in terms of rules not in terms of orders backed by threat.
      - We don't face Austin's problem of not being able to make sense of laws repealing laws.
  - Also: **Power Conferring Rules**
    - Power to make contracts, wills, transfer property, etc.
    - Exercise of limited legislative powers by individuals
- Remedy for Inefficiency: **Rules of Adjudication**
  - Identify who and how disputes are adjudicated
  - Whose decisions will be treated as authoritative?
  - Define procedure to follow.
  - May be accompanied by Primary Rules imposing duties on judges to adjudicate, but in the first instance they *confer judicial powers and special*

*status on judicial declarations about the break of obligations.*

- Centralize sanctions by prohibiting use of physical punishment or violent self-help by individuals.
- Three Theses Revisted
  - **Conventionality Thesis:** That legal validity ultimately rests on social convention, i.e., that it is to be explained in terms of criteria that are authoritative by virtue of a social convention of taking them to be authoritative.
    - For Austin, this is the convention of deference to the sovereign.
    - For Hart, this is the convention among officials (judges in particular) of taking the criteria identified by the rule of recognition as standards that govern their official behavior, i.e., judges taking legislation and precedent as guiding their legal decisions.
  - **Social Fact Thesis:** Legal validity is a function of certain social facts, not to be derived from some moral principles or axioms.
    - Austin: a rule R is legally valid (that is, is a law) in a society S if and only if R is commanded by the sovereign in S and is backed up with the threat of a sanction.
    - Hart: a rule R is legally valid in a society S if and only if it satisfies the criteria of validity contained in a rule of recognition that is binding in S.
  - **Separability Thesis:** Law and morality are conceptually distinct.