

Paper 1: An Analysis of Hart's Theory of Primary and Secondary Rules

In his essay, *Laws as a Union of Primary and Secondary Rules*, Hart criticizes Austin's theory of laws as commands and argues for a new framework which describes laws as rules. Hart, like Austin, is a positivist and wants to separate the descriptive question of what law is from the prescriptive question of what law should be. But, he does believe that there is a normative aspect to the law, which is reflected in the obligation we feel to follow it. In his analysis Hart makes a distinction between two types of rules (primary and secondary). The separation of rules into these two different categories allows him to establish a method to determine the validity of a law, which is what determines whether it creates an obligation among citizens in a society or not. For the most part, Hart is able to create a very neat and consistent model to describe the legal system, but one inconsistency that I saw, and which I will address, is with the way that Hart incorporates judicial decisions into his system of rules.

First of all, in Hart's analysis, laws are described as rules in order to be distinguished from Austin's theory of laws as commands. A brief observation of existing laws will present us a wide range of laws that do not neatly present themselves in command form. For example, power-conferring laws, which describe or direct agreements between people such as contracts or marriages, appear to be granting people rights or describing the way public officials should react to certain circumstances rather than commanding people to behave in a certain way. Furthermore, the command theory leaves out an explanation for how, in modern representative systems, the rule-makers who issue the commands find themselves bound by them as well (Hart, 68-69). For these reasons, Hart believes that a more appropriate metaphor for thinking about laws is that of rules in a sporting competition. Rules can not only direct the players to perform or refrain from performing certain actions, but they also give directions to the umpire or score keeper. Furthermore, players feel themselves bound by the rules. The rules themselves provide a reason to act, not just the fear of punishment as in the command theory. Hart calls this point of view, where the existence of the rule provides an obligation for action, the internal perspective to the law. (Hart, 73)

Hart divides rules into two categories, primary rules and secondary rules. According to Hart's definitions, primary rules either forbid or require certain actions and can generate duties or obligations. For a citizen with an internal perspective to the law, the existence of a primary rule will create an obligation for him or her to behave a certain way (Hart, 74). When we think of something being against the law, or required by the law, we are generally in the realm of primary rules. A primary rule can be the law against walking out of the Apple Store with an iPod without paying or the law requiring you to stop at a red light. In the "rules of the game" metaphor, an example of a primary rule would be that in football, it is illegal to restrain a player who is not in possession of the ball.

Secondary rules on the other hand, set up the procedures through which primary rules can be introduced, modified, or enforced. Secondary rules can be thought of as rules about the rules (Hart, 76). Continuing with our football metaphor, an example of a secondary rule would be that a coach is

permitted to challenge a call by the referee, but must accept the final decision of the ref following the viewing of the instant replay. When analyzing the necessity for secondary rules, Hart imagines a simple society, with only primary rules, but concludes that such a society would face a number of challenges: because there would be no systematic method of rule creation, there would be uncertainty about what the rules actually are; the system would be very static, since any changes in the rules would have to occur organically; finally, without a defined adjudication method, inefficiencies would arise from disputes over whether a rule was actually broken (Hart, 75). These three problems can be remedied with the introduction of three types of secondary rules, in order: rules of recognition, rules of change, and rules of adjudication (Hart, 76-77).

Of these three secondary rules, Hart believes that rule of recognition is the most important. The rule of recognition tells us how to identify a law. In modern systems with multiple sources of law such as a written constitution, legislative enactments, and judicial precedents, rules of recognition can be quite complex and require a hierarchy where some types rules overrule others (Hart, 76). But, by far the most important function of the rule of recognition is that it allows us to determine the validity of a rule. Validity is what allows us to determine which rules should be considered laws, and therefore, which rules should create obligations for citizens with an internal perspective to the law. According to Hart, validity is not determined by whether a rule is obeyed, its morality, or its efficiency, but by whether it fits the criteria set forth by the rule of recognition (Hart, 80). In more complex legal systems we may have to trace the origin of a rule back a few steps to the “supreme rule” of that system (Hart, 81-82).

In the context of Hart’s definition of validity (whether the law is derived from a source and in a manner approved by other rules) it simply does not make sense to ask about the validity of the rule of recognition in its supreme form. Once we have reached the rule of recognition, there is no higher level of rules to provide us with the criteria with which to judge its validity. Other writers have made the claim that the rule of recognition can simply be “assumed to be valid”. Hart, however, believes that this description is inaccurate and prefers the explanation that the rule of recognition is “presumed to exist”. The word “validity” can only be used to answer questions about the status of a rule within a certain system of rules. Since the rule of recognition is the standard which we use in order to judge the validity of other rules, it cannot itself have a validity test. Hart states that asking about the validity of the rule of recognition can be equated to asking whether the standard meter bar in Paris is in fact a meter. In the same way that the Parisian standard bar identifies the accuracy of instruments used to measure a meter, the rule of recognition identifies the validity of a rule. You can use the Meter Bar to check the accuracy of other instruments, but the bar itself cannot be accurate or inaccurate because accuracy is only defined by how well an instrument approximates the standard (Hart, 83).

In this context, the rule of recognition cannot be described in terms of validity, but only in terms of existence. The rule or recognition is presumed to exist if it is actually accepted and employed in general practice. In this respect, the existence of the rule of recognition is an external statement of fact. While laws can be valid even if defacto no one abides by them, the rule of recognition can only exist if courts, legislators, officials, and citizens act in a consistent way that corresponds with the presumed existence and acceptance of such a rule (Hart, 83-84).

One area where I think that Hart's theory falls short is the way he incorporates laws that created on the basis of judicial decisions into his framework of rules. According to Hart, once a rule is established according to the rule of recognition, whether by the legislature or by judicial precedent, it becomes part of the legal pedigree and there is little further uncertainty about its meaning or validity. This analysis, and even the choice of the word "rules" implies that the laws are very explicit and do not contain much room for interpretation. However, in many real life examples we find that the laws are rather vague or flexible, or that they turn on abstract concepts, like in contract law, where judges often make decisions based on whether the parties acted in good faith.

Let's take the discussion further with the contract law example. One of the parties has intentionally hidden some documents from its contract partner. A judge will consider this evidence of a lack of good faith and it may cost the first party the case, even if the law never explicitly listed "hiding documents" among the activities that are considered illegal. Hart would defend his theory by saying that in this case the judge went outside the boundaries of the existing law to create a new law, which never existed before that moment, and which states that it is illegal to hide documents from your contract partner. But this seems inconsistent with the way that judges view their own position in the legal system. No judge sees his or her role on the bench as a maker of new laws, but as an interpreter of the existing laws. In the metaphor that Hart gives of the rules of a game, the judge would be like a referee. The referee can identify when a rule was broken, but it shouldn't be within her power to create new rules. A judge writing a decision in the contract example wouldn't say that there was no rule against concealing documents, but now that the question has come up, she thinks it would be good to have one. She would say that the rule against concealing documents was there all along; it wasn't explicitly written, but it was in the implied subtext of the general understanding about the rules of contract law, and that the first party should have known it was doing something wrong even if it wasn't printed in the text.

If Hart would believe that any judicial decision in which there is uncertainty or a lack of specificity within the law in question constitutes the creation of new laws by a judge, then that amounts to an incredibly large quantity of retroactive laws, which is problematic to the consistency Hart wishes to maintain in his theory of rules. The reason that Hart gave for the necessity of a rule of recognition was to solve the problem of uncertainty about the rules by making it easy for people to clearly identify what the laws are. But if new laws can be created every time a judge makes a difficult decision, it makes identifying the rules just as difficult as if there were no rule of recognition at all.

This means that judges are cannot be free and unconstrained to make new law in any way they wish every time a case comes up where existing laws were undefined or when the factors that influence a decision are not explicitly part of a distinct set of secondary rules. Intuitively, a judge who decides that hiding documents from a contract partner is wrong, even if this is not explicitly stated in the law, has made a fair or just choice (it would almost seem unfair if the decision had gone the other way), but the types of considerations that would guide the judge in making this decision do not seem consistent with what would fall under the rule of recognition as described by Hart. Dworkin makes a similar objection when he discusses the way in which judges make an appeal to principles when deciding cases. Principles

are not hard and fast rules since, standing alone, they do not constrain behavior in the legal sense. They do however they provide guidelines for how the law is to be interpreted and applied. (Dworkin, 74- 75)

In conclusion, Hart's analysis of primary and secondary rules provides a very useful framework for understanding the sources of law and how we can distinguish valid laws from invalid ones without entering into subjective moral territory. Hart's system creates a way to reconcile some of the inconsistencies in Austin's theory, while also incorporating some of the more normative nuances of the law without making any moral claims. Hart observes that people feel an obligation to follow primary laws, even in cases where the likelihood of being caught and punished is slim to none. Since Austin defines laws as demands issued by a sovereign under threat of sanctions, this observation cannot be explained by Austin's theory. Hart argues that this obligation does not come from the moral content of the law, but from its validity, which is why we need secondary laws to determine the validity of the primary laws. Because people who take the internal perspective to the law presume the existence of the rule of recognition, they accept to be bound by laws that are valid according to the criteria set forth in the rule of recognition and in the secondary laws derived from this rule. I do feel, however, that Hart's theory on judicial decisions fails to address the reality of how judges see their role in the legal system, as interpreters or arbitrators of the law rather than creators of new laws.

References

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