

Study on the Reflection of Hart's Critical and Reflective Attitude in the "Concept of Law"

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Abstract—In the process of criticizing each other between Hart and Austin school, there are also some contradictions. For example, although hartism explains the fundamental problem of the source of legal effect, it doesn't explain the reason why people obey the rules; when Hart explains the critical reflection state, he adds the cognitive factor and the will factor, which is consistent with his own opinion that "the existence of law is The view that a social fact does not involve morality is contradictory. Hart's critical and reflective attitude is fully reflected in the book "the concept of law", but its contradictions are also exposed, but it is undeniable that Hart and his "the concept of law" have far-reaching significance for the development of philosophy of law.

Keywords—Hart; critical reflective attitude; concept of law; philosophy of law

I. INTRODUCTION

There are two important sources of Hart's thought: Austin's tradition of analytical law and language philosophy. In the concept of law, Hart criticizes Austin's theory on the surface in the first four chapters, but fundamentally, he still adheres to the position of analytical law, that is to say, the position of legal positivism originated from Austin's analytical law. Different from Austin's "legal order theory", Hart hopes to introduce "the rule of law theory" to better explain the law.

II. CRITICISM ON THE SIMPLE MODEL OF AUSTIN'S THEORY OF LEGAL ORDER

A. Diversity of Laws

Hart criticizes Austen's "law commanding theory" from three aspects of the content, scope of application and mode of origin of the law. The model is too simple. Hart believes that it is not enough to understand the law from the appearance alone, but also to understand it from the mind. Hart used the diversity of law to deny the unity and singleness of Austin's theory of legal orders [1].

1) *Content of law*: Hart criticizes Austin's simple model of "legal order theory" by taking contract and will, judicial power of court and legislative power as examples. Austin thinks that the law is the obligation of granting, but Hart proposes that granting rights is also the law, such as

administrative law, tax law and civil law. In these laws, not only the obligation of granting, but also the right of granting. In addition, Hart also takes "jurisdiction" as an example to show that "revocation" and "abandonment" of jurisdiction are two different concepts, which are used to criticize Austin's simple model [2]. The purpose is to show that the exercise of rights in granting rights is not necessary, not only including one kind of simplicity, but also including a variety of contents, and the exercise of rights is also diverse. Austin, through "invalidity as a sanction" and "the rule of granting rights as a fragment of law", tries to refute Hart in a special way. In Austin's view, Hart's individual legal phenomenon is just like the "three eyes" in human beings. It is only an exception in the common phenomenon. But Hart refutes Austin with "distortion as the cost of unification". Hart believes that the simple model proposed by Austin is at the cost of distortion.

2) *Scope of application*: In the debate on the scope of application of law, Hart and Austin launched two rounds of debate. According to Austin's theory of legal order, the sovereign should not be restricted by law. But Hart criticizes Austin's theory and thinks that the sovereign should also be restricted by law. In response to Hart's criticism, Austin tried to give two kinds of identities to the sovereign, "the official identity of the legislator is one personality, while the private identity of the legislator is another personality. When acting in the official identity, the legislator formulated the law on the obligation of others". But Hart thinks that this kind of complex design is actually unnecessary. In order to prove his point of view, Hart gives three reasons. First, even without this design, we can show the self-restraint of legislation. Secondly, the personality of the offeror can be divided into two parts: one is to act as the creator of the obligation, the other is to act as the obligor, and think of it as someone ordering others to do something. This is indeed possible, but it does not help. Third, we do not need this design to understand the self-restraint of legislation. Because, like making decisions, the making of laws presupposes the existence of specific rules that govern the making process [3]. On the basis of criticizing Austin, Hart put forward his own suggestions: "for the amendment of

coercion order or rule, what is needed most is to have a new idea of legislation, that is, legislation is to introduce or amend the general standards of conduct that should be generally observed by the society." However, Hart's criticism of Austin's "giving sovereignty two kinds of identity" is obviously insufficient, and lacks a strong argument. He only pointed out that Austin's design was meaningless, but he did not make a deep interpretation and criticism [4].

3) *Origin mode*: Austin believes that the law comes from the creation law, and the custom does not belong to the law. Hart criticizes Austin and thinks that custom also belongs to law. Austin criticizes Hart and thinks that habit can only be regarded as law after it has been confirmed, and can't be regarded as law before it has been confirmed. Hart responded to Austin's view that even if some habits are not confirmed, they may be laws. After constant debate with Austin, Hart's criticism on Austin's simple model of "legal order theory" can be summarized into three main aspects: first, even criminal law (which is the closest to coercive order), its scope of application is usually different from the order issued to the other, because such a law may be subject to the obligations of both the maker and the other. Second, other written laws and orders are not the same. They do not require people to do certain things, but grant them power; they do not subject to obligations, but provide convenience for the free creation of legal rights and obligations under the compulsory framework of law. Third, although the enactment of statute law is similar to the issuance of orders in some aspects, some legal rules are derived from habits, and the acquisition of legal status is not due to any conscious act of law creation like this.

B. Sovereign and Subjects

Hart's purpose is to continue to criticize Austin's theory of "sovereign". At the beginning of this chapter, Hart generalizes Austin's "sovereignty theory", the content of which is: a person or a group of people, the vast majority of people in the society are accustomed to obey his (their) orders, but he (they) are not accustomed to obey anyone else. The premise of "sovereignty theory" is that there is a vertical structure between the sovereign and the subjects in the society, which is as necessary as the spine of human being. The two cores of "sovereignty theory" are: one is "the habit of obedience", which requires the continuity of legislative power and law; the other is that the sovereign is not restricted by law. "The habit of obedience and the continuity of law" and "the continuity of law" are intended to criticize the lack of continuity and continuity of "customary obedience" mentioned in Austin's "sovereignty theory". Among them, continuity is from the legislative aspect, and continuity is from the judicial aspect. "Legal restriction on legislative power" and "the sovereign behind the legislator" are the second core of Austin's "sovereignty theory" - the sovereign is not restricted by law [5].

1) *Criticism on the lack of continuity and continuity of Austin's theory of legal orders*: First of all, in terms of

legislation, law has continuity, but Austin's "sovereignty theory" can not explain the continuity of law. Hart cited Rex's example: according to Austin's theory, the law made by Rex I was recognized as law because of his subjects' habitual obedience to him. Then, after Rex II succeeded, in the initial period of time, the subjects did not have this kind of habitual obedience to Rex II. According to Austin's theory, the law formulated by Rex II could not be called law at this time. But in practice, the law just after the accession of Rex II, we still believe that it is a law. According to Austin's "sovereignty theory", the continuity of law cannot be explained. Secondly, from the judicial point of view, Austin's "sovereign" theory can not explain the continuity of law. Hart cited examples to prove his point: the laws made by Rex I still worked after Rex II succeeded. If according to Austin's "sovereign" theory, Rex I, who is habitually obeyed by people, died at this time, then the laws made by him should also be invalid, but in fact, the laws made by Rex I are still effective, which shows that Austin's "sovereign" theory can not explain the continuity of law. Hart made a comparison between "law under habitual obedience" and "law as social rule", and thought that the law under habitual obedience and the law as social rule have one similarity, that is, the behaviors involved in the two situations must be general, but not unchangeable. However, there are also huge differences between the two types of laws, which are mainly reflected in three aspects: first, what the custom requires is convergence, and there is criticism and pressure for deviating behavior in social rules; second, there is a legitimate reason for criticism and pressure under social rules, that is, such criticism can be considered reasonable and legal, that is, social rules. There is a constant standard, but habits are not; third, habits are people's "external" obedience to rules, while social rules are people's "internal" identification of rules, while the internal identification of legal rules is essential in a society. Hart made a distinction between the internal view of law and the external view of law, criticizing Austin's "sovereign" theory that customary obedience is only the external view of law, but it just ignores the internal view of law. Hart believes that we should not only pay attention to the external aspect of law, but also to the internal aspect of law. According to Austin's theory of "sovereign", Austin only pays attention to the external aspect of law, and Hart introduces the theory of "recognition rules[6]". He believes that social rules not only pay attention to the external aspect of law, but also the internal aspect of law. The naturalism school thinks that in addition to the question of what law is, we should also consider what law should be, that is, "evil law is illegal"; the positivism school thinks that we only need to consider what law is, and we don't need to consider moral factors, that is, "evil law is law". Hart is a representative of the new analytical School of law, which holds that law has no moral element. Dworkin criticizes Hart's analysis of the meaning of legal words, which is a kind of standard concept analysis.

Hart responded that Dworkin misunderstood his meaning, confused the meaning of the concept and the standard of use. However, Hart's interpretation of the concept of law is contrary to his advocacy that law should see both "external orientation" and "internal orientation". Hart's analysis of the meaning of the word "law" with the help of "internal point of view" involves value analysis. Therefore, when Hart analyzes the concept of law, he cannot completely abandon moral factors [7]."

2) *Criticism on Austin's theory of "sovereign" that the sovereign is not limited by law*: In Austin's theory of "sovereign", there are two outstanding characteristics about the view that the sovereign is not restricted by law, which are: the first is that there must be a sovereign in the legal system; the second is that the sovereign is not restricted by all but by law. Hart criticizes Austin's thought. First of all, Hart believes that there is no inevitable relationship between the elements of the establishment of law and whether it is necessary to require the sovereign not to be restricted by law. For example, water is composed of hydrogen and oxygen. If water wants to form ice, it must be below zero °C, but there is no necessary relationship between whether water can form ice and whether water is composed of hydrogen and oxygen. Austin believes that there is always a sovereign behind the law. Hart criticizes that "the sovereign may be the constitution of a country, may be politics outside the scope of a country's laws, may be the voters of the country [8]". In response to Hart's criticism, Austin said, "in any democratic system, it is not the elected representatives but the voters who constitute or form the subject of sovereignty." But it is this response that makes Austin fall into a self-contradictory situation. No matter from its interpretation of the concept, or obedience, command and habit, it has great defects. First of all, Austin's Refutation makes his concept fall into error. Austin's "legal order theory" holds that the sovereign is not limited by law, but if the voters are regarded as the sovereign, the voters are bound to be limited by law, so Austin falls into a contradiction. Second, according to Austin's theory, there is no reason to equate sovereignty with democratic state and elector of democratic state, unless we give the keywords of "obedience to habit" and "obedient to habit" quite different from their meanings in simple situations; and this meaning only introduces "accepted rules" in secret. "That's what makes sense. The simple structure of obedience to habits and orders alone is not enough to achieve this goal. Third, if we try to treat the electors in these situations as sovereign and apply the definition of the original theory, we will find that the "majority" in this society habitually obey themselves. Therefore, the clear social image originally divided into two parts: the sovereign who issues the order but is not limited by the law, and the subject who has the habit of obeying, is replaced by the fuzzy social image, that is, the majority of the people in the society obey the order

issued by the majority or all. Here, we have neither the original meaning of "order" nor "obedience".

III. HART'S REFLECTIVE ATTITUDE

When Hart introduced "social rules", he criticized Austin for only paying attention to the external aspect of law, but ignoring the internal aspect of law.

A. *Concept of Internal Perspective*

Hart's internal perspective is regarded as a key step towards understanding the nature of law and its practice. Different from the traditional legal positivism, Hart put forward a new theory of legal positivism based on the concept of social rules. According to the theory of social rules put forward by Hart, the practice of social rules is usually composed of two elements, which are: the convergence and aggregation of social members in the behavior mode, so as to form a universal and stable conventional behavior mode; social members have a widely shared critical and reflective attitude towards this behavior mode, which is mainly reflected in every social success. All members need to follow a common standard of conduct, and those who deviate from it will be criticized and condemned by others.

B. *The Reflection of Critical Reflection Attitude in Perspective*

1) *Acceptance rules*: The meaning of acceptance rule is that all members regard the rule as the universally followed standard, the rule as the motivation of all behaviors, and the basis of punishment and criticism, so as to ensure the legitimacy of punishment and criticism. However, the basic norms from Hartism to Kelsen can only explain the fundamental problem of the source of legal effect, but still can not explain why people have the reason to abide by and obey the legal obligation, that is, why people should obey the rules [9].

2) *Critical reflection attitude*: We should have a critical and reflective attitude towards rules, which is reflected in self-criticism and comments on people or things other than ourselves. Hart interpreted critical reflective attitude as "the willingness or preference to take specific actions according to specific rules under the premise of accepting social rules", that is, there are cognitive factors and willingness factors. It can be imagined that people's "acceptance" of rules inevitably involves subjective judgment and moral considerations, which contradicts Hart's view that "the existence of law is a social fact without morality".

IV. CONCLUSION

There are only two things in the world that can make our hearts deeply shocked. One is the brilliant starry sky above our heads, and the other is the lofty moral principles in our hearts. In the process of criticizing each other between Hart and Austin school, there are also some contradictions. For example, although Hartism explains the fundamental problem of the source of legal effect, it doesn't explain the reason why

people obey the rules; when Hart explains the attitude of critical reflection, he adds cognitive factors and willingness factors, which is a kind of society with the "legal existence" advocated by himself. There is a contradiction in the view that facts are not involved in morality. Critical reflection thinking not only plays an important guiding role in the analysis of legal issues, but also plays an important guiding role in social practice. The thoughts of our predecessors can give us inspiration for thinking, but the way to explore the truth is still long.

REFERENCES

- [1] Luo Shigui, Shu Weibin. Research on moral conditions of legal effectiveness [M]. Research Press, December 2018: 39-47.
- [2] Chen Jinghui. Introduction to the concept of law by Hart [J]. Philosophy of law and sociology of law, 2017 (00): 271-283.
- [3] Wang Meishu. Rethinking on Hart's "theory of legal rules" — reading the concept of law by H.L.A. Hart [J]. Political and legal forum, 2016,34 (03): 185-191.
- [4] Song zhaoyue. On Hart's theory of legal rules [D]. Heilongjiang University, 2016.
- [5] Jia Jia. The forerunner of semantic analysis research law — Thoughts on reading Hart's concept of law [J]. People's Procuratorate, 2012 (17): 62-63.
- [6] Lin Wenjing. The introduction of internal view — from Austin's scope of jurisprudence to Hart's concept of law [J]. Commodity and quality, 2012 (S3): 232-233.
- [7] Qiu Zhaoji. Uncertainty of language and Law: Hart's opinion and related comments [J]. Xiamen University Law Review, 2010 (00): 44-77.
- [8] Ming Hui. Analysis of "legal concept" from the perspective of Positivism — Interpretation of Hart's concept of law [J]. Beihang law review, 2010 (00): 24-35.
- [9] Chen Shi. Recognition rules and internal viewpoints [D]. Southwest University of political science and law, 2010:68-70.