John Austin's and H.L.A. Hart's Legal Positivist Theories of Law: An Assessment of Empirical Consistency

Ekaterina Bogdanov

210 374 718

January 18, 2012

John Austin and H.L.A. Hart are both legal positivists. As such, "they see law as a social fact, which is to be characterized using only empirical and evaluatively neutral terms" (Dimock 33). Austin takes a view of law "as the sovereign's coercive orders." H.L.A. Hart departs significantly from this, describing law as "a union of primary and secondary rules" (Hart 91). As I will argue, the theory of H.L.A. Hart remedies the defects in the theory of John Austin, yielding a model of law which is more consistent with empirical observations of legal systems.

Austin's theory of law is defective in three ways. Firstly, Austin renders an incomplete account of law, by excluding "important kinds of laws that are neither commands nor backed up by coercive threats of sanction" from the definition of law (Dimock 90). Secondly, Austin's model misrepresents "how laws are used in society" (Hart 90) by taking what Hart later defined as an "external" view of law, and misidentifying the source of an individual's obligation to obey the law. Finally, the theory's test for assessing the validity of law requires the invocation of problematic concepts of "sovereign," and "command," which are inconsistent with the following realities: (a) the "sovereign" often cannot be identified using Austin's definition of "sovereign", (b) law can emanate from sources other than the sovereign, (c) the sovereign does not have unlimited legislative power in a modern state, and (d) legislative authority is continuous.

Hart's model addresses the above deficiencies. His definition of law includes the kinds of laws excluded from Austin's theory. He provides a more empirically consistent view on the role of law in society by positing that law is a type of social rule which is generally obeyed for reasons internal to the individual. Finally, Hart's rule of recognition introduces a test for validity of law which does not require valid law to emanate from the sovereign and conform to a command structure, and thus better accounts for the above-mentioned realities of law.

To begin analysis of Hart's and Austin's models of law, we must first form a clear

understanding of their definitions of law. Austin argues that "law is to be defined in terms of commands, issued by superiors to subordinates and backed by a threat of sanction if they are not complied with" (Dimock 33). In this structure, a command is a "signification of will," the superior is the "sovereign," who is habitually obeyed and obeys no other, and the "subordinates" are all members of the political society, excluding the sovereign. Any "law" that is not structured as a sovereign's coercive order is not law strictly so called. Hart, on the other hand, argues that laws are a type of social rules, not of commands. Specifically, laws are a type of social rules which, in case of violation, are associated with a physical sanction such as imprisonment, as opposed to moral sanctions, such as feelings of guilt (Hart 96). Law in general is a combination of primary and secondary rules. Primary rules "are concerned with the actions that individuals must or must not do" (Hart 100). They can be referred to as rules of obligation, because they impose an obligation of obedience on members of society. These rules exist in even the smallest communities, "contain in some form restrictions on the free use of violence, theft, and deception," and are obeyed by the majority of the social group (Hart 99). They encompass all that Austin defines as true, or *positive*, law. An informal system based strictly on primary rules has, however, three defects: uncertainty, a static nature, and inefficiency. For this reason, a proper legal system has *secondary rules*, which "are concerned with primary rules," and serve to address the primary system's deficiencies (Hart 100). These secondary rules are divided into rules of recognition, rules of change, and rules of adjudication. The rule of recognition makes primary rules certain by laying out criteria for authoritatively identifying valid laws. The rules of change consist of all laws that allow individuals to change their position relative to primary rules, and that allow societies to change law. The rules of adjudication consist of all laws that make the system efficient by setting up the judiciary to allow to rapidly resolve disputes about whether a rule has been violated, and to punish violators.

The first defect to address in Austin's theory is that his definition of law is flawed because it is insufficiently broad: while it may adequately describe criminal codes, it does not encompass many other areas of what is called "law." Most significantly, it excludes from law what Hart refers to as private and public power-conferring rules. These rules constitute a very large and important part of the legal system; they "typify life under law" (Hart 101). Private power-conferring rules allow individuals to "create or vary legal relations" by establishing a process of legally changing one's rights and obligations through voluntary activities such as marriage, the transfer of property, and the like (Dimock 91). Public power-conferring rules are laws which confer on public entities the power to legislate and adjudicate, as well as set up systems and procedures to do so. In reference to Austin's theory, these important areas of what we call law are not law. There is no real sense in which laws which, for example, govern the process of marriage are a coercive command to any party. Similarly, there is no real sense in which, for example, a judge is under a coercive command to issue judgments, or a parliament is under coercive orders to issue new laws.

Hart rectifies the incompleteness of Austin's definition of law by eliminating the notion of a "command" from his own model. In Hart's model, private and public power-conferring laws have a place as law within the category of secondary rules. Private power-conferring rules are part of the rules of change, because they allow an individual to legally change his or her position with respect to primary rules: for example, laws conferring on individuals the power to marry allow a person to legally change their social role to that of a "spouse," and become subject to all primary rules which govern this social role. Public power-conferring rules are part of the rules of change and rules of adjudication, because they establish legislative and adjudicative processes.

To further analyze and address the second defect of Austin's theory, we must continue our exploration of the two models and their take on the notion of obligation to obey the law. Both models

begin with a "perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory" (Hart 93) For Austin, law makes conduct obligatory because an obligation arises automatically from a command, as a result of a person becoming "liable to evil" in case of non-compliance (Austin 39). Hart likens the obligation of the Austinian individual to obey law to avoid a sanction to a "gunman situation," where an individual A is *obliged* to hand over his money to individual B to avoid some punishment threatened by B (Hart 93). In this situation, it would be wrong to say that A is obliged to obey B if the threatened punishment is trivial (like a pinch), or if B cannot carry out the threatened punishment (he threatens to shoot A, but clearly has no gun). If either of the two scenarios were the case, A would keep the money. Therefore, before A feels *obliged* to hand over the purse, A must calculate the *chances* of incurring some punishment. In Austin's view, obligation is then defined "in terms of the chance or likelihood that the person having the obligation will suffer a punishment or 'evil' at the hands of others in the event of disobedience" (Hart 94). If this chance is high, an obligation to obey exists; if it is nil, there is no such obligation. In this way, Austin's theory of obligation is *predictive.*

There are two objections to the predictive theory of obligation that can be raised here. Firstly, accepting this theory would mean accepting that an individual hasn't an obligation to obey the law if there is "not the slightest chance of him being made to suffer" (Hart 95) For example, in Austin's model, members of organized crime syndicates who have bribed most of the police force and judiciary cannot be said to have an obligation to obey the law, because they are not liable to any 'evil' should they disobey it. Such a statement would rarely (if ever) be made or understood. The reason for this inconsistency of Austin's view with reality is because Austin conflates the terms "to be obliged" and "to have an obligation": while a person may be *obliged* to do something in view of a credible threat of sanction, saying that he or she *has an obligation* to do that something is a different matter. Thus, the

above organized criminals may not *be obliged* to follow the law because they face no sanction, but they may (and, as most would say, do) *have the obligation* to follow it. Secondly, if we take Austin's view of obligation, we must accept that the only reason that individuals follow law is external to them. Like a passive spectator, they observe regularities of behaviour in the society, correlate deviation from regularities with hostile reaction, and assess the chances that hostile reaction would befall them in case of deviation as high (Hart 97). The individuals thus reject the rules in themselves, obeying strictly out of desire to avoid punishment. They thus take what Hart terms the external view of law.

It is this external point of view, which arises from treating law as a "gunman," that is seen as the fundamental problem with Austin's command theory: this point of view is not only inconsistent with how people use laws, but can lead to the disintegration of the social order if it were widely adopted. Such an external view of law is not a view that the majority of individuals normally take (though it can be, and is, a view held by some). Commonly, we feel that we must not murder the person sitting next to us for reasons other than just the calculation that if we do so, we will be punished. As Hart argues, the majority of individuals not only do not, but *cannot* take an external view of law if a society is to endure. If *everyone* rejects the rules, no one would feel justified in enforcing these rules. There would not, therefore, be a threat of hostile reaction that could make people feel *obliged* to follow the rules, and there would be no *obligation* to follow them, either: the rules would just not be followed, and society would decay. Further, the external view of law cannot be taken by any legal officials of a society, such as judges and legislators. These officials face no sanction if they disobey laws governing their roles, so they must obey for reasons *other* than the prediction of sanctions.

As an alternative to the external view, Hart offers the *internal* view of law, which is the view taken by those "who accept and voluntarily cooperate in maintaining the rules" (Hart 98). When people take the internal view, they use rules not only as grounds to predict that if they disobey there will be

negative consequences, but as reasons to behave a certain way and punish those who do not. To illustrate with Hart's simple example, when a light turns red, people use that not only as a sign that others will stop, but as a signal for them to stop. Similarly, when a law exists, people not only see that as a sign that deviators from the law will be punished, but as a reason and justification for them to obey the law and punish those who do not. For Hart, obligation, therefore, stems not from an assessment of chances of punishment, but from the person's *internalization* of the idea that everyone, including him or herself, has an obligation to follow the law for a reason unrelated to possible sanctions or the fear of hostile social reaction that may arise in the case of deviation. Specifically, people internally feel the obligation to obey rules which (1) society generally pressures people to follow, (2) "are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it", and which (3) may require conduct that conflicts with an individual's self-interest, meaning some degree of sacrifice or renunciation may be required of the person is to obey the rule (Hart 96).

Hart's model of law, therefore, is more empirically consistent than Austin's because (a) unlike Austin's model, it does not make it contradictory to say that a person has an obligation to follow law where said person cannot suffer from disobedience, and because (b) it more accurately describes how people use laws. Hart's model allows that some individuals use law to observe regularities in behaviour and predict whether their deviation from such regularities would result in sanction. At the same time, it does not "define out of existence" (Hart 98) the internal view of law, maintaining that most citizens, and all officials, use law as a reason and justification for their own conduct and for sanctioning deviators.

Finally, the third major defect of Austin's theory lies in his test for validity of law, whereby a valid law is one that has the structure of a command, in is issued by the "sovereign." The concept of the

"sovereign" is problematic for this test. Austin's definition of a sovereign, identified by patterns of obedience, and single-handedly possessing unlimited legislative power, is inconsistent with several realities of a state. Firstly, in a modern state, a sovereign is impossible to identify using patterns of obedience. Consider, who is the sovereign in Canada? The parliament of Ontario appears to be sovereign, in the Austinian sense, regarding healthcare, while the Canadian parliament appears similarly sovereign in others areas, such as trade. The Supreme Court can be viewed as being sovereign in some sense: it can strike down law, and the government generally obeys, though it has the power to disobey, as well. The Queen and her representatives may have some claim to sovereignty – their signatures are required to pass law. Austin's theory is thus not helpful in making sense of complex patterns of interaction in a modern state. Secondly, in a modern state law emanates from a variety of sources, including statutory law made by different levels of government, by-law, common law, and some form of unwritten customary law. Austin attempts to explain this by positing that the sovereign is the sole source of valid law, but he or she can delegate authority to create law to other entities or, through tacit agreement, allow sources of law (such as custom) to be considered valid. However, as Hart argues, "we can think of the whole official world as one person (the 'sovereign') issuing orders, through various agents or mouthpieces, which are habitually obeyed by the citizen. But this is either no more than a convenient shorthand for complex facts which still await description, or a disastrously confusing piece of mythology" (Hart 111). Thirdly, the Austinian sovereign is above the law, because (a) he obeys no other, (b) there isn't anyone with the power to sanction him in case of deviation, and (c) the sovereign can "abrogate the law at pleasure" (Austin 58). This does not appear to be the case in modern societies, however: "sovereigns" are not only subject to law in their personal capacity (if, for example, they commit murder), but they also do not have unlimited legislative power. This power is, in a very real sense, constrained by the constitution, which is upheld and enforced by the courts, and

cannot be changed by the sovereign's "will". Finally, the concept of command is problematic also, because it defines law as the signification of the sovereign's will. This implies that in the event of the sovereign's death or another incapacitation, the law ceases to operate, because a non-existent entity cannot have a "will." And if we assume that the "sovereign" is a permanent, continuous *institution*, such as parliament or a throne, we would need to accept the absurd notion that an inanimate institutional shell has a "will." Austin's theory thus fails to account for the continuity of law and legislative authority.

Hart's model offers a far more elegant way to test the validity of law, which does not rely on the problematic concepts of "sovereign" and "command." Simply stated, in Hart's model, valid law is law that passes "all the tests provided by the rule of recognition" (Hart 104). The rule of recognition is an unwritten rule which sets out the criteria for recognizing law as valid, and which the legal system's officials feel the *internal* obligation to follow (their taking an internal view of law here is key, because there is no sanction that deviation from the rule can result in). The rule of recognition addresses the deficiencies in Austin's view of legal validity. The first two deficiencies can be addressed by the fact that the rule of recognition could, but does not *need* to, require the identification of a single sovereign, because it can allow for valid law to emanate from multiple sources. The rule of recognition can state that, for example, only the parliament of Ontario creates valid healthcare laws for Ontario, while only the federal parliament creates valid trade laws, and the courts make valid common law. The rule can further "make provision" for conflicts between sources of law, by arranging them into a hierarchy, where, for example, what is valid under statutory law cannot be invalidated by common law, because common law is inferior to statutes. The third deficiency of the requirement of unlimited legislative power for the sovereign can be addressed by the introduction of a condition into the rule of recognition which states that only law which complies with the constitution is valid law. Compliance with the

constitution can thus be made the superior criterion for assessing the validity of law. Finally, the model is consistent with the continuity of legislative authority because since law is not a command, i.e. a signification of the will of the sovereign, the rule of recognition can refer to the "institutional shell" such as parliament as a source of valid law without invoking the assumption that such a shell has a will.

To conclude, Hart has identified, and in his model addressed, the defects of Austin's theory of law. In doing so, he has yielded a theory which is more consistent with empirical observations of states. As we review Hart's model of law, "stand[ing] back and consider[ing] the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change, and adjudication, it [becomes] plain that we have [in his model] not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist" (Hart 102).

Works Cited

Austin, John. "The Province of Jurisprudence Determined." *Classic Readings and Canadian Cases in the Philosophy of Law.* Ed. Susan Dimock. Toronto: Pearson Prentice Hall, 2002. 37-60. Print.

Dimock, Susan, ed. *Classic Readings and Canadian Cases in the Philosophy of Law.* Toronto: Pearson Prentice Hall, 2002. Print.

Hart, H.L.A. "The Concept of Law." *Classic Readings and Canadian Cases in the Philosophy of Law.* Ed. Susan Dimock. Toronto: Pearson Prentice Hall, 2002. 91-113. Print.