The Differences and the Practical Implications between Hart’s Account of Modern Legal Positivism and John Austin’s Legal Positivism

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Introduction

Austin and Hart’s theories of law are distinguished from each other in many significant stances regarding to three main questions: 1/ what are the core substantial components of the concept of law? 2/ what makes the law binding? and 3/ what is the basis for the validity of law? Following this line, the main purpose of this paper is double: i/ discussing the differences between these two most influential paradigms of British legal positivism in addressing the above questions and; ii/ drawing some general practical implications resulted from these two accounts of legal positivism as to how the theories are applicable to encompass and explain the variety of law as a social phenomenon.

I. What are the core substantial components of the concept of law?

1. Austin’s concept of law

According to Austin, law is a ‘species of commands’ signified by a political sovereign. By the term command, Austin means an ‘expression of a wish’ of a political superior supported by threat of sanctions if this wish is not complied with. In other words, in Austin’s definition, law is seen as a set of coercive orders imposed by a political sovereign on the conduct of the inferiors. In this sense, the concept of law has four basic elements: sovereign, command, duty, and sanction. As such, Austin’s account of legal positivism is often referred to as command theory of law.

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1 John Austin, The Province of Jurisprudence (John Murray, London, 1832) 1,6.
3 Jonathan Chamber, Legal Positivism: An Analysis (Undergraduate Honors Theses Paper 79, Utah State University, 2011) 8.
2. Hart's definition of law
Hart defined laws in terms of social rules, not of commands. For Hart, the key factor that distinguishes social rules from habit and merely convergent behaviour is what he terms as 'internal aspect', meaning that social rules constituted in patterns of behaviour are internally recognized as a standard to be followed. These rules are empirically observed by three noticeable characteristics:

i. a rule governing certain behavior exists where deviations are generally seen as faults subjected to criticism and readjustment;

ii. a rule governing certain behavior exists where criticism of behavioral deviations is seen as legitimate or justified self-defense mechanism of the social entity as a whole;

iii. a rule governing certain behavior exists where a general 'critical reflective attitude' among people holding certain kinds of behavior as a common standard.

On this ground, Hart arrives at the central argument stating that law, as a type of social rules, combines primary and secondary rules. Primary rules regulate behaviour that individuals must or must not conduct. Secondary rules play the function of identifying and correcting deficiencies embedded in primary rules, consisting of: rules of recognition, rules of change, and rules of adjudication. The first one sets up criteria on which a valid law is to be authoritatively made, the second confers individuals with rights to change their social status and position by entering different kinds of social contracts, and the third allows that laws can be changed and decides whether a rule is infringed and what appropriate punishments for rule violation are.

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6 Ibid 87-88.
7 Ibid.
8 Hart, above n 4, 99-100.
11 Ibid 14.
3. Discussion

Strictly confined to the notion of coercive orders, Austin’s view of law did not encompass all the variety of branches of laws existing in modern societies, including: customs, civil procedures, constitutional law, property, family law, and contract and business transactions, which are essentially not threatened sanction-based commands. As such, Austin’s concept of law is at best applicable only to a very narrowed area of laws that coercively imposes duties with the backup of sanctions, and therefore inadequate and incapable to explain other important portion of laws referred to as power conferring rules in Hart’s definition of law. However, Hart’s concept of rule did not stand without critiques\(^\text{12}\), which can be summarized as follow.

First, arguing that law is a system of rules combining of primary and secondary rules does not mean that the distinguishable characteristics attributed to the concept of law are clearly identified\(^\text{13}\). Many institutional systems, such as a biking club, may have codes of conducts consisting of both primary and secondary rules in the sense of what Hart means, but it is impossible to consider these kinds of rules as laws\(^\text{14}\).

Second, Hart’s rule-based theory of law presupposes that there already exists a culture forming general patterns of conduct that social members must follow\(^\text{15}\). The problem here is that the rule-based theory of law defends itself on the ground of a presupposed view of ‘social convention’\(^\text{16}\) which should have been clearly identified before the inquiry into the nature of law taken place\(^\text{17}\). Up to this point, Hart refers to what he calls ‘minimum content of Natural Law’\(^\text{18}\) as the universal human nature serving as the driving force that human beings must comply with to survive\(^\text{19}\). This notion of minimum content of Natural Law, though undisputable in the sense of a

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12 Ibid 16-18.
13 Anthony Kronman, ‘Hart, Austin, and the Concept of Legal Sanctions’ (Faculty Scholarship Paper 1017, Yale Law School, 1975) 589.
14 Ibid.
17 Dan, above n 15, 27.
18 Hart, above n 4, 189.
19 Kronman, above n 13, 590.
truism statement, brings about no clearer understanding of characteristics peculiar to legal system\textsuperscript{20}.

Third, two salient characteristics of social rules (a) and (b) as Hart suggests above are apparently problematic\textsuperscript{21}. The first characteristic (a) is a ‘complete non-sequitur’, because there may be a pattern of behaviour, for example, drinking, eating and smoking, though results in diseases, is construed as a standard to follow by a certain group of people. However, it cannot be said that deviations from this pattern, such as healthy eating and physical exercises, are considered as faults open to criticism\textsuperscript{22}. The second characteristic (b) emphasizes the legitimacy of criticism of deviations, but this legitimacy is ‘completely empty’, since it grounds on no independent standards other than the mere fact that there is a support for this criticism\textsuperscript{23}.

Fourth, how, from this conception of social rules, did Hart shift his argument to the nature of the concept of law? Basically, this transformation started with Hart’s discussion of Rex, which is featured by the idea that the standards of behaviour, from now on, are not determined by internal attitude of certain groups of people, but are exactly what specified by Rex as authoritative orders to be followed\textsuperscript{24}. This shift in the conception of rule taken by Hart is, again, faces with some difficulties as follows:\textsuperscript{25}

1. defining the concept of legal rules in terms of an ‘authorizing rule’ runs into conflict with the salient characteristics of social rules that Hart already well established because this rule of authorization just reflects an attitude toward a desirable pattern of behavior, not the actually existing one;

2. Hart’s notion of authorizing rule rests on a circular argument: the authorizing rule exists because the standards set by itself are accepted, and this acceptance exists because there is a general

\textsuperscript{20} Ibid.
\textsuperscript{21} Moles, above n 5, 90.
\textsuperscript{22} Ibid 91.
\textsuperscript{23} Ibid 92.
\textsuperscript{24} Ibid 94.
\textsuperscript{25} Ibid 94-112.
obedience to these standards. This general obedience exists because there are acknowledgments that the man who signifies this authorizing rule is qualified to have the right to this obedience under the authorizing rule. It is obvious that this argument is ‘obfuscation’ in essence, hence, possesses less power in explaining the concept of legal rules.26

II. What makes the law binding?

1. Austin’s ‘gunman situation’
   Much like Hobbes’s idea that ‘there can be no covenants without the sword’27, Austin’s conception of law is characterized by the central argument that law as commands is backed by the threat of coercive sanctions28. The sanction makes obligation, because in case of non-compliance, a person becomes ‘liable to evil’29. For Austin, commands without being backed by sanction are not law as in the case of international law which has no mechanism of coercive sanctions30. Hart characterized this central theme of Austin’s command theory of law as a ‘gunman situation’ whereby an individual A is obliged to hand over his money to individual B to avoid some punishment threatened by B31. In other words, coercive sanction, not the internal virtue of the law, is the only source making the law obeyed.

2. Hart’s internal view of law
   Hart pointed out that the defect in Austin’s view of obligation rooted in his confusion between the meanings of the two concepts: ‘having an obligation’ and ‘to be obliged’32. Hart argued that social members are binding to the legal rules because they fully recognize that these rules are made in a legitimately authoritative way, and

26 Ibid.
28 Austin, above n 1, 9, 21.
29 Ibid 39.
30 Ibid 171.
31 Hart, above n 4, 93.
32 Ibid 218.
hence, are accepted and valid legal rules. Hart identifies three main sources that make the law internally obeyed, which are:

i. general social pressures imposing on people to follow;
ii. a common thought seeing legal rules necessary to maintain social life and;
iii. a recognition that obligation to obey the law may require some degree of sacrifice or renunciation as the obedient conduct runs into conflicts with an individuals’ points of view or self-interests.

On this ground, Hart maintains that law is binding to all individuals and authoritative officials largely because it is often considered as an ‘internal reason’ and ‘justification’, not an external coercive force, for their own behaviour and for sanctions imposed on violators.

3. Discussion

Regarding to the question of what makes the law binding, Hart's objection to Austin’s theory of law rests on two main arguments: the modes of origin of law and the content of law.

The content of law argument holds that Austin’s coercive sanction-backed model cannot explain the fact that there is a large body of laws which are binding or enforceable without being backed by threats of sanctions, which fall into what Hart categorizes as the secondary rules. At this point, Hart denies two main counterarguments as follows:

i. the first one states that legal nullity, by itself, is a specific type of sanction embedded in any law, since any law would have to face with the possibility of failing to enforce. Hart rejects this argument by holding that legal nullity, as a type of sanction, is not always seen as something threatening or fearful, but sometimes considered as

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34 Hart, above n 4, 96.

35 Ibid.

36 Keith, above n 9, 8.

37 Ibid 8-9.
benefits, as in the case of insane or innocent individuals who are not finally sentenced to death penalty as decided in the final verdict.

ii. the second claims that without coercive sanction included, a law is not in its complete form but just a fragment of law, suggesting that laws should be made in conditional form with appropriate sanctions included. For example, supposing that there is a law stating that one must be at least at the age of 21 to be legitimately entitled to vote. This type of expression of law should be rephrased in a conditional form such as if and only if a specific voting behavior conducted by a citizen at the age of 21, shall this voting behavior be given effect as a legitimate conduct. Hart disagrees with this kind of counterargument by contending that, while the idea that a law can be made without a sanction included in itself is commonly conceivable, the notion of fragments of laws conceals laws into a misdirected form and twists the normal functions intentionally performed by the law. 38

The modes of origin-of-law argument states that Austinian coercive sanction model fails to identify a set of customary laws which, though not being formally enacted, serve as 'a deliberate datable act' and has nothing in common with the notion that law is essentially backed by threatening sanctions39. Again, up to this point, Hart disagrees with two counterarguments. The first one holds that, unless being practically used in litigation, customary rules are not law in its strictly defined term40. Hart strongly objects that: i/ this line of argument 'is dogmatic' and fails to explain the significant difference between 'contingent' and 'necessary' aspects as customary rules are incorporated into a law and; ii/ more importantly, it is commonly observable that 'custom is often contingently law even before it is ordered in a court'41. The second one claims that, in practice, the process in which a customary rule becomes a law very often involves with an implied order signified by a political sovereign, therefore, this legal practice is explainable by order-backed model of law42. Hart rejects this notion of 'tacit order' by asserting that, in any modern political system, one hardly denies the fact that there are always some kinds of interference between

\[38\] Ibid.
\[39\] Ibid 10.
\[40\] Ibid.
\[41\] Ibid.
\[42\] Ibid.
the political sovereign and lawmakers, hence, the notion of tacit order is meaningless.\footnote{iId.}

III. What constitutes the validity of law?

1. Austin’s theory of sovereignty

The notion of sovereignty lies at the heart of Austin’s theory of jurisprudence in addressing the question of what constitutes the validity of law. Austin’s view of sovereignty can be summarized as follows:

i. members of an independent political society consist of two portions: the sovereign portion and the subject portion;

ii. the sovereign portion may be a single person, a group of persons or a slender part of the whole social members, and the subject portion is the vast majority of the society;

iii. law as commands must be signified only from a \textit{determinate source which is resided in the sovereign portion}, and the power to impose commands is the unique trait of sovereignty distinguishable from other social forces.\footnote{John Dewey, ‘Austin’s Theory of Sovereignty’ (1984) 9.1 \textit{Political Science Quarterly} 31, 37-38.}

As such, Austin’s conception of sovereignty logically results in an inference that a law is considered as a valid one if and only if it is issued by a numerical sovereign portion of the whole society on whom the sovereignty is resided. In other words, for Austin, the validity of positive law depends on the fact that whether it issued by a political sovereign through and by which the sovereignty or the determinate source is operated.

2. Hart’s theory of rule of recognition

Hart’s theory of rule of recognition suggests that a valid law is the one that passes ‘all the tests provided by the rule of recognition’.\footnote{Hart, above n 4, 104.} The rule of recognition emphasizes the internal aspect of obedience as the reasons and justifications for individuals’ conducts. It is on this ground of internalized recognition, the validity of a
law is determinate. This test of law’s validity is significant for two reasons: i/ the authoritativeness conveyed through the expression of a law is ultimately originated in a pattern of obedience which is a social fact empirically observable and; ii/ this pattern of obedience is constructed on the ground of what the obedient individuals internally recognize as merits that make a law valid\textsuperscript{46}.

3. Discussion

The problems with Austin’s notion that sovereign is the sole source of valid law lie in the way he defined the concept of sovereign. First, why is it that the sovereignty resides in a sovereign? Austin’s answer to this question is that: i/ law must be understood in terms of commands, and these commands are issued only by an individual or a group of individuals ‘capable of specific enumeration’ and; ii/ this is because that a sovereign which is uncertain in terms of numerical stance cannot operate as a political sovereign body, hence, incapable of issuing commands\textsuperscript{47}. The notion that sovereign must be understood in terms of a numerical political body seems to be inconsistent with the idea of popular sovereignty which is practically built into modern democratic societies\textsuperscript{48}. It is empirically observable that, in almost all modern societies, governments seen as numerical political organs are strongly affected and controlled by other popular forces of sovereignty. Second, even assuming that the notion of a numerical political body is the key to capture the meaning of the term sovereign, it is still not clear that who are exactly the persons constituting this sovereign body. For example, a lot of questions, such as ‘is the Crown sovereign?’, ‘is the prime minister or president sovereign?’, ‘is the House of Common or the Lords sovereign?’, or ‘is the electorate sovereign?’, etc. reveal the fact that Austin's conception of sovereign is but ambiguous, which is practically inapplicable to any existing modern government\textsuperscript{49}. Third, for Austin, the sovereign is not bound by the law because: (i) he/she obeys no others, (ii) there isn’t anyone with the power to sanction him/her in case of deviation, and (iii) the sovereign can ‘abrogate the law at pleasure’\textsuperscript{50}. In this sense, the validity of law is ultimately

\textsuperscript{46} Jules Coleman, ‘Rules and Social Facts’ (Faculty Scholarship Paper 4194, Yale Law school, 1991) 706.

\textsuperscript{47} Dewey, above n 44.

\textsuperscript{48} Ibid 37.

\textsuperscript{49} Ibid 41.

\textsuperscript{50} Austin, above n 1, 58.
determined at the will of the sovereign, while all other sources that, in reality, make the law valid are excluded.\textsuperscript{51}

Hart's rule of recognition is conceivable but not without problems, of which, the following ones are worth to be mentioned. First, the notion that rule of recognition stems from certain patterns of convergent social practice is not compatible with the fact that a law may be authoritative even there is no convergent practice existed before the law is enacted\textsuperscript{52}. In addition, there are cases in which a law serves as an adjudicative resolution for conflicting patterns of behavior, hence, the already existed rule of recognition is subject to change, not the fixed ground for the validity of the law. Second, assuming that rule of recognition sets up the conditions upon which a law is seen as valid and authoritative, the question is: why is this rule of recognition valid and authoritative? Three explainable alternatives should be involved:

i. there is another set of rules under which the rule of recognition is valid;

ii. it is the moral values of the rule of recognition that make it valid and;

iii. the rule of recognition is constituted as the internal view of the relevant authorities in charge of making the law.\textsuperscript{53}

The first explanation is obviously a tautological one. The second one is incompatible with the legal positivism because it brings legal positivism back to the natural law theory. It is noticeable to see that the last explanation is the one that Hart's position is grounded on\textsuperscript{54}. Accordingly, Hart comes to a conclusive argument that the authority of the rule of recognition cannot be conceived in terms of its ‘formal validity’ or ‘substantive defensibility’ but just in term of ‘social fact’, hence, the rule of recognition is valid and authoritative because it is a special kind of social rule\textsuperscript{55}. In this sense, if the rule of recognition constitutes in the relevant authorities’ internalized recognition reflecting in their convergent practice, then it follows that the validity of the law made by them depends on the validity of their internalized recognition.

\textsuperscript{51} Ibid.
\textsuperscript{52} Coleman, above n 46, 707.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid 708.
\textsuperscript{55} Ibid.
Essentially, this argument does not take any further significant steps distinguishable from what had been suggested by Austin’s conception of a numerical political body seen as the sole source of a valid law.

IV. Some conclusion remarks

The differences between Austin and Hart’s accounts of legal positivism becomes apparent when Hart makes a conclusion at the end of his criticism of Austin’s concept of law, that is: Austin’s model of law is built on just some ideas of ‘order, obedience, habits, and threats’ in which the idea of rule is excluded, while this idea is the key to understand the most basic elements of a legal system.\(^{56}\)

However, drawing a sharp line between these two accounts of legal positivism should be directed to yield significant practical implications regarding to the question of how these two theoretical models of law is consistent with the facts empirically observed from variety of legal systems in the real world. In this sense, it is obvious that there has been a common tendency of criticism holding that, in rejecting Austin’s model of jurisprudence, Hart’s model of law creates a much more comprehensive theoretical framework on and from which most defences of legal positivism rest and follow in a search for a consistence between legal positivist theory and the facts of legal systems in reality.\(^{57}\) Yet, there also exists a strong line of criticism contending that Hart’s model of law ‘is deeply ambiguous’\(^{58}\), and that, since Hart’s model of law borrowed many elements from Austin’s model, the question is not of how Hart’s model differs from that of Austin’s but of ‘the extent to which Hart followed Austin’\(^{59}\)

From this direction, it will follow that, in term of consistence with empirical observations of legal systems, Hart’s model of law is essentially not in a significant difference to that of Austin’s.\(^{60}\) And finally, facing with this wide spectrum of criticisms, one may take an alternative position arguing that, in a scientific inquiry into objective phenomena, including that of law, ‘observation is always selective’\(^{61}\) and

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\(^{56}\) Hart, above n 4, 78.


\(^{58}\) Kronman, above n 13, 585.


\(^{60}\) Moles, above n 5, 1-5, 7.

‘no phenomenon is ever completely explained’\textsuperscript{62}. Hence, criticism of Austin and Hart’s models of law should be carried out in the form of an interpretation that helps to make the best sense of them, contributing to better theory of law, rather than using the one to demolish the other.