

# HART'S CRITIQUE OF AUSTIN'S THEORY

Literature:

A. Marmor, *Philosophy of Law*

# HART *vs.* AUSTIN

- imperative theory of law (J. Austin, 1790-1859)
    - 1) law consists of instructions or directives issued by some people in order to direct the conduct of others
    - 2) the guidance is 'law' if it emanates from the political sovereign and purports to function as an exercise of sovereignty
- ⇒ law is (1) instructions or commands (2) of the political sovereign

# HART *vs.* AUSTIN

## 1) legal norm as a command

- each and every legal norm is a *command*
- a command is the expression of a wish by a person (or persons), that some others behave in a certain way, backed by a threat of sanction
- according to Hart, Austin actually meant ‘orders’ not ‘commands’
- the form of: „Do this or else ...”
- such model of law assumes that:
  - a) laws are there to impose obligations
  - b) every legal norm is backed by a threat of sanction

# HART *vs.* AUSTIN

- Hart's critique (1):
    - gunman case
    - order *vs.* generality of law
      - a norm indicates 1) a *general type of conduct* and 2) applies to a *general class of persons*
      - individual orders by officials?
    - order *vs.* standing (persistent) character of law
    - order *vs.* general habit of obedience
- ⇒ Hart's correction: general orders backed by threats given by one generally obeyed

# HART *vs.* AUSTIN

- Hart's critique (2):
  - some laws have the structure of commands (e.g. criminal law, administrative law)
  - but most norms do not impose obligations (e.g. norms conferring *legal powers*)
    - powers to make contracts, wills, or marriages; power to adjudicate, make by-laws
  - conditional structure: „*If* you want to form a legally binding contract, this is *how* it is done.”
- ⇒ irreducibility of all legal norms to one general form

# HART vs. AUSTIN

- Hart's critique (3):
  - not all laws are „expressions of a wish by a sovereign that some *others* behave in a certain way”
    - statutes binding the legislators themselves?
  - not all laws are „expressions of a *wish by a sovereign ...*”
    - would an enactment duly passed not be law if those who voted for it did not know what it meant?
  - order vs. laws created by legal recognition of  
**customs**

# HART *vs.* AUSTIN

- Hart's critique (4):
    - Austin greatly exaggerated the role of sanctions in the law and the use of force
    - sanctions are not a necessary condition for the fulfilment of all the law's functions
    - Raz's thought experiment (world of angels)
      - need for: normative solutions to large-scale coordination problems, mechanisms to determine what needs be done in cases of disagreements, mechanisms for resolving conflicting views, institutions entrusted with determining the relevant facts in conflictual circumstances
- ⇒ law serves many functions without the need to use force

# HART *vs.* AUSTIN

## 2) legal norm as a command of a political sovereign

- if, and only if, the command emanates from the political sovereign, then it is legal
- political sovereign = person, or group of persons, who is *habitually obeyed* by a certain population and not in the habit of obeying anyone else
- reductive explanation: explanation of law in terms of something else, more basic and factual in nature



# HART *vs.* AUSTIN

- Hart's critique (5):
  - the idea of sovereignty is a juridical one
  - sovereignty (as an institution) cannot be at the foundations of law because it is partly the law that constitutes what sovereignty is and who counts as the particular sovereign in any given population
  - rules:
    - constitute the status function 'sovereign'
    - determine how one becomes a sovereign
  - game analogy

# HART *vs.* AUSTIN

- Hart's critique (6):
  - sovereignty cannot be constituted by the habits of obedience
    - legal transition of sovereignty?
    - continuity of legal rules?
  - Austin didn't distinguish between *regularity of behaviour* and an instance of *following a rule*
    - going to movies, eating lunch → rules?
  - ⇒ impossible to offer a reductive explanation of legal validity in terms of a sociological conception of sovereignty

Thank you for  
your  
attention!