

ON A RECENT THEORY OF “LEGAL OBLIGATION”

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MAY I START BY SUMMARIZING professor Hart’s essay in a few words.¹

On one hand the author analyses the concept of law by resorting first to the classical concept of “obligation.” On the other, he tries a “fresh start” by resorting, later on in his analysis, to the concept of “secondary rules” and puts an emphasis on the concept of “legal order” besides (or instead of?) that of “legal norm” (Kelsen is an obviously important precedent in this connection).

It seems to me that 1) the former attempt is confronted with serious difficulties; 2) the latter attempt (to which professor Hart possibly resorts in view of overcoming some of said difficulties) is ultimately inconsistent with the former. Perhaps the author will show me that I am wrong.

1) Professor Hart’s concept of an “internal” and an “external point of view” as regards rules and obligations seems to me a tricky one. When he says that the “observer” adopts the “external” point of view by treating the traffic lights in a road as signs that the drivers will behave in a certain way, while the driver who stops treats the light from an “internal point of view” as

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¹H.L.A. Hart, *The Concept of Law* (London: Clarendon, 1961). This book has been recently translated into Italian and is still stimulating interesting discussions in this country.

a signal for him to stop (p. 87 of the English edition) I guess I understand Hart's distinction well.

But when he also says (p. 86) that the *external* point of view "may very nearly reproduce the ways in which the rules function in the lives of ... those who are only concerned with the rules because unpleasant consequences are likely to follow violation," he seems to introduce into the picture a new element which is certainly not present in the mere attitude of the "observer." The "observer" does not drive. He simply "observes." He does not decide whether to stop or not and why. The driver does. His attitude in this sense is always an "internal" point of view, as his conduct is the result of his decision. The prediction of the consequences of violation is only a possible premise of his decision to stop, while his desire to avoid being fined is only a possible motivation of that decision. Both the driver who decides to stop at the signal for the latter reason and the driver who stops for any other reason, accept, in a sense, the rule. Only their motivations are different. Professor Hart seems however to prefer to call "previsions" the decisions motivated by the desire to avoid a sanction, and to refer to an "internal" point of view only when the acceptance of a rule is motivated by *reasons other than* the desire to avoid sanctions. This procedure seems to be rather confusing and leaves us in the dark about the "real" nature of a *legal* obligation, especially as one cannot see how an "obligation" accepted from an *internal* point of view can become "legal" for the very fact that there is some "physical sanction" to support it (see e.g. p. 84, 85, 175 and 210), i.e. something which can be predicted just from an "external" point of view. Hart seems to adopt promiscuously the "external" and the "internal" points of view in order to locate the "legal" aspect in an obligation, probably because in his opinion neither point of view appears to be fully satisfactory in itself. I share this latter position, but I cannot help noticing the *contradictio in adjecto* of Hart's reasoning when he tries to remove the difficulty.

A precedent in this respect is Kelsen's theory of the "legal norm": on one hand he considered the "norm" as something having nothing to do with the "Sein," and on the other hand resorted to the concept of "sanction" (i.e. of a *fact* belonging to the realm of "Sein") to distinguish a "legal" norm from other kinds of norm. He tried to conceal the contradiction by saying only that the "sanction" for him was not a fact but something contemplated by the norm.

It seems to me that professor Hart tries to have it both ways: he compares the "legal" obligation to the moral one, then he resorts also to the "external" point of view (physical sanctions, see p. 175); but when he compares the legal rule with simple *technical* rules (e.g. somebody will avoid being killed by obeying the orders of a bandit, p. 80, or avoid being fined by

stopping at the red light), then he resorts to the argument that legal rules (*properly* so called) are to be considered as "obligations" from the "internal point of view." The consequence is that one really never locates the "legal" aspects of the legal rules (with the minor corollary that one never locates the "legal" aspects of *international* law, as compared with *state* law).

2) Hart's attempt to resort to a theory of the legal *order* is also probably due to the uncertain results of the above-mentioned theory of the legal *rule*. Unfortunately, it seems to me, Hart's concept of "secondary rules" as power-conferring rules does not seem to be ultimately consistent, in its turn, with his concept of "primary rules" as (legal) obligations.

Professor Hart points out (quite correctly, I would say) that "reductions" such as those developed in Austin's or in Kelsen's theories lead to distortions and prevent us from understanding the nature and the function of many legal rules. It seems to me, however, that the same kind of strictures could be applied to Hart's own attempt to consider both "obligations" (primary rules) on one hand, and power-conferring rules (secondary rules) on the other, as "law." How can a *power-conferring rule* be something similar to an obligation?

And how can an obligation be something similar to a power-conferring rule? How can Hart piece them together under the same label, "legal rules"? Is not this a new kind of disguised (and completely unexplained) *reduction*?

3) A third and final point in my criticism concerns the rather mysterious notion of "rule of recognition." I am inclined to consider this notion as a very important one. But I cannot help noticing the obscurity of it in Hart's theory. I used to say to my students that the "Grundnorm" of Kelsen (which is probably the ancestor of Hart's "rule of recognition") can never be "Norm" in the Kelsenian sense, if it is "Grund," and never be "Grund" if it is "Norm." I suspect that a similar stricture may be applied to Hart's "rule of recognition." Hart's Italian translator, Cattaneo, summarizes Hart's "rule of recognition" idea by saying² that Hart's "rule of recognition" is based on a question of fact and that therefore one cannot refer to its "validity." I doubt whether he is completely right. But even supposing he is right, how can something be a fact (that is something considered from the "external" point of view of the "observer"), and be called at the same time a "legal rule" i.e. an "obligation" accepted by acting men from an "internal point of view"? Once again, are we "out" or are we "in" when Hart speaks of these rules?

²See "Introduction," *Il Concetto di Diritto* (Torino: Einaudi, 1965), p. XV.

For my part, I concluded a few years ago that *the source of all troubles in many theories of law comes from the fact that they move from the concept of "obligation" as a basic notion of the theory.* I preferred to adopt the concept of "claim" just because this "fresh start" seemed to offer the possibility of consistently maintaining the "internal" point of view, without introducing the contradictions one is forced to introduce when moving from the "internal point of view" of the man who is obliged, or, as Hart says, who has an obligation. But the concept of *claim* has another advantage: it explains the life of the law much more than the logically corresponding concept of "obligation." Hart himself refers in his book to this "other end of the chain." I think this is the proper end from which to start. Logically speaking, there are no "claims" without corresponding "obligations" and vice versa, just as in an economy there are no "demands" without corresponding "supplies." But praxeologically (as Ludwig von Mises would say, or "pragmatically" as Max Weber would put it) the concept of "demand" is prior in economics just as the concept of "claim" (*lato sensu*) is prior in law. There would be no supply without demand, nor demand without need. There would be no "obligations" (or at least "legal" obligations) without claims, and no claims without the typical "need" of all individuals to have cooperation (both at the negative or *laissez faire*, and at the positive, levels) of the other individuals to achieve their own ends.

Finally, such concepts as "sanctions" are much more reconcilable with the notion of "claim" than with the logically corresponding notion of "obligation." While there is no "praxeological" nexus between an "obligation" in Hart's sense and a "sanction," there is an obvious praxeological nexus between a "sanction" as a possible means to secure the success of a "claim" and the "claim" itself. The same, I think, applies to "powers" conferred by rules: the concept of "power" as the possibility of making other people behave in accordance with our "claims" is praxeologically reconcilable with the concept of "claim," while it is not reconcilable with the concept of "obligation."

A special mention should be made of the concept of "prediction" in this respect: once again this concept is perfectly reconcilable (at the praxeological level) with that of "claim," and especially of "legal" claim, while its connection with the concept of "obligation" is not so easy to see.

Of course we must distinguish between "legal" and other claims. I think that a claim may be called *legal* whenever it is based on predictions generally made in a given environment, relating both to claims and to the corresponding compliances. In their turn, those predictions are successful whenever there is a sufficient agreement among the individuals who make these predictions in order to exercise "claims." Any "compliance" is

conceivable as a means to satisfy the claims of the people who comply with others people’s claims, just as well as any supply is conceivable as a means to satisfy a corresponding demand of the supplier. The compatibility—even more, the complementarity—of the claims makes the “legal order” exist just as well as the complementarity of *demands* makes the market exist. Legal rules describe—or try to describe or pretend to describe—this complementarity of claims, just as well as prices describe—or try to describe, or pretend to describe—the complementarity of demands on the market.