Lecture 11

Austin’s theory –

Two main elements

commands and sovereignty

Problems with idea of sovereignty

cannot explain – limitation on sovereignty, division of sovereignty, continuity of sovereignty

also cannot explain persistence of laws when sovereign lawmaker changes

eg when Rex II follows Rex I

if there is a revolution there will be a genuine problem of the continuation of laws from before the revolution – in that case the new lawmaker will have to reissue the old laws (that is what VA’s reception statute did for Engl law after the American Revolution)

The problem is Austin appears to have to use this explanation even when there is no revolution, but Rex II simply follows Rex I

* But it is false that Rex II expressly or tacitly reissues Rex I’s laws
* They remain without reissuance being necessary – but it is hard to see how Austin can explain this

Another problem is auto-limitation

The sovereign might make a law that does not merely apply to him but also that binds him in the sense that he cannot change it after enacting it

* That is impossible under Austin’s theory, but it seems possible
* To be sure, sometimes autolimitation is impossible for a particular lawmaker
* Congress can make laws that apply to it but it cannot make a law that a later Congress cannot repeal

But it seems *possible* for there to be autolimitation

Another problem with Austin’s theory is that it misses out on the normative aspect of law

A habit of obedience is something we actually do – but it does not follow that we ought to do it

But people talk about obligations concerning the sovereign and they speak of the sovereign as authorized to create law – this has a normative sound to it

Natural law is of course one way to explain this – the sovereign has a moral right to rule

But the problem with natural law is that wicked legal systems seem possible

Hart’s solution

First, we need a rule at the top – an egg approach

Having a rule at the top of the legal system authorizing lawmakers explains continuity, limitation, auto-limitation and division

But his approach is positivist – the rule is created through social facts

It is a social rule, which exists simply because it is practiced

Sometimes people will offer the following argument against division of sovereignty – suggesting it cannot even occur under a theory like Hart’s

* Assume there are two highest lawmakers – Red Rex (for external affairs) and Blue Rex (for internal affairs)
* This cannot exist, the argument goes, because there must be someone to decide disagreements about whether the matter falls in Red Rex’s sphere or Blue Rex’s
* The decider of that matter will be the real sovereign
* But this argument is too good, for it argues against one sovereign too. After all, there could be disagreement about whether that sovereign is the sovereign and there would have to be someone to decide that, who would be the real sovereign (and there could be disagreements about that sovereign and so on)
* The point is that you can have division of sovereignty if there isn’t, by and large, disagreement about their division, just as you can have a sovereign when there isn’t, by and large, disagreement that he/she/it is the sovereign
* After all, division of sovereignty over time exists – first Rex I then Rex II when Rex I dies, so there is no reason there cannot be division of sovereignty by subject matter
* There might be more disagreement as a contingent fact when sovereignty is divided by subject matter but that doesn’t mean that it is impossible

Another potential problem with Austin’s theory that is solved by Hart, which we did not discuss before, is that Hart’s theory can explain the existence of laws that are widely disobeyed

Imagine that an Austinian sovereign issues a law but no one obeys it (not that he is the sovereign because he is habitually obeyed, but that doesn’t have to mean that every command is obeyed)

* Is the disobeyed command law?
* It might be that Austin would have to say No
* But that is a problem because we think something can be the law (say a speed limit) even if it is widely disobeyed

Hart can explain this

* It is the law if it is identified as such by the rule of recognition
* It does not matter whether the particular law is followed by the population, although Hart does think that a legal system does not exist unless laws are generally obeyed by the population

Another issue: isn’t it true that under Hart’s theory the officials are sovereign?

After all, aren’t they legally unlimited – they can make any legal system they want

* If they start a rule of recognition in which Michael Green’s word is law then my word is law
* Response: it is important to distinguish where Austin got things right and where he got things wrong
  + He was right that legal systems come into being through something legally unlimited – social facts
    - Hart’s approach is similar in that respect
  + But that does not mean officials are sovereign under Hart’s theory for that would make all legal systems oligarchies
  + The point is that officials do not (necessarily) look to themselves as lawmakers – they look to someone else and that is the person authorized, not the officials
* Here is an analogy
  + When we play chess the rules of chess apply because we have agreed to them
  + But that doesn’t turn chess into a game where the rule are what you agree to
  + That would be a different game in which were able to change the rules of chess in the middle of the game by agreement
  + But we do not agree that the rules are what we agree – we agree that the rules the rules of chess
  + By the same token the officials don’t agree that their agreement makes law – they agree that some lawmaker makes law

Another problem: how does Hart solve Hume’s problem – the idea that you cannot derive an ought from an is – that DINO inferences are invalid

Austin is able to solve Hume’s problem because in the end legal obligation for him is not normative – to say I have a legal obligation is simply to make the descriptive claim that the sovereign is likely to sanction me if I don’t obey his command

That is not a normative conclusion

But Hart seems to suggest that a social practice, which is a descriptive fact, somehow generates a rule, which sounds normative

The solution for Hart is the idea of expression

* Imagine that I say some action (say promise-keeping) is good
* One way of understanding this is that there is a special quality that promise-keeping has that makes it such that we should do it
* When I describe something as good I am ascribing a quality to it, just as when I describe something as square I am ascribing the quality of squareness to it, something that is actually in the square thing
* My statement that promise-keeping is good is true or false on the basis of whether goodness is actually there in the action, just as my statement that something is square is true or false on the basis of whether the thing is square or not

Bu there is a problem with this view. To say something is good is to take oneself to have a reason for action with respect to it

I can say something is square without thereby taking myself to have a reason for action

This idea of giving rise to reasons for action is the idea of the normative

But the notion that something would have a quality, the recognition of which would move me to act, is mysterious – it is hard to see how there could be such a thing

The expressivist explains normative utterances differently – when I say X is good I am not describing X but I am expressing my desire concerning X. It is like saying “Hurrah X!” If so then it is easy to understand why, having said something is good, I am inclined to do it – what inclines me is my very desire expressed

Hart’s speaks of officials participating in the rule of recognition as expressing their acceptance of the rule in normative statements

The idea of normativity is an expressive one

* in a sense, this is not real normativity
* officials, taking the “internal point of view,” make expressive statements in normative language, but they are not right or wrong – for there is no fact of the matter for them to be right or wrong about
* in this way Hart arguably satisfies Hume’s law
* there is no inference from the descriptive to the normative – the normative only exists from the point of view of participants in the rule of recognition, which is a descriptive fact
* notice that from the perspective of the general population the law can be very Austinian
* they need not take the internal point of view concerning it
* they may treat the law as simply the probability of sanctions
* That means legal obligation for them is not about social rules
  + But if that’s so then why can’t we have even officials obeying simply out of concern about sanctions (think of North Korea)
  + Why can’t everyone be taking the external point of view?
  + Why is it so important to Hart that officials take the internal point of view?
* There is another problem with Hart’s theory [I think we discussed this]
  + Hart does not claim that officials necessarily accept the rule of recognition because they think that morality requires it
  + They may accept it for any number of reasons including the simple desire to collect a paycheck
  + But if that’s so, how can it be the case that when an official fails to abide by the rule of recognition, he is criticized by other officials using normative language? (remember that it is essential to Hart’s theory of a social rule that there is criticism, using normative language, of those who fail to satisfy the rule)
    - My desire to collect a paycheck cannot justify you following the rule of recognition
    - The matter would be different if the reason that officials followed the rule of recognition is because they thought morality required it – then criticism of other officials would make sense
    - Notice that this is not to adopt natural law theory
    - The fact that officials think something is morally required does not mean it is
    - Thinking something is morally required is a non-moral descriptive fact
  + If officials expressed their moral views in the normative statements that would also explain why they claim that the general population have legal obligations too
    - That too is mysterious under Hart’s approach