
Analysis of Issues of Justification: Does Hart Give an Adequate Account of Legal Obligation

Does Hart give an adequate account of legal obligation? Explain and defend your answer.

This essay aims to answer the question on two grounds: How Hart's account of legal obligation can be seen as possibly inconsistent with his own account and incompatible with some areas of positivism. The inconsistency will be tackled through the following factors: (I) Austin's account of legal obligation (II) and issues of justification to provide further elucidation (III) and deconstructing Hart's social rule theory. Whereas the possible incompatibility will be analysed through (IV) the moral obligation that is incited from his account of both justification and motivation. Despite the critical outlook, this essay will conclude on (V) the positive adequacies of Hart's account of legal obligation that is worth mentioning.

To begin with, it is essential to highlight Austin's account of legal obligation because it can be contrasted later on to show Hart's strength and weaknesses with his own analyses further. For Austin a law is a command. Command creates duties or obligations but they do so by virtue of the threat of evil sanction that accompanies noncompliance. Austin further summarised his analysis of the notion of a command in three points:

1. A wish or desire conceived by a rational being, that another rational being shall do forebear.
2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish.
3. An expression or intimation of the wish by words or other signs.[footnoteRef:1] [1: John Austin, The Province of Jurisprudence Determined (Cambridge University Press, 1832) 14-15, 17.]

From the summarised quote, Austin's legal account of obligation can then be shortly attempted. In addition, legal obligation exists when a particular superior, a sovereign issue a command. Evidently, Austin says "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the political society where in that person or body is sovereign or supreme." [footnoteRef:2] Moreover, Austin relates notions of a sovereign with the concept of habitual obedience. The aforementioned concept is important to state to link it with the two requirements for a sovereign: Firstly, the bulk of a given society must be in a habit of obedience to the superior. Secondly, said superior whether it is an individual or a body of individual must not be in a habit of obedience to any other superior. With that, it is easier now to amplify his analysis of legal obligation. Put simply or numerically: [2: Ibid 193.]

A has a legal obligation to do (or forbear from doing) B if:

1. A is rational being
2. C is a rational being

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3. C expresses a desire that A do (or forbear from doing) A
 4. C is capable of and willing to inflict an evil on A if fails or chooses not to do B
 5. A is a member of a society where a bulk of it is in habitual obedience to C
 6. C is not in a habit of obedience to any other superior.

After being acquainted with Austin's aforementioned account above, it is now natural to explain how it can make legal obligations binding and provide motive because Hart similarly recounts the same abilities later on. As previously mentioned, one feature that is noteworthy about Austin's account of legal obligation is that the threat of evil sanction is a necessary part of every command fulfils two important functions: On one hand, it makes an obligation binding. This is showed when he says "He who is liable to the evil in case he disregards the desire is bound or obliged by the command." [footnoteRef:3] On the other hand, it provides a motivational reason for fulfilling obligation. This is clear when he states that "I am determined or inclined to comply in the wish of another, by the fear of disadvantage" and "any eventual evil may operate as a motive to conduct..." [footnoteRef:4] This parallel framework of being bound and having motive will be later compared and contrasted with Hart. [3: Ibid 14-15.] [4: Ibid 133.]

Besides the binding nature and motives that consists within legal obligation, Austin's legal analyses of justification is excluded within the legal realm. This makes sense because the question of justification – of whether one morally ought to fulfil the obligation — does not appeal to him. At the risk of making a gross oversimplification, Austin would simply address the moral status of the action on utilitarian grounds as opposed to whether one is morally justified in fulfilling an obligation. [footnoteRef:5] The point to be emphasised here is that unlike Hart, the legal analysis of obligation concerning justification is not excluded or avoided entirely because it is addressed it in terms in a wider approach, as will be explained later. [5: Ibid 277.]

It is now appropriate to start comparing Austin's notion of command and introduce Hart's notion of social rules. One of the central themes of *The Concept of Law* is Hart's rejection of the Austinian view of legal obligation. He specifically criticised that Austin's view can only simply explain why one is legally obliged to obey laws. It is a fact that any adequate analysis of a legal obligation should provide a more thorough account. Hart's account is proven to be more sophisticated as he discards the notion of a coercive order, which understands legal obligation as simply being obliged. To elaborate, this is because the idea that a person is obliged to do something is simply a psychological statement about the beliefs and motives of the agent. Most importantly, Hart rejects the Austinian predictive interpretation because it regards legal obligation as mere assessments of the probability of suffering punishment for disobedience. In contrast, Hart's own view is that account legal obligation must be spelled out in terms of social rule instead of the notion of a coercive command.

Despite having the upper hand against Austin, it is now natural to begin critically appreciating and examining his social rule theory. Interestingly, the existence of a social rule is a necessary condition for one to have a legal obligation but at the same, it is also not a sufficient condition. Without going into much detail, it is already plausible how that idea can be seen to result in inconsistencies. Hart evidently remarks that "The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them required by them is conceived of in terms of obligation." [footnoteRef:6] From the aforementioned quote it can also be gathered that that not all social rules impose obligations. An example of a social rule that does not impose obligations would be the rules of grammar. After expanding on the existence of a social rule, it is

now essential to address the three particular characteristics of social rule that impose obligations: [6: H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961) 83.]

1. The rule is supported by an insistent, general demand for conformity, accompanied by the application of substantial social pressure on those who deviate or threaten to deviate.
2. The rule is thought to be important because it is believed to be essential to the maintenance of some valued facet of social life
3. The rule requires conduct that, although beneficial to some, may conflict with what the person who has the duty may wish to do.”[footnoteRef:7] [7: Ibid 85.]

From the description above, it can be clearly attributed that Hart wants the notion of legal obligation to be descriptive. This is because he would argue the three requirements or criteria do not make the analysis evaluative because of the careful way in which it is phrased. In addition, the three characteristics concern people’s beliefs, thoughts, demands, wishes and whether these psychological states exist is a factual matter.

Before assessing his social rule theory, it is important first to delve into how issues of justification can further emphasise the factual matter of his views. One can discern his notion of legal obligation seems to be necessarily connected with the notion of justification since he is much more willing to include it, compared to Austin. In addition to that, one can prefer to talk about duty instead of obligation because the concept of duty also seems closer to the concept of obligation. For instance, a soldier may have a duty to kill but he has no obligation to kill. Evidently, Hart also uses the terms “duty” and “obligation” interchangeably throughout *The Concept of Law*. However, this may pose a slight problem because one may also be reluctant to substitute “duty” for “obligation” because one’s duty often is a result of one’s role and Hart’s notion does not appeal to the roles one play. The insight that Hart wants to capture here is that an action or omission may be obligatory not because of the agent or action itself. But it is rather because other people think it is obligatory or expect the agent to perform or forbear.

With this in mind, it is yet another repetition to the idea that Hart views the existence of obligation in a truly factual matter. Issues of justification is important to be repeated because it paves way to his account of legal obligation which can be expected to be adequately descriptive and factual as well.

Extensively assessing his social rule theory is now relevant. Since the rule in his social rule is a duty-imposing rule, the problem of power-conferring or facilitative rules imposing obligations is right away avoided. But it begs the question, must the rule be a social rule? According to his definition of a social rule earlier, the rule can be something else entirely because people either do not conform to the social pressure and do not think people have an internal point of view towards it. However, this is a problem because if the rule is not a social rule, then Hart’s analysis of legal obligation is inconsistent with his general account of obligation which implicitly insists that it must be a social rule. This criticism against Hart which was also echoed by Roscoe Hill in his article *Legal Validity and Legal Obligation*[footnoteRef:8] but it is incorrect. This is because Hart explicitly says that the notions of duty and obligations are “both expressions are almost always appropriate for whatever the rules of an actually existing legal system.”[footnoteRef:9] [8: Roscoe E. Hill, ‘Legal Validity and Legal Obligation’ (1970) *The Yale Law Journal*, 3.] [9: H.L.A Hart, ‘Legal and Moral Obligation’ (1958) ‘*Essays in Moral*

However, if the rule is already social rule also poses further interesting issues. This is because Hart's analysis of legal obligation is understood as a special case of obligation since it involves the expectations and behaviour of officials. To begin with, Hart's view is that legal obligations are imposed upon officials by social rules which exist by virtue of the behaviour and expectations of other officials. This separate account for officials is a problem because like Austin, it can explain the nature of legal obligation from the behaviour of officials but can only explain how the obligation is legal in circular terms. Namely that the social rule that imposes legal obligation exists by virtue of officials in the same legal system. This area then shows the lack of adequacy in Hart's social rule theory.

It is now also appropriate to extensively assess Hart's issues of justification and motive on its own without contrasting it with Austin. The merits of his argument with motive is clear when he realises that it can be diverse. This is clear when he says that "Allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do." [footnoteRef:10] Hart even acknowledges that one might decide that obedience to a law would be morally wrong but nevertheless continue to obey the law. [10: H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961) 206.]

With justification, Hart also recognises the distinction between the existence of legal obligation and the justification of legal obligation. This can be seen when Hart argues for the practical merits of a wider, positivist concept of law:

What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that however great the aura of majesty and authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[footnoteRef:11] [11: *Ibid* 199.]

Besides the adequately flexible approach, Hart therefore holds that there is a rational and moral justification for obeying valid laws. The source of this justification is in his argument for the minimum content of natural law. This is because the presence of the minimum content of natural law is what provides a justification for voluntary obedience to valid laws. Despite its flexibility, one can definitely misinterpret Hart's views as incompatible with the school of positivism. The laws that contain this minimum content are in everyone's interest because they promote survival in society.

Most importantly, Hart states that some people voluntarily obey valid laws not only as a necessary condition for the existence of a legal system but also entitles those who do obey to extract obedience from others. Hart thus view that most people as rationally self-interested and so will recognise the benefits of having a legal system with at least the minimum content. However, one may ask whether Hart believes that there is a *prima facie* obligation in the sense of a justification to obey every valid legal rule of obligation in a legal system with minimum content? Or whether Hart holds that there is a *prima facie* obligation to obey only those valid legal rules of obligation that comprise the minimum content of the legal system. Given Hart's sketchy account of justification earlier, it does not appear possible to answer this question.

It is not possible to answer that question because it is important to realise that Hart much closer to the natural law camp than one might suppose. Although, Hart insists there is no necessary connection between morality and legal obligation. However, he does agree with the natural law tradition that there is a connection between morality and legal obligation in the interesting, justifying sense of legal obligation. Hart would argue that an obligation to obey a legally valid law, in the sense of a justification comes from the content of the law and not from the property of it being valid. Again, one may easily interpret Hart's account of legal obligation as completely incompatible with positivism. That is the case with some commentators who have read moral obligation into Hart's analysis of legal obligation. Evidently, Jerome Hall offered that Hart's analysis of legal obligation seems to mean "ethical obligations." [footnoteRef:12] His interpretation is incorrect however because Hart's analysis of legal obligation must be distinguished and is entirely foolproof incompatible. [12: Jerome Hall, Foundations of Jurisprudence (Bobbs-Merrill, 1973) 132.]

Further defence of Hart's descriptive analysis of legal obligation as incompatible with positivism will be elaborated. There are strong grounds for saying Hart has a positivist account of legal obligation. Hart obviously wants to avoid necessary connection between legal obligation and moral justification because a legal positivist cannot avoid addressing the question of justification. The difference between the two approaches is therefore over the proper place for addressing the issue of justification. The real issue between the two positions, therefore, is disagreement over the appropriate moral theory to use in answering the question of justification.

Relinquishing the major connection with natural law, there are three last points that makes Hart's account of legal obligation adequately defensible despite its shortcomings. Firstly, the recognition and awareness that Hart has a descriptive analysis dispels much of the controversy that surrounds the positivist view that those who are subject to a legal system have a legal obligation to obey unjust laws. Consequently, Hart does not have to admit that any justification or motivation for obeying an unjust law is present. In other words, Hart can admit the existence of a legal obligation to obey unjust laws in a purely descriptive sense and reserve judgment about whether one has any justification or motivation for obeying unjust laws.

Secondly, his interpretation makes Hart's argument for the practical superiority of a wider conception of law is more plausible. Hart wants to argue that a wider notion of law makes it possible to distinguish the legal validity of rule and the morality of rule, is more likely to lead people to resist morally iniquitous laws. This is compared to the natural law's view that holds that immoral rules are not legally valid.

Finally, this interpretation makes some sense of the claim that officials are obligated or bound to reach legally correct decisions. Many people have denied that officials are in any way bound or obligated to reach legally correct decisions. For Hart, however, there is a descriptive sense in which officials have an obligation. It is spelled out in terms of the beliefs and expectations of the parties in dispute. It is therefore independent of the issue of whether a correct decision actually exists for every case.

To conclude, Hart's analysis of legal obligation certainly has its issues such as issues of justification having moral tendencies and the circular nature of his social rule theory when it comes to officials. But he also provides attractive reasons that can seem to override that. Namely the practical and wider approach to the issues above that might make him appear that he is departing from positivism as a whole, to the ordinary reader.

2887 words (Excluding Bibliography)

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