On the Possibility of Law without Dignity

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Introduction

Despite being a major exponent of legal positivism, H. L. A. Hart viewed certain rules that restrain the use of fraud and violence as belonging to an indisputable minimum content of natural law shared by legal systems and social morality. Moreover, Hart classified higher-level rules employed to identify, change, and apply rules as remedies for defects found in certain social arrangements based only on the first type of rules. In both arguments, Hart had in mind elementary truths about the nature of human beings and human life. Nonetheless, I shall suggest that both arguments fit very well with the famous Kantian thought experiment of a race of devils. Then I shall develop this thought experiment by showing why it is possible for a race of devils to want to employ secondary rules to better exploit other races. Thus, I will argue that the functions of Hartian primary and secondary rules are not necessarily of moral worth since they can serve their functions when used to fulfill immoral purposes by agents devoid of moral dispositions. Finally, I will consider possible objections to the key methodological resource applied in my work, since the use of thought experiments of that sort is commonly scorned as being too detached from reality.

1. The Function of Primary and Secondary Rules

According to Hart (1994, 199), there is a "core of good sense in the doctrine of Natural Law". Following in the empiricist footsteps of Thomas Hobbes and

David Hume, Hart (1994, 191-98; 1983, 258) derives the content of some rules against violence and deception from the minimal aim of survival - or, later on, from the existence of aims in general (Hart 1983, 112) - in addition to five truisms about human nature and environment: 1) human vulnerability; 2) approximate equality; 3) limited altruism; 4) limited resources; 5) limited understanding and strength of will.

Such necessary rules cannot always be restricted to the domain of conventional morality. They can require the support from law as a distinct form of social control endowed with the organized power to coerce, for truisms 3), 4), and 5) make likely that some agents will want to carve out covert exceptions for themselves from those rules when they live in societies lacking solid ties of solidarity (Hart 1994, 195, 197-98).

Those two steps in his argument suggest that Hart considers law as necessarily valuable from a moral point of view. This impression seems to be confirmed by the introduction of higher-level rules of recognition, change, and adjudication in Hart's theory.

A society lacking rules of change is unable to intentionally respond to factual changes in its circumstances. Its primary rules only can be altered "by the slow processes of growth and decay" (Hart 1994, 227). This may not be a problem for "the smallest most tightly knit and isolated societies" (Hart 1994, 227). Otherwise, a society lacking rules of change has a defect.

But since a society accepts rules of change, it has to be able to identify successful proposals for enacted rules (see Waldron 1999, 38). The rule of recognition supplies criteria for the identification of legal rules, i. e., it is a remedy for uncertainty (Hart 1994, 94, 227).

Finally, without rules of adjudication fixing whose are "final and authoritative determinations" of the fact of rule violation (Hart 1994, 93-4), and "the procedure to be followed" (Hart 1994, 97) to assert rule violation, "[d]isputes as to whether an admitted rule has or has not been violated" will continue interminably (Hart 1994, 93).

At this point, it is important to make clear that Hart was neither prescribing that a society must be complex nor assessing a complex society as morally superior to simpler societies, but only pointing out the defects that a complex society would have if it had the same kind of social arrangement of "the smallest most tightly knit and isolated societies" (Hart 1994, 227; see Green 1996, 1698-700). Besides, Hart did not consider that the above benefits of law for complex societies are without costs, or that such benefits necessarily outweigh costs. But what are law's costs according to Hart?

The very same changes in societies that allow them to have gains in adaptability to new circumstances, efficiency in conflict resolutions, and certainty about the existence and content of rules also open the doors to powerful means of oppression unavailable before. If new rules can be intentionally created, and old rules can be intentionally extinct or modified, but such a normative power cannot be available to anyone, those invested with such a centrally organized power can use it against anyone "with whose support [they] can dispense" (Hart 1994, 202; see Waldron 1999, 174-77; and Green 2008, 1052-54).

So my point is that, from the moral point of view, there is no symmetry between law's benefits and its costs. On the one hand, every moral theory that does not trivialize this issue - by considering that everything that is legal is also moral by definition - has to admit that said costs are also moral costs; on the other hand, however, every moral theory that does not assimilate law and morals should not consider said benefits as moral benefits in certain contexts.

In certain contexts, the Hartian functions of secondary rules listed above could be of benefit only for the elite of a society that could make all the benefits encompassed by the minimal content of natural law its privilege while it exploits the others (see Hart 1994, 201). To sum up, even in a complex society, it is not necessarily a good thing from a moral perspective that there are legal officials who are able to change rules, to identify them, and to apply them authoritatively

(see Kramer 2018, 18, 75, 158), for it depends on the distribution of the protections represented by the minimal content of natural law as I argue in the next section.

2. On Law Among Devils

The first thing we shall notice is that the minimal content of natural law itself is not necessarily moral. If it is true that there is no possible conventional morality without such a content, it is also true that the same content would be of interest for agents absolutely devoid of moral consciousness. Remember that Hart derived the minimal content of natural law from purposes that are morally neutral - survival or the capacity to have purposes in general - added to five truisms about human nature and environment. Nevertheless, the only Hartian truism seemly incompatible with agents devoid of moral consciousness is 3) limited altruism.

My claim is that, without any loss to the conclusion, the premise of limited altruism in Hart's argument can be replaced by the more pessimistic view about human nature confronted by Plato in The Republic according to which, for human beings, doing wrong "is by its nature a good - and being wronged an evil - but the evil of being wronged outweighs the good of doing wrong" (Plato 2000, 38-9). In other words, it is enough for Hart's argument for the minimal content of natural law that agents are more interested in avoiding suffering wrongs than they are in causing them. They do not need to be altruist even in a minimal sense.

This is why, many centuries after Plato, Kant was able to claim that even a "nation of devils" would need "universal laws" provided that these devils were rational and interested in self-preservation (Kant 1996, 335). The whole point is that if devils cannot get what they want most - wronging without being wronged - then they will agree on not wronging so that they will not be wronged. To be certain, each Kantian devil "is inclined covertly to exempt himself from

[universal laws]" (Kant 1996, 335), what makes necessary a coercive system to enforce those universal laws. But, as we have seen, sanctions are also necessary in the Hartian scenery in which human beings are endowed with limited altruism and limited understanding and strength of will.

Perhaps we are inclined to say that even a nation of devils is a moral nation, although the devils themselves do not care about that, since the minimal content of natural law is law for them. My reply is that we think so, not because the law of such a nation of devils does incorporate the minimal content of natural law, but because we have assumed that the distribution of such protections among the devils would be equal. In other words, what matters from a moral point of view is the distribution of those protections represented by rules against fraud and violence. Thus, the minimal requirements of morals transcend the mere existence of such a content in a legal system by including its distribution.

That is easy to see when we consider that a nation of devils could make the protection of the minimal content of natural law a privilege to the race of devils - let us call it race D - while enforcing rules against another race - let us call it race R - under its domain. D could enforce against R rules regarding R's economic activities and taxation such that D would make a living from tributes exacted from R. The tributes exacted by D would be so heavy that the only reason left for R to keep its economic activities would be the fear of sanctions following the breach of rules making those activities mandatory.

What is to be noticed in that case is that the use of force by D against R would not necessarily be random. As Matthew Kramer said, "[h]ighlighting the correlation between nonfulfillment-of-duty and subjection-to-punishment is the means of promoting a pattern of incentives that will secure the efficacious functioning of a scheme of imperatives" (Kramer 1999, 91). Here, "duty" means merely an action to be exacted in accordance with a rule, but not every kind of rule enforced by anyone at will, or the effect on R's behavior would be the same of a random use of force by D. It will be a rule enforced by those invested with the power to identify the rules properly enacted by D against R. In other words,

D can find room for secondary rules to change, apply, and identify rules against R, and not only to change, apply, and identify those rules designed to protect devils from each other.

As a result, there is a system connecting primary and secondary rules, but no moral aim being served at all. Certainly, one can refuse to call legal a system whose rules are not themselves practical reasons for their addressees, as it is the case of rules enforced by D against R in our thought experiment. But call it as you like, the fact remains: it is possible to connect primary and secondary rules in a system without obtaining or claiming to obtain anything morally valuable.

3. In Defense of Thought Experiments

Now why is it important to know that? Are we interested in knowing how law would be among devils? Indeed, I believe we learn something important about our own law by learning that whatever we consider morally valuable about it is not a function of the presence of (primary and secondary) rules itself. By isolating elements and controlling interactions just as in any experiment, thought experiments can lead us to understand which features of our law are due to historical conditions in which our law arises and develops, and which ones are due to the mere administration of force in congruence with rules that obtains in the central cases of legal systems. That result helps us to resist legalism and to promote those social environments and civic virtues that are the true sources of anything morally worth regarding law.

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