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Insights from Hart's Critical Process of Austin's Theory of Legal Command Sayings

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Abstract

Hart's critique of Austin's theory of legal command is of great significance to jurisprudence and has far-reaching influence, so much so that scholars of later generations have to learn to understand Austin's theory from Hart's description of Austin's theory of command. The purpose of this essay is to revisit the process of Hart's critique of Austin's theory, focusing on Hart's critical logic and methodology, and attempting to explore the following questions: is Hart's description of the Command Saying sound? Is Hart's critical process of the Command Theory rigorous and logical enough? Does Austin's theory still have a chance to resist the attack of Hart's book The Concept of Law? Was Hart influenced by Austin's theory? Finally, what is the significance of Hart's critique, which replaces the naturalistic perspective of analysing law, for the construction of the state of law nowadays?

Keywords

Hart, Austin, Command theory, Naturalism

1. Overview of Austin's Command Theory

Nowadays, although Austin's theory has almost no influence in the academic world, in order to analyse Hart's critical process, you first need to have a preliminary understanding of who Austin was and his theory. In 1826, Austin was appointed Chairman of Jurisprudence at the University of London, but instead of accepting the appointment he went to Bonn, Germany, to prepare for his lectures and theoretical studies. Three years later, he joined University College London and published A Treatise on the Scope of Jurisprudence, whose theories were influential in the decades following his death and became the basis for jurisprudential education in Europe and the United States, and which even Hart recognised: ‘Austin actually started a craze for jurisprudential studies in England.’

The command was also framed on the basis of naturalism and behaviourism, with naturalism being the view that ‘only things that natural science tells us exist really exist’, such as atoms and molecules, which exist, and spirits and gods, which do not. One of the more extreme forms of naturalism is known as behaviourism. Behaviourists not only believe that spirits and the like do not exist, but also believe

that mental activities, spiritual activities, thoughts, feelings, desires, and other such manifestations of behaviour that cannot be externalised are also empty, and that behaviourists do not want their scientific research to be infused with anything other than objective behaviour. Austin was an extreme behaviourist, and in his theory he only studied people's external behaviours, i.e. habits, sanctions, commands, and other visual patterns of these behaviours. Hart, on the contrary, focuses more on specific mental states, although this is not relevant for this paper, which can be found in Chapter 5 as well as Chapter 6 of The Concept of Law.

The formal name of Austin's command doctrine is Command of sovereign, a theoretical model in which a sovereign or a group of sovereigns possesses the habitual, permanent, and absolute obedience of all their subjects, and at the same time that sovereign does not take orders from anyone. In short, law is a command, an expression of a desire to get others to do or not to do something. According to Austin, law has the following characteristics: first, the sovereign has a desire for others to do or not to do something; second, the desire must be issued by the sovereign; third, the desire must be expressed and externalised; fourth, the desire must be common-sensical; and, fifth, the desire carries a potential threat of punishment for non-compliance.

These characteristics enable Austin's ‘command’ to be distinguished from other instructions, and at the same time, Austin excludes from the law some rules that are not artificially made, such as religious law, custom, and so on.

2. Overview of Hart's Critical Process and Reflections

In his book, The Concept of Law, Hart begins with a model of the robber scenario, which he adapts, or ‘fixes’ as he calls it, in the following ways.

Firstly, the order is universal, in the sense that it applies to the general public; secondly, it is continuous, in the sense that an order backed up by a threat is not fleeting; thirdly, it is universally obeyed, in the sense that it is obeyed by the majority of the population; thirdly, it is internally supreme, in the sense that everyone else habitually obeys it; and lastly, it is externally independent, in the sense that it does not follow the orders of anyone else.

With these modifications, Hart then constructs a model of the legal system which incorporates all the resources of legal interpretation used by Austin more fully. Putting aside Hart's critique in The Concept of Law, there is a certain rigour to this model, and Hart acknowledges that the command doctrine is perfectly capable of explaining criminal law.

After admitting that the command theory can explain criminal law, Hart then cites a series of laws that are contrary to the ‘backed by threat’ theory, such as laws of authorisation such as entering into a contract, entering into a marriage, or creating a will. No one would be punished for not marrying or creating a will. Austin's followers countered that if a person does not enter into a marriage or create a will in accordance with the law, the marriage or will lose its legal validity, and nullity will be considered a sanction. Hart, on the other hand, argued that Austin had extended sanctions indefinitely

and that nullity was clearly not a sanction.

Hart also emphasises the fact that the legislative and judicial powers given to officials are also independent of obligatory norms, and that these legislators do not legislate and administer justice because they are obliged to do so by the law, but for other purposes, and that this kind of law, or legislative law, which confers legislative powers, is, according to Hart, of great importance, and is crucial to the development of the rule of law civilisation and, indeed, of human civilisation, and to the development of our rule of law civilisation from the pre-legal world into the post-legal world. Into the post-legal world, Hart said the pre-legal era is the authoritarian, barbaric clan era, that time the law is usually very cruel, and the legislator (ruler) wantonly, the post-legal era refers to the era of democratic legislation, the legislative power is controlled by the people, the officials, legislators are subject to the legislative law, in order to maximise the safeguard of democratic freedoms. From here, it is easy to see that, as Hart states among the concepts of law:

‘[N]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology;’

Hart not only stood on the legal point of view, but also on the sociological and anthropological point of view to study the concept of law, unlike Austin, Hart is more inclined to stand on the height of the society as a whole to consider the problem, and in the breadth of knowledge is much greater than Austin.

Hart's thesis on the source of law is also very interesting, Hart thinks that Austin's exclusion of custom from the law is unreasonable, custom should be the law, and not because of the affirmation by the legislature or the judge to become the law:

“Why if statutes made in certain defined ways are law before they are applied by the courts in particular cases, should not customs of certain defined kinds also be so? Why should it not be true that, just as the courts recognize as binding the general principle that what the legislature enacts is law, they also recognize as binding another general principle: that customs of certain defined sorts are law? What absurdity is there in the contention that, when particular cases arise, courts apply custom, as they apply statute, as something which is already law and because it is law”.

Therefore, according to Hart, a custom is the same as a decree, and when a judge makes a custom a law through a judgement, it is because the custom itself is already a law, and the judge only confirms it. However, unfortunately Hart does not describe the characteristics of custom although he states that it should belong to the law, so the reader is still unable to distinguish the boundaries between custom and law, as well as the boundaries between other rules and custom.

In the modern system of law, when a decree is issued by a legislator, the legislator, while enacting the law, must himself obey the law. Hart points out that if the command theory were used to explain this situation, it would lead to a very absurd scene in which the robber, while threatening the teller at gunpoint to put the money into the money bag, suddenly pulls the money out of his pocket and puts it into the money bag himself. The command says that there is obviously no explanation for this

phenomenon.

Finally, and most importantly, Hart points out that to call the threat-backed command the essence of the law would result in the absence of the guiding role of the law. Hart discusses the guiding role of the law, i.e. the function of the law is not singularly to merely sanction transgressions, but also to emphasise a kind of active compliance, which is the guiding role of the law. Hart stresses that this guiding role is often overlooked because people focus too much on the sanctions that come with breaking the law, and that this guiding role is indeed the primary role of the law, whereas sanctions, on the contrary, only provide people with one of the incentives for their behaviour to be guided and regulated by the law, and are of secondary importance. Under the command system, if the normative role of law is blurred, Hart gives an example, then there will be no difference between paying a fine for violating the criminal law and paying a tax, because the law, which has lost its guiding role, will no longer regulate people's behaviour and will only be punitive, that is, to give the offender a certain disadvantageous consequence, which, then, will be tantamount to condoning the crime, because some of the rich people will not care about the fine and will keep on committing crimes. This will lead to the state's harsh tax and fines are not essentially different, and it is clear that the legislator and then set up these two laws when the lawmakers must be considered that these two laws are essentially different. The legislator's intention to achieve social effects through these two laws is also different. Therefore, it is very inappropriate to regard sanction as the only function of law.

Later on, Hart further clarifies his criticism of the theory that law has only the function of sanction by arguing that turning all laws into sanctioning instructions (i.e., if...it will ....) This form is not conducive to the guiding role of law, which does not only exist in the courts, which is only one of the places where the law fulfils its function, but also in the society and life all the time. If the law is turned into a sanction, it may clarify the consequences of the offence, but it will also weaken the normative role of the law in the life of the society. The object of legal norms is broad, the law can not only guide the judge how to judge the case, but also to guide the behaviour of all social subjects.

If the law does not play a guiding role, from the perspective of social development and political institutions, if all people are ‘forced’ to comply with the law simply because they are afraid of punishment, then the society can never achieve the rule of law, and the operation of the entire social system will depend entirely on fear. What a terrible thing it would be if all sovereigns thought that the nature of the law was to be threatening, to be feared, and that this would give rise to corruption, despotism, and dictatorship. At the same time bad law would grow unchecked because people would lose the incentive to question the reasonableness and legitimacy of the law because they would always be lowly law-abiding. If the law is interpreted as a mere command, like a slave owner holding a whip to force a slave to labour, the slave's continued labour is not a recognition of the law enacted by the slave owner, but a recognition of the power of the whip he holds. Montesquieu described three types of government in his book The Spirit of the Laws. The essence of democracy is virtue, that is, the love of one's country and the love of equality; the essence

of despotism is fear and threat, in which all people live under a haze of suspicion, even the despot, for the fear Montesquieu spoke of does not only include the fear of the despot, but also the fear of the despot of the people, and the fear of the people of the despot. It also contains the despot's fear of the people. Just as mentioned above, if the slaves still want to fight for their rights and interests, they are certainly not thinking about how to make the slave master's law reasonable and justified, but how to take the slave master's whip away…

To sum up, the author believes that, leaving aside the loopholes of the command statement, even if the command statement can be a perfect interpretation of the law, is the most perfect model, in the real rule of law society or in the gradual development of the rule of law social life, the law is not and can not be a ‘threat backed by the order’, the fear and threat behind the cold command statement is unacceptable. The fear and threat behind the cold command is unacceptable. In a country governed by the rule of law, law-abiding citizens not only abide by the law in their behaviour but also recognise the law in their hearts.

3. Limitations of Hart's Critique

Hart's description of Austin's doctrine of command as a robber scenario has some validity, however, the model also has some limitations, as Hart states in the second chapter of the concept of law:

‘In this and the next two chapters we shall state and criticise a position which is, in substance, the same as Austin's doctrine but probably diverges from it at certain points ...’

It is clear from this that Hart does not directly criticise Austin's theory, but rather restates his theory as Hart understands it. Some of Hart's critiques of Austin's theory are not analysed in the context of the book Scope of Jurisprudence. In other words, possibly out of a desire to fulfil a theoretical task, Hart describes the command doctrine as very extreme, and Hart constructs a model of the robber scenario that would be at variance with Austin's command doctrine. The author sees the following flaws in Hart's argument:

Combined with the background of the birth of the command theory and the background of the era in which Hart was born, probably due to the concept of ‘breaking the army first to cut down the generals, capturing the thief first to capture the king’, or possibly due to the different understanding of positivism between Hart and Austin, Hart is extremely concerned about the word ‘command’. From a linguistic point of view, he fiercely criticises Austen's incorrect use of the word ‘order’. When a gunman orders a teller to hand over money or he will shoot. Thus, the gunman gives an order to the teller, and the teller may hand over the money, but Hart argues that this cannot be called ‘obedience’. But Hart argues that this cannot be called ‘obedience’ because obedience implies a certain right or authority to give orders, which does not exist in this case. Hart ridicules Austin for replacing the word ‘command’ with ‘command backed by threat’. Hart argues that the term command should be used in a military context and carries a very strong implication that there is a relatively stable hierarchical organisation in which commanders occupy a position of pre-eminence. He mentions that specific orders are characterised by

authority over people rather than the power to inflict harm on them, although it may be combined with the threat of harm. But commands are primarily a respect for authority rather than an appeal to fear, and Hart argues that Austin misused commands, ignoring the fact that commands should not only be threatening but also authoritative. Hart should also have mentioned that soldiers are punished when they ignore orders from their superiors. This is actually as Austin states that a monarch can cause harm to his subjects for disobeying his orders. Austen actually realises that the word 'command' is flawed, and that there are subtle differences in linguistics with words such as instructions, however, language cannot express ideas perfectly, and we should understand the meaning of a command in context, and Austen does not misinterpret the semantics of a command, although commands cannot be used in the sense that they can be used as a punishment for disobeying a superior. If we take the context of the Scope of Jurisprudence into account, Austin did not misinterpret the semantics of the command. Although the command does not fully express Austin's understanding of the concept of law, it is probably the most appropriate word that Austin could think of, and the mere difference in language is not enough to make the word command a target of criticism.

Secondly, Hart argues that the command doctrine cannot explain the continuity of legislative authority; if a king, Rex I, whose commands are habitually and universally obeyed by the world and issues a decree that 'Everyone must Read concept of law or their head will be chopped off 'When Rex I dies, Rex II inherits the throne outright, yet at this point in time, no one obeys Rex II because habitual obedience takes time to develop. Hart argues that if Sovereignty was based on customary obedience, as Austin suggests, then in the time period between Rex I's death and Rex II's universal obedience, Sovereignty would have disappeared and there would have been a vacuum of legislative authority. However, this is not the case, and Rex I's decrees are not unobeyed during this period because of his death. And Rex II could have begun to proclaim laws immediately after his succession, and they would have been obeyed. Austin actually has a clear explanation for this, that the king or sovereign is an abstraction, and does not refer to a specific person or group of people, but to the legislative power or authority itself, in short, the king will die, but the king's throne will not die, and so there will be no interruption of sovereignty, as Hart suggests. The author argues that if the sovereign is abstracted, Austin's theory does not break the continuity of legislative authority. Therefore, Austin's theory is not flawed here.

4. Implications of Hart's Critique for Building a State Based on the Rule of Law

The first chapter of the concept of law is entitled 'Persistent Questions', the concept of the rule of law is also an annoying problem. In the author's view, the concept of law is constantly changing, with the continuous progress of the times and the improvement of national quality, the law will be given a different meaning. So, what is the need for the concept of the law to continue to ask? The answer is important, the people only continue to get to the bottom of the meaning of the law, the whole process of supervision of the legislative process, to provide legislative advice, the full exercise of the right to

supervise and advise, in order to achieve the real master of the house, in order to not in line with the socialist rule of law and the socialist core values of the evil law strangled in the cradle, Bacon once said: ‘An unfair trial is often more harmful than Ten offences are more harmful, because the former pollutes the water, while the latter pollutes only the water flow.’ And how many unfair trials can result from the outpouring of a bad law? The consequences are incalculable.

Aristotle Dodd was the first to address the concept of the rule of law: ‘Established laws are obeyed by the general public, and laws that are obeyed are well-made laws.’ If we want good laws to be made, we must understand the concept of law. To sum up, the author believes that the concept of law brings us inspiration mainly about the inspiration of legislation, only the legislator fully understands the concept and spirit of law, and combined with the specific conditions of China, abandon the backward concept of China's legal system, integrated planning, design and regulation of the law and morality, religion, politics, economic relations, in order to formulate perfect laws, and may achieve the real rule of law. In the author's view, China urgently needs to improve the quality of legislation, which is derived from the basic national conditions of our country's vast territory, large population, and diverse nationalities. China's legislative system is different from the Western unitary or dualistic system, it is unified but hierarchical, from the people's government and people's congresses at the prefecture level have the right to legislate, which makes it all the more necessary for our legislators, especially the grass-roots level legislators, to improve their professionalism and fully understand the concept of law. Legislators can't just stay with book learning, but also need to learn and experience in judicial cases, judicial practice and even people's daily life.

To sum up, Hart and later generations of lawyers for the concept of law is necessary, and, ‘the law in the end why’ will be not only jurisprudence, but also every party, lawyers, judges, prosecutors will continue to mention. The concept of law will continue to change as society develops. Political and legal thought arose with the emergence of class and state, and is the ideology that most directly and centrally reflects the economic base. In the article ‘Critique of the Gotha Programme’, Marx clearly pointed out that ‘in communist society, a high degree of harmony in social relations is achieved as a result of the extinction of classes, the extinction of the state and the elimination of the “three great distinctions”. Associated with the high degree of development of the productive forces of society and the high degree of harmony in social relations, there is a great improvement in the spiritual state of people.’ The essence of the state is a tool for one class to rule over another, a product of irreconcilable class contradictions. As the proletariat becomes the ruling class, it is only through the transitional form of the dictatorship of the proletariat that the state returns to the social organism ‘all the power hitherto seized’. The day when the state and society are completely united is the day when the state dies. At that time, political and legal thought will cease to exist. Lawyers of our generation, including also the concrete people, should inherit the spirit of Hart and keep defining the law before stepping into the communist society, so that the law will become the most solid institutional guarantee of the society and the most powerful channel for the realisation of democratic justice. At present, although the author cannot

answer the question of what the concept of law is, when the world really steps into the form of communist society, this question will be solved: the law is nothing, because the law does not exist in communist society, and we do not need to define a fact that does not exist.

Xi Jinping's thought on the rule of law is based on the great changes that have not occurred in the world for a hundred years and the strategic overall situation of the great rejuvenation of the Chinese nation Xi Jinping's thought on the rule of law is the subordinate concept of Xi Jinping's thought on socialism with Chinese characteristics, is a scientific summary of the Party's valuable experience in building a rule of law for a long period of time, and is a great banner for improving the ability of the country's governance and governance level. As long as we always adhere to Xi Jinping's thought on the rule of law as the norms and guiding requirements for legislation, then China under the rule of law will certainly be realised.

4. Conclusion

Austin's command theory is a relatively perfect model, however, from a rational point of view, the command theory is really a good explanation of the law, but it lacks the human or emotional perception of the law, and it can not satisfy the people's longing for the modern rule of law society, and it can not give play to the positive role of the two core legal values of democracy and freedom. Hart's critique of Austin's command has certain limitations, but overall the logic is still meticulous, and Hart's critique also indicates that China's lawmakers should not suspend the search for legal concepts, only to continue to search for and adhere to Xi Jinping's thought on the rule of law as the guiding ideology of the legislation, in order to maximise the emergence of the avoidance of bad law.

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