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Hart's Continuity of Law Objection to Austin's Theory of Law

Austin's Theory

In *The Province of Jurisprudence Determined* (1832), John Austin examines the question "What is law?". To boil down Austin's answer to this question to one sentence, we can understand his theory of law in the following way:

Law is a standing and general command backed by the threat of sanction that issues from the sovereign.

To expand on this sentence, Austin states that "Every law or rule is a command" (Austin 21) and describes a command as "expression or intimation of your wish is a command" (Austin 21). However, the difference between a mere wish and command is that a command holds a threat of sanction that creates an obligation (Austin 22). A sanction, according to Austin, is described as "the evil which will probably be incurred in case a command be disobeyed or in case a duty be broken," (Austin 22). Austin then defines what he means by political superiors by referring to superiority as not "synonymous with precedence or excellence" (Austin 29) in his definition, but rather that "the term superiority signifies might" (Austin 30). Austin relates this idea of superiority to another term, sovereignty, which follows these criteria: "1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body of aggregate individual persons. 2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior". In essence, Austin's understanding of law postulates that laws are commands backed by sanction which come from a sovereign who is habitually obeyed and habitually obeys no one else (Austin 166).

H.L.A. Hart, in *The Concept of Law* (1961), presents a direct rebuttal to Austin's theory of law. While Hart presents a variety of arguments against Austin's theory, in this paper I focus on Hart's objection that Austin's appeal to habits of obedience cannot explain how law-making power continues when one sovereign succeeds another. I argue that this objection succeeds, and that the Austinian reply that the people are sovereign fails, because it makes the people habitually obey themselves and can identify "the people" as a law-maker only through rules, which Austin's theory was meant to do without.

Hart's Critique

Hart's critique regarding the continuity of law centers on Austin's argument that political inferiors must be in a *habit* of obedience towards a sovereign as Hart argues that Austin's theory is not able to explain the continuity of law-making power during a transfer of law-making power between sovereigns (Hart 53). Furthermore, Hart believes that a habit of obedience is not enough to explain why a sovereign's commands are obeyed and that even without a habit of obedience, a political superior's laws may still be followed (Hart 54). To explain his point, Hart gives the example of Rex I and Rex II in which Rex I, a sovereign who is habitually obeyed, passes away, and his son, Rex II, will not have the same habit of obedience his father had as "There is as yet no established habit of obedience to Rex II" (Hart 53). Therefore, Hart claims that according to Austin's theory, Rex II would not be habitually obeyed

immediately after he inherits the throne. So, if Rex II cannot immediately become the sovereign, there's a period in time between Rex I's death and the point at which a habit of obedience has been established to Rex II when nobody has law-making power or sovereignty. Yet in a monarchy with an established rule of succession, Rex II's commands are law from the moment he takes the throne, so Austin's theory gets the case wrong. Following Austin's theory, habits themselves are not transferable because habits are understood by their definition as "a settled tendency" or "an acquired mode of behavior" and therefore Rex II cannot inherit sovereignty immediately.

Hart presents the counterargument that if the inheritance of the title of sovereign which confers the right to rule is habitually obeyed and is uninterrupted in its succession then it could be argued that Rex II, as the incumbent of the title, would be habitually obeyed through the title according to Austin's theory. However, Hart dismisses this counterargument by asserting that that is not an accurate relationship of obedience between subjects and sovereigns according to Austin's theory since Austin states that a sovereign is specifically an individual person or a body of individual persons. Therefore, a title cannot necessarily be a sovereign and consequently cannot be habitually obeyed. It is likely that someone can be obeyed due to their title to rule even before a habit of obedience is established as Hart states "He will have the *right* to make law on his father's death, and when his first orders are issued we may have good reason for saying that they are already law, before any relationship of habitual obedience between him personally and his subjects has had time to establish itself" (Hart 54). For that reason, Hart's critique stands against this counterargument because we have good reason to believe that Rex II's first orders would be followed on the basis that he has the title to law-making power even though there is no habit of obedience towards him.

Austinian Defense

Although Austin never makes this argument himself, an Austinian defense against Hart's objection is that the people are the sovereign, so there is no discontinuity in sovereignty when Rex I dies. Austin claims that "But the governed collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude" (Austin 30). This implies that the monarch, Rex I or Rex II, is not true sovereigns since he is checked in power by the people and it is ultimately the people who allow the Rex monarchy to stay in power. This allows Austin to defend against Hart's critique as there is no discontinuity in law-making power when Rex I dies because the people have law-making power.

Hart's Response

One response to this objection is that while this might work in societies where monarchs are checked in their power or are conscious of possible resistance, the idea of people being the sovereign fails in situations of absolute law-making power in a single person. There is bound to be a discontinuity in habitual obedience when one person, Rex I, dies while having absolute control and power over his people. Hart himself goes further: if the people are sovereign, they must habitually obey themselves, and identifying "the people" as a law-maker requires rules about who votes and how, which are exactly what Austin's theory tries to do without. Therefore, I believe that Hart's objection regarding the continuity of laws undermines Austin's theory since Austin's choice to use the concept of habits to describe sovereigns omits rulers who have the right to rule and the power to rule immediately after gaining law-making power.

Sources

Austin, John. *The Province of Jurisprudence Determined.* 1832.
Hart, H.L.A. *The Concept of Law.* 1961.