Philosophy and the Law 2.26.18

1. Austin Review

* The chicken theory cannot explain why the sovereign would be limited, division of sovereignty or continuity of sovereignty.
* Problem of explaining legal obligation
  + What does it mean to say someone is legally obligated?
    - for Austin - just the probability of punishment
    - How he solves Hume’s problem
    - Not DINO- descriptive to normative
    - instead DIDO
    - 🡨 Hart criticized because Austin explains only why someone is obliged; not obligated to do so.
* for Austin sovereign is Legally Unlimited 🡨 in every legal system exists. When you move over to the idea that there’s a rule at the apex of the legal system (instead of a lawmaker – as for Austin) then you could say the sovereign is legally limited or legally unlimited.

G: Should I have said always limited?

* + Rule is empowering him, thus he is subject to that rule – not responsible for it
  + Can he change empowering rule? – and thus does he really empower himself?

🡨 Does look like always lawmaker legally limited because cannot change the rule empowering them.

?: Can the sovereign change the rule empowering them without a revolution? (*different from the sovereign just doing something different and officials going along with it; want to say that’s not a revolution, he was always legally able to do that*)

🡨 Const. Conv to Constitution – G: Yes new empowering rule - bloodless revolution

* + - * It will be a problem, if we start noticing too many revolutions. G: End up being problem for Hart’s theory.
        + When Congress passes a statute, not a revolution. To say king can change empowering rule must say there is not a revolution.
        + will discuss later in connection with the paradox of self-amendment

1. Hart

* The rules of change and adjudication drop out – people tend only to talk about rule of recognition
* The rule of change is empowering: If you want a new rule in the legal system, here is how you do it.

🡨 Does not impose a duty.

* The rule of adjudication is also empowering.
* According to Shapiro the Rule of Recognition is duty imposing.
  + The duty is on the officials
  + The rule says to them they have a duty to only enforce those norms which satisfy the RoR (*all those things which satisfy the rule of recognition which :G: will ultimately encompass rule of change and recognition*)
* According to Shapiro, Hart criticizes Austin for having a theory based on sanctions.
  + Is Hart theory also about sanctions? After all – isn’t the RoR about when officials can sanction?

No: There would still be law under hart’s theory even if there aren’t sanctions. Hart can accommodate a legal system with a rule of recognition that does not have any sanctions.

* + - the RoR could tell officials what norms to use for adjudication even though adjudication wasn’t enforced by sanctions
    - could have a RoR for a society of angels
* Hart criticized the understanding of law being directed to officials. Doesn’t this criticism apply to hart’s own theory: the rule of recognition imposes duty only on officials? Only they are participants in the RoR
  + Hart accepts that there can be a legal system in which citizens only abide by primary legal rules because of fear of sanctions
  + in such a case the social rule is only among officials – RoR among officials is the only social rule that is necessary for law
    - but it is *possible* for the primary rules of the legal system to be social rules, in the sense that people criticize one another for non-compliance
  + But what does it mean when officials say that citizens have a legal *obligation* to stop at a red light - what are we saying?
  + it would appear that this means only that there is a probability of sanctions – the officials cannot be speaking of a social rule, because the citizens are not participants in the social rule (the RoR)

Though we normally do have a social rule with respect to the primary legal rules too

* + Can have pockets of Anarchy where individuals do not obey the legal system.
* Are the Boy Scouts a legal system?
  + Do they have a rule of recognition, change, and adjudication that are created by a practice among officials and is there by in large obedience?
  + YES, but not a legal system; we need something else🡪 Shapiro says difference is no choice to be under law making power. The system is saying not your choice to be a part of, the legal system is going to determine everything, the power to regulate everything.
  + Boy Scouts is different
    - Is the power to regulate everything essential to a legal system?
    - Why is religion not a legal system when it claims to have the power to regulate everything?

🡨 It lacks the necessary obedience?

* Doesn’t international law say a domestic legal system creates law by getting effective control over a population with territory?

🡨 If true would mean Hart is confused because he thought it was articulating the concept of law but what he was actually articulating was international law.

* Can we understand a state not being recognized by international law but nevertheless is it a legal system under Hart’s theory of law?
  + Somaliland has a legal system according to Hart’s theory of law but no nation recognizes it.

🡨 Showing that international law is deviating from what is really law from the concept of law

G: Can have law without any other legal system recognizing it.

* What creates the rule of recognition?
  + Social Rule among officials
  + What does it take for there to be a social rule?
    - If you deviate from it you are criticized
    - People do it, not just a habit, do it for reasons. Appeal to the rule as a reason.
  + What about- practice of not hitting self with a Hammer
  + everyone in general does not hit self and criticize those who do – but it isn’t a social rule
    - * Not social rule because people are all recognizing preexisting reasons not to hit head with hammer
      * for social rule, it because of the practice, but the reason not to hit head with hammer exists independently of the practice
      * Whether you ought not hit yourself with a hammer is independent of everyone doing it.
    - social rule is different from a generally recognize reason
      * + take your hat off in church is a social rule because people appeal to the rule not to a generally recognized reason
        + NOT SAYING don’t do it because you’ll get hot
* How does Hart’s theory solves Hume’s problem?
  + Social Rule descriptive but looks like Hart wants to get on the end normativity, general oughts
  + Why not DINO inference?
    - expressivism