

Law, ORDER, and Habit

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The Structure

- I. The Variety of Laws
- II. The Habit of Obedience
- II. The Unlimited Sovereign

A Recapitulation of Austin's Accounts of Law

- Why does Hart mention a gunman scenario?
- What's wrong with the gunman scenario?
- Why Hart replaces “command” with “order” in addressing Austin's accounts of law?

The Variety of Laws

What type of laws resembles Austin's orders backed by threats the most?

Apart from that particular type, are there any other variety of laws? For example?

1. The Content of Law

- A: Conferring power on individuals to mould legal relationship with others by contracts, wills, marriages, etc.
- B: Conferring legal powers on public or officials: judicial, legislative, and administrative.

C. Two Objections to the Variety of Laws


- What does “nullity as a sanction” mean?
- What’s the analogy’s problem?

C. Two Objections to the Variety of Laws

- Power- conferring rules as fragments of law
- What's Hart's critique of this objection?
- What's your view on this? Do you think the law without sanction is conceivable?

What do you think of this following paragraph:

“The principal functions of the law as a means of *social control* are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.”



2. The Range of Application

- What is the range of application in Austin's mode of law as orders backed by threats?
What's the problem here?
- What's Austin's strategy in solving this problem?
What does Hart think of this strategy?
- What's Hart's suggestion for this problem?

3. Modes of Origin

- According to Austin, how to view custom laws as tacit coercive orders?
- Under what circumstances, the idea of “tacit order” might be plausible?
- Why does Hart object to treating custom laws as tacit orders?

Summary of Hart's Critiques of Law as Coercive Order

- First of all, it cannot even explain the penal statute, which comes nearest to it, for it may also impose duties on legislators.
- Secondly, it cannot account for those laws which confer power on persons.
- Thirdly, customs do not owe their legal status to such law creating act.

II. The Habit of Obedience

- Imagining an absolute monarch Rex I: Rex I died, do you think his son Rex II's order is also law? Do you consider a general habit of obedience to Rex I in his lifetime by itself renders that his son, Rex II, will be habitually obeyed?
- Is the law made by an earlier legislator, long dead, still be law for a society? For instance, is Queen Victoria's statute still law? Could the habits of obedience explain that? Could a tacit expression of the current sovereign's will by court explain that? Can a tacit order explain the distinction between an old law which has not been repealed and another one which was repealed?

II. The Habit of Obedience

- The *facts* that orders were given by Rex I and his orders were habitually obeyed is not enough to account for his successor's *rights* to rule: habits are not normative.
- If there is to be this right and this presumption at the moment of succession, there must have been the *acceptance of the rule* under which the new legislator is *entitled* to succeed.

II. The Habit of Obedience

- What do you think of the similarity of/difference between *social rules* and *habits*? Any examples of habits and social rules?

Rules and Habits:

- First, for the group to have a habit it is enough that their behavior in fact converges. Deviation from the regular course need not be a matter for any form of criticism, where there is such a **rule deviations are generally regarded as lapses or faults open to criticism.**
- Secondly, where there are such rules, not only is such criticism in fact made but **deviation from the standard is generally accepted as a good reason** for making it.

Rules and Habits:

- Thirdly, the generality of habit is merely a fact about the observable behavior of the group. By contrast , if a social rule is to exist some at least must look upon the behavior in question as a **general standard** to be followed by the group. In addition to the external aspect of a social habit and which consists in the regular uniform behavior which an observer could record, a social rule has an *'internal'* aspect.

III. The unlimited sovereign?

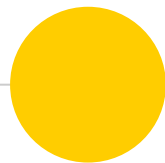
- In Austin's theory, there's nothing that a sovereign "can't do".

- Distinguishing two senses of "can't do":

I can't throw wet and dry garbage together.

I can't walk on the moon.

- Legal limitations on legislative authority consist not of **duties** imposed on the legislator to obey some superior legislator but of **disabilities** contained in rules which qualify him to legislate.



III. The unlimited sovereign?

- Given that those supreme legislature within their legal systems are legally limited, can we find a sovereign incapable of legal limitation behind a legally limited legislature?
- The problem may manifest itself especially in modern democracy, why?

Conclusion so far...

- The simple idea of orders , habits , and obedience, cannot be adequate for the analysis of law. What is required instead is the notion of a rule conferring powers.

Do you consider Hart's above
critiques fair?

