

RULES AND THE CONCEPT OF LAW

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What is law? In *The Concept of Law*, H.L.A. Hart approaches this question with a philosophical acumen that is practically without rival.¹ From a review of how 'law' is used and from an analysis of the distinctive and complex elements which makes up the standard cases of a legal system, Hart isolates 'three recurrent issues' which have formed a constant focus in any discussion on the nature of law, and which, therefore, may rightly be assumed to contain the key to an elucidation of 'law'. The issues are: (i) How does law differ from and how is it related to orders backed by threats; (ii) How does legal obligation differ from and how is it related to moral obligation? and, finally, (iii) What are rules and to what extent is law an affair of rules.²

The first issue seems to arise from the recognition that the law regulates human conduct. That is, where the law exists certain kinds of conduct are made obligatory or non-optional. The sense of obligation or non-optionality which is applicable here is that sense in which pressure is implied (rather than that sense in which the police-officer frog-matches a criminal). The pressure will then take the form of threats, which may be explicit or merely implicit. The gunman who orders the shop-keeper to hand over his money or be shot if he refuses is exerting this kind of pressure). The second issue arises from realizing that human conduct is made less optional through assumed obligations. When Y create or incurs an obligation in respect of XC (say Y promises to take X to lunch) then Y's freedom of action is to that extent limited. Y cannot now say 'But why should I take X to lunch?' If Y were to say that, then the language-rules concerning the uses of 'promise' would require, at least, that Y explains his present attitude vis-a-vis X. An explanation such as 'I no longer feel like having lunch with you' (tenuous as it seems) might be acceptable. Now, the different kinds of obligations which we have correspond to the different ways in which one's conduct may become less capital.

However, in this paper, I shall not ask whether 'law', because of its coercive nature, is significantly different from coercive orders. Also, I shall not ask to what extent (if at all) legal obligations differ from moral obligation. Or, what is the stringency of each category of obligation. Rather I shall ask with Hart: What are rules and to what extent does the notion of a

rule enable us to understand the concept of law? And I raise this question in order to expose Hart's particular contribution to an understanding of the concept of law. I shall, therefore, proceed by attempting to answer the first half of the question: What are rules?

I

In recent discussions on the notion of a rule, there have emerged five main senses of 'rule' and hence five main types. There is a sense of rule as (i) instruction, (ii) regulation, (iii) precept, (iv) practice or what John Rawls calls 'practice-type of rule' and Hart and J. Searle 'constitutive rules', and (v) semantic rules.³ Semantic rules regulate and guide the appropriate use of concepts. We find an example of this type of rule in the rules governing the use of the verb 'is', which L. Wittgenstein discussed in the *Philosophical Investigations*. There is the rule which allows us, for instance to use the verb 'is' in the sentences: 'the rose is red' and 'twice two is four'. There is also the rule which allows us to replace 'is' in the second sentence with the equal sign (=) and forbids this substitution in the first sentence.⁴ It would appear that semantic rules necessarily cuts across all other rule, since a rule, whatever its type, must be stated by a suitable set of words. (For example, the Pawn Promotion rules reads "A pawn reaching the eight rank must be promoted to a piece according to the player's choice").

The different types of rules perform different roles, and they may or may not, depending on what type it is, give rise to obligations. Thus, the existence of a rule to X (verb) does no entail an obligation to X, any more than P ought to D and P has an obligation to X (verb) are synonymous. Rules of etiquette and semantics belong to this class. There are rules as instructions, which appear to be laid down by some one who is 'an authority' in Friedman's sense of this phrase. Consider the following rules that are likely to be found in any Good Luck and Safe Driving Booklet. 'Check the rear view mirror before you start your car', 'check the fuel gauge', 'get off the road as soon as you feel drowsy', 'lock your car when you leave it at night'.

It is important to note that instruction-type rules could be incorporated in municipal legislation and would *ipso facto* become sources of legal obligation. When this is the case, such rules cease to function as mere instructions. (Failure to lock one's car at night may, for this reason, be legally liable). But, by and large, instruction-type rules are practical guide-lines or directives, which, in spite of their value, one may choose to follow or to ignore. Rules as instructions are, therefore, generally not spoken

of as 'violated' or 'broken', nor is there a censure attached for their violation. Unlike constitutive rules, instruction-type rules do not define activities, much less do they constitute practices. It would be misleading linguistically to talk of an obligation to comply with a rule of this type.

There are some uses of 'rule' for which the word 'regulation' is an approximate synonym. 'Traffic rules' and 'debating rules' are two rather obvious examples. Other words which may be appropriate, depending on the context, are 'law', 'bye-law', and 'ordinance'. Regulation-type rules have an author (or authors) who may talk of announcing, enforcing, changing, revoking, or re-instating the rule, and correlatively, this type of rule can be disobeyed, obeyed, broken, or rescinded. Because this class of rules derives from some one or group of persons 'in authority', *a la* Friedman, they are said to impose obligation to comply. Rules of games provide a good example. And their similarity to constitutive rules is easily ignored (H.L.A. Hart provides an excellent discussion of constitute rules relative to rules defining valid contracts, wills, marriages. These rules do not define an obligation to make wills or contracts, only the legal requirement that whosoever does not follow them simply does not make a will or a contract)⁵.

Apart from the rule-types, I have discussed above, there are also rules of etiquette and of language; there are rules of games, and so on. One rather obvious function which these rules perform irrespective of their mode of origin is to determine what kind of conduct is permitted or forbidden to those who fall within the range of application. It is possible to distinguish between modes of behaviour in terms of whether a given behaviour is regulated by an appropriate rule or is merely the result of a habit. A group of people may play chess on every second Friday of the month. They may even play together. And yet there may be no rules which require them to do so. But there is a rule which requires that 'For Castling to take place, the King, and the Rook with which it is proposed to castle, must stand on their original square and there must be no piece in between'. Where a rule defines a practice or a game (as in the chess example) we may appropriately say that men 'must', 'should', or 'ought to' play according to the rules. It would be linguistically inappropriate to use these expressions in the context of merely habitual behaviour. We are not surprised that Hart insists on the irreducibility of social rules to habits or mere regularities. The question now is: To what extent is law an affair of rules?

II

Hart again is our guide. Hart distinguishes between two main rule-types, namely, primary and secondary rules. The former impose duties and so are

concerned with action, which involve physical movements or changes, while the latter confer powers. Under primary rules, human beings are required to do or forbear from doing certain actions whether they like it or not. Under secondary rules, human beings may, by doing or saying certain things, introduce new rules of a primary dimension.⁶ Now what distinguishes these rules is that the primary rule-type involves, as the secondary rule-type does not, a standard of behaviour which binds everyone, not merely officials. In other words, it is the function of a primary rule to bind persons to act in a certain specifiable manner and to impose sanctions for deviance. For this reason, criminal laws may be regarded as strong analogues of primary rules. We may, therefore, become clearer about the nature of primary rules if we examine the nature of criminal laws.

A crime is defined as any offence which, in the opinion of the community, deserves punishment.⁷ Thus, acts of bigamy, fraud, abduction, embezzlement, assault and various misdemeanours which are viewed with considerable displeasure are deemed punishable and, therefore, are an appropriate subject-matter of the criminal law. Primary rules, by analogy, will therefore regulate an area of human conduct which is considered wrong because it is *prohibited or right because it is approved of* (though not necessarily from the moral point of view). But sometimes such an area will coincide with acts which are *mala per se* (that is, acts which are morally wrong). Examples of this class of rules are the rules against murder incest, or rape, to mention a few.

By contrast, secondary rules are to be looked at from the point of view of those who exercise the powers these rules grant. Thus, secondary rules lay down the minimum requirements which must be possessed by individuals who wish to mould their relations with others through such acts as marriage, contract, or will. It may be asked to what extent is it possible to classify most legal rules into secondary rule-types or power-conferring rules in Hart's sense? The power of the district attorney to decide whether or not to publicly prosecute a hit-and-run motorist, the power of the traffic control officer to decide whether or not a given case is a case of parking violation, the power of the customary court judge to witness the oath-taking ceremony of Government security guards, and the power of civilian arrest which the law grants to citizens generally to apprehend any persons caught in the act of law-breaking are some examples of secondary rule-type. More complex examples are the legal rules of marriage, of contract, or valid attestation, or the administration of trusts (where the law determines *who* shall exercise the power to enter into these relationships). For example, the law recognises

marriage as the union between two (adult) persons of different sexes, who at the time of marriage, are unmarried and who enter into this union with the object of setting up together a permanent and exclusive domestic life.⁸ In as much as marriage is a relation recognised by law, it can only be effected by the use of certain prescribed and legally recognised forms. The law may require (as, in fact, it does in many cases) that marriage be celebrated publicly; (that is, in the presence of at least two witnesses), by an authorised person (clergyman, an imam, or a court registrar), and in a place set aside for this purpose. Apart from considerations of proper form, there may also be the requirements of age majority, the giving of consent, evidence that the contracting parties are free of a previous marriage (if any), and are not consanguineously related in the degree forbidden by law.

It is quite possible that primary rules alone cannot explain the concept of law. Any society of human beings which tries to exist or operate on the basis of primary rules alone would be subject to a number of defects. First, there is what we might call the defect of 'uncertainty' as to what the primary rule is and/or demands. Secondly, there is the defect arising from the static character of the rules, and thirdly, there is the defect of inefficiency, which means that the exertion of social pressure in any of its variations for violation of the rule is not administered by a special agency but is left to the individuals or groups affected. Now, the introduction of Secondary rule-types is an attempt to remedy these deficiencies. Accordingly, we have the secondary rules of recognition, change and adjudication. The rule of recognition is to specify some feature or features which a rule must possess in order to be taken as an authoritative rule of the group. Rules of change allow for the creation of new rules of a primary dimension and the elimination of old rules. And the rules of adjudication define individuals who are competent to pronounce authoritatively on whether or not a rule has been broken. Thus, the primary rules of obligation or duty, supplemented by the secondary rules of recognition, change and adjudication, hold the key to an understanding of law and seem *jointly* to be at the heart of a legal system.⁹

The point of the union is not that the word 'law', wherever and whenever it is properly used is sufficiently explained by this union. After all 'law' is itself a complex notion. Rather the point is that because of its great explanatory power, the union of primary and secondary rules plays a pivotal role in elucidating the concept of law and the related concepts of obedience, obligation and duty.

III

Let us recall an Austinian theory of law in terms of which the majority of a social group habitually obey the commands of a sovereign. In Austinian terms, a 'command' is an authoritative pronouncement of a sovereign, who may be an individual or a group of individuals. Whereas everyone habitually obeys the sovereign, he owes no like obedience to anyone. A command, Austin points out, is a 'signification of desire', which is usually, though not necessarily always, formulated in the imperative mood.¹⁰ Now, let us inquire whether or in what sense, if any, such an account suffices for the legal system.

An account of law in terms of a habit of obedience seems inadequate in explaining two salient features of the legal system, namely, the continuity of law and the persistence of law. It must be admitted that the idea of obedience is not a simple one. The word 'obedience' suggests deference to authority and not merely compliance with orders which are backed by threats... and only because they are backed by threats. And even so, it is not easy to specify the connection between giving an order and the performance of the requisite act. Can P be said to be *obeying* an order to do X if, in fact, P would have done X in any case without the order? The difficulty about 'obedience' is more acute in negative commands, which prohibit people from doing things they would normally not think of doing (for example, Do not commit murder). We may, however, for our purpose, imagine a very simple social structure where the ruler, Babakus Sr. is an Austinian Sovereign, who passes numerous repressive laws. We can understand that his subjects initially obey these laws out of fear. Even if such prudential obedience translates into a habit (of obedience), it seems to me that such obedience would remain a personal relationship between each subject and Babakus. That is to say each subject *regularly* carries out what Babakus *orders* him to do. But suppose Babakus dies leaving a son, Babakus, Jr. who then starts to issue Austinian orders. Can we say that there is a habit of obedience to the new ruler? I suppose an affirmative answer would be difficult. We would need time, it seems, to assess the tone and thrust of this new ruler and how the people generally react to him. *Prima facie*, we can say that a mere habit of obedience does not, as in the case under consideration, mean that similar obedience will be accorded his successor. Thus, even if we admitted to a certain unity in the reign of Babakus, Sr, the continuity between his reign and that of Babakus, Jr. is broken by the time it takes his successor to establish himself as sovereign ruler and legislator.

For the same reason, an account of the legal system in terms of habit cannot yield persistency of laws. At the death of Babakus, Sr., the people may just decide that enough is enough and that all 'laws' commanded by him will no longer be obeyed or carried out in the reign of his successor. A legal system, even one in a primitive social structure, if it is to be continuous and persistent, must require more than a habit of obedience to sustain and, therefore, must contain more than a primary rule, must include, at least, a secondary rule of recognition, which will make it possible for people to identify commands and orders as primary sources of obligation. Where such a rule exists we have, it seems to me, the foundation of a legal system. And wherever such a rule of recognition operates, one is *eo ipso* provided with the criteria for identifying primary rules of obligation. (These criteria may include references to an authoritative text, a customary practice, pronouncements by specified persons, or documents and judicial decisions intended to serve as rules of judgment).

It must not be supposed, however, that the rule of recognition will always and everywhere be expressly stated. In some cases, this rule is not stated at all but its existence is inferred from the way that particular rules are identified (either by the courts or other officials or private persons). Now the use of unstated rule of recognition, by courts and others, in identifying particular rules of the system is characterised by what is usually called the, *internal point of view*. One takes an internal point of view in the context of the legal system, when one allows that those who use the rules in a particular way *ipso facto* signify their acceptance of the rules (as possessing a measure of reasonableness), they are prepared to comply with the rules, and generally presuppose that there are officials who will enforce the rules in any case. There is the other side to the coin... the external point of view. This is the perspective of someone outside the system who merely recognises the fact that others accept the rule and live by it.¹¹ Usually though not always, talk about the validity of law means or requires nothing more than reference to the internal point of view. To say that a given rule is valid is to recognise it as satisfying the requirements of the rule of recognition (whether or not these requirements are stated) and so, as a rule of the system.

There are, of course, certain problems connected with the requirement of validity as we have here conceived it. Some of these problems concern the relation between the validity and the efficacy of law. A rule of law is said to be efficacious if the behaviour it commands is elicited more often than not. Given this definition of efficacy, it is obvious that there is no necessary efficacy. There cannot be unless the rule of recognition, in some way, also

contains the provision (sometimes referred to as the rule of obsolescence) that no rule is to count as a rule of the system if it has become obsolete and irrelevant to the social situation.

In conclusion, two conditions seem jointly necessary in an attempt to elucidate the concept of law. First, the rules of behaviour (or what has been referred to as the primary rules of obligation) must be generally obeyed once they have been identified as such. It makes little or no difference whether these rules are obeyed as a matter of habit or from whatever motive one might choose. It would, of course, be better (morally speaking) if obedience were an indication of the general acceptance of the rules. Secondly, the sources of law (or what, again, have been referred to as the rules of recognition and their adjunct rules of change and adjudication) must serve effectively as critical common standards of official behaviour once they have been accepted as such from at least, an external point of view.

Notes and References

1. H.L.A. Hart, *The Concept of Law*, (Oxford: At The Clarendon press, 1961).
2. H.L.A. Hart, *The concept of Law*, p. 13f.
3. Since this classification is bound to appear rather arbitrary not much point is gained in discussing them at length. However, see Max Black's *Models and metaphors* (Ithaca; Cornell University press, 1962), pp. 109—115, and 'Notes on the meaning of 'Rule' *Theria* Vol. XXIV (1958), pp. 142—144.
4. L. Wittgenstein, *Philosophical Investigations* trans. By G.E.M. Anscombe, (New York: The Macmillan Company, 1958), p. 558.
5. H.L.A. Hart, *The Concept of Law*, pp. 26—48, 78—79.
6. H.L.A. Hart, *The Concept of Law*, pp. 8—9.
7. E. Jenks, *The book of English Law*. (John Murray Ltd., London, 1957), p. 154.
8. E. Jenks, *The Book of English Law*, pp. 220.
10. J. Austin, *The Province of Jurisprudence Determined*, (Humanities Press: New York, 1967), pp. 217f.

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