
LANGUAGE AND OPEN TEXTURE OF LAW IN THE PHILOSOPHY OF HERBERT HART

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Resumo:

Este artigo pretende mostrar, inicialmente, como Hart compreende o direito enquanto um sistema normativo moderado, uma vez que o autor pauta seus argumentos sobre a função da *linguagem* para legitimar o conceito de *textura aberta*. Defensor do positivismo jurídico, Hart não pretende dizer que os sistemas jurídicos contemporâneos excluem os princípios e valores morais de sua estrutura, mas que o fundamento e a validade das normas encontram-se na hierarquia das fontes do direito (regras primárias e regras de reconhecimento). Por fim, mostramos de que modo o positivismo jurídico de Hart permanece herdeiro da tradição pragmática de linguagem sustentada por Wittgenstein.

Palavras-chave: Linguagem; Positivismo Jurídico; Textura Aberta; Regra de Reconhecimento; Hart

Abstract:

The present article primarily aimed at showing how Hart understands the law as a moderate regulatory system as the author bases his argument on the role of language to legitimize the concept of open texture. Proponent of the legal positivism, Hart does not claim that the contemporary legal systems exclude moral values and principles of its structure, but that the basis and validity of the rules are in the hierarchy of law sources (primary rules and recognition rules). Finally, we show how the legal positivism of Hart remains as an heir to the pragmatic tradition of language supported by Wittgenstein.

Keywords: Language; Legal Positivism; Open Texture; Rule of Recognition; Hart

Introduction

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.

Herbert Hart, The Concept of Law.

The Theory of Law by Herbert Hart is part of the proposal endorsed by the legal positivism, as his work *The Concept of Law*, published in 1961, represents a major milestone in retaking the methodological question of Law. From the deadlocks corresponding to the classical positivist theories, such as the theories by Jeremy Bentham and John Austin, Hart focuses on pointing out their limitations, as these authors consider that certain foundations of any legal system consist, as he affirms, in the situation in which the majority of a social group usually obey the orders based on threats by an individual or sovereign persons, who, in turn, do not obey anyone.

The *corpus* of the legal positivism, or juspositivism, consists in defining the legal phenomenon based on the exclusivity of the legal rules, which are established only by those who have the competence granted by the political power. Thus the legal system has a formal nature, primarily meaning that the law does not work through external criteria such as moral or politics, and that the legal positivism opts for the neutrality of the interpreter, excluding decisions that may be supported by the will of the lawmaker or the linguistic gaps of the rules.

This question undoubtedly perceives the law as an operational activity in which the foundation and validity of the rules and the legal system lie in the higher hierarchy of the law sources. This means that the legal positivism aims at removing morality from the decisions, as the logical deduction is responsible for establishing the product of the will of a legislative authority. Unlike jusnaturalism, which supports the existence of a natural law parallel to what the State should create, the positivism is based only on the validity of the rules, which represent a monopoly of the legislative activity.

Together with Kelsen and his *Pure Theory of Law*, Herbert Hart, who considers the indeterminacy of Law as a product of the limitation of language that, in some cases, comes from the will of the creator or interpreter of the legal text, is also among the precursors of the legal positivism in the twentieth century. His less conservative view in comparison with Kelsen allows his theory to be entitled “moderate positivism”, as the legal system may accept the existence of morality to support court decisions. In this sense, the analysis of the language used by the law has become a major challenge to the legal hermeneutics and the definition of the normative criteria to the lawmaker (see BOBBIO, 1995, p. 18-36). However, the understanding of this peculiar type of positivism in the thoughts of Hart is only possible when we admit the concern arising from the philosophy of Wittgenstein. In this sense this paper aims at recovering the elements of the approach between the discussion on the language conducted by Wittgenstein and the theory of moderate positivism proposed by Herbert Hart in his work *The Concept of Law*.

This form of discussion means accepting that what makes the law unique is the legal rule, a command imposed to a given community that, once disobeyed, allows the State to use the positive legitimacy of its power to obligate those who do not follow it to adapt their behavior. This means that a penalty resulting from the *interpretation* of the rule may be applied in case of noncompliance. Therefore it is important to know, from a legal text, how the same meaning of the rule shall be achieved, that is, what is sought through the deduction of the result based on the analysis of its linguistic structure. For this reason it is possible to understand that the legal positivism collides with *linguistics pathologies*, disorders established at the moment of the interpretation of the meaning of the rules. Hart shows to have awakened from his "dogmatic sleep" by attributing to the Wittgensteinian rules the role of recognizing and enforcing the necessary legality to the legal system.

In short, the foundation of the concept of law by Hart lies in the *ultimate rule of recognition*, which is linked to the social fact of its acceptance and presents a definition that is not exempt from a certain normative conception of law (of what the law should be) and, more precisely, of a moral and political conception of law. As a consequence, there is the problem of the ultimate foundation of the legal system, which, according to Hart, lies in the *ultimate rule of recognition*, from which all other rules are recognized

and admitted. In turn, this would be an unquestionably valid, not enunciated rule. It concerns a *social fact* attested upon the observation of the behavior of the social agents, thus generating their acceptance. At the same time it is important to emphasize that the “rule of recognition” is a legal rule and belongs to a legal system, presenting the dual function of providing a basis for the legal system and ensuring a standard that allows the identification of whether or not a rule belongs to that same system.

Critique by Hart to the imperative theory of John Austin

One of the primary ideas of the legal positivism by Hart is that the law does not consist exclusively of orders and commands. The clearest attempt to analyze the concept of law in terms of commands and habits was conducted by Austin in his works *Province of Jurisprudence Determined* (1832) and *Lectures on Jurisprudence or the Philosophy Positive Law* (1863). The philosophy of Austin, directly influenced by the works of Thomas Hobbes and Jeremy Brentnam, proposes that the legal system is formed only by general, imperative, threat-based rules. “The main aspect of the theory of law by Austin consists in understanding that the concept of *law* does not involve the concept of justice.” (KIRALY, 2008, p. 25).

According to Austin, the ideas of command and obedience are often mistaken for the idea that an “order” by an authority is based on some threat. However when considering the function of the law and, consequently, the assumptions that constitute its legality, the statement by Austin is somewhat insufficient. This is one of the initial aspects of the critique by Hart, in which the law is not only a command or order established by means of threats imposed by the legal system; instead, to command is to “characteristically exercise authority over individuals, not the power to inflict them any harms, and although it may be associated to threats of penalties, a command is primarily an appeal to the respect for the authority rather than to fear” (HART, 1994, p. 19).

Austin aims at finding the "province" of law determined, that is, the very own object of the jurisprudence. To do so he reflects based on a distinction between private jurisprudence and general jurisprudence. The first refers to the investigation on the operation of the positive laws, in force or not, in a given country. The latter promotes the investigation of the principles, notions and distinctions regarding the law, making

use of abstract reasoning and the operation of more complex legal systems. Thus primarily based on the analysis of the meaning of the word “law”, Austin aims at showing what a law is, rather than showing the law in a specific location (AUSTIN, 1995, p. 14; AUSTIN, 1985).

The word “law” has two applications: one is used in the *proper* meaning and the other in the *improper* meaning. Regarding the first, Austin identifies the divine laws and the positive laws, presenting general and abstract characteristics. Those with improper meaning include all situations that, instead of following a law, we just observe a partial determination, that is, situations in which people do not dominate the criteria for law determination. Therefore the thesis by Austin claims that the laws in the proper meaning are applied by a political authority to its subjects as a result of a desire of inflicting harm to those who disobey it (see AUSTIN, 1995, p. 22-28). Thus it is possible to understand that the command may only come from an authority that has all the sovereign powers.

Austin also approached the character of obedience, a result of the conflict between the will of the legal act and the authority grounded on the superiority of the State based on its political position. Therefore Austin affirms that the law works only where a hierarchical relationship exists, that is, where some individuals command and others are commanded. In this case, the State shall only be sovereign if a separation between those who may elaborate commands and those who must obey them is established. This question establishes an irreconcilable separation between the jusnaturalism – with its view of natural rights – and the juspositivism.

As an example, Austin mentions the supremacy of God in relation to men to the extent that His power influences believers to behave in accordance with His will. Something similar occurs with the subjects in relation to their sovereign, or with a magistrate in relation to the citizens. Therefore, the concepts of "superiority", "sanction", and "duty" are immediate results of the notion of command (KIRALY, 2008, p.50).

As shown, in the philosophy of law of Austin the private will of the subject is in a lower hierarchical position in comparison to the will of the sovereign. For this reason the sovereignty depends on the superiority of the sovereign in relation to the others, and shall be exercised through certain attributes granted to the State, and never to particular individuals. According to Hart this conception arises from the false idea of a full “supremacy” of the sovereign, where the existence of the duty of “legislating” and imposing rights is observed, as in this perspective “making laws differs from ordering

people to do things, and we must allow for this difference in using this simple idea as a model for law". " (HART, 1994, p. 22): About the law as coercive orders, Hart affirms that:

The concept of general orders backed by threats given by one generally obeyed, which we have constructed by successive additions to the simple situation of the gunman case, plainly approximates closer to a penal statute enacted by the legislature of a modern state than to any other variety of law. For there are types of law which seem *prima facie* very unlike such penal statutes, and we shall have later to consider the claim that these other varieties of law also, in spite of appearances to the contrary, are really just complicated or disguised versions of this same form. But if we are to reproduce the features of even a penal statute in our constructed model of general orders generally obeyed, something more must be said about the person who gives the orders (HART, 1994, p. 24).

As pointed out, Austin places the law based on coercive orders, in which the figure of the sovereign and the courts are above the subjects and can, if necessary, expand or reduce their level of freedom. By avoiding these hypotheses, Hart proposes a society that has a *Rex* in the power. This would be a democratic society in which its sovereign imposes the obligations to be followed in a coercive way. In the beginning of his reign there are complications arising from the wish of disobedience and fear of sanctions, which are legitimated according to the will of the sovereign. Over time this society begins to abide by his laws; a work that was initially uncommon becomes a standard behavior by means of habit formation (see HART, 1994, p.40).

Hart concludes that in this case the sovereign may legitimate a habit that is widely observed by the subjects, making it a constitutional law as it is in accordance with other legitimized values. Continuing the exemplification, it is possible to consider, as pointed out by Hart, that Rex I has died and his son, Rex II, assumed the power. At first, the orders and commands imposed by the former lawmaker had been imposed by force of habit and were respected by that society. However the death of Rex I authorized his successor to legislate, but could not assure in any way that the society would obey him, taking into consideration that his government is not constituted with rules specifying such obedience. This shows that, *a priori*, Rex II did not actually "inherited" what his father had worked with the society, therefore Rex II would be a lawmaker with his succession threatened by the instability created over the structure of the legal system. According to Hart, "The mere fact that there was a general habit of obedience to Rex I in his lifetime does not by itself even render probable that Rex II will be

habitually obeyed (...). There is nothing to make him sovereign from the start” (HART, 1994, p. 53).

In the positivist theory of Hart this example aims at showing two enigmas that permeate the construction of legal systems. The first presents a sociological character, in which the organization of a society by means of a legal system cannot be constituted only in a coercive way, as described by Austin. The second presents a methodological character, in which the legitimacy of a legal system must be in alignment with *rules* ensuring the efficiency of the laws that form the State and clearly establishing who is authorized to legislate on behalf of that society.

Therefore, when initially dealing with the elements that differ the positivism of Austin from the positivism of Hart, it is possible to notice that the filling of the legal gaps is only possible when the existence of *rules* assuring the legitimacy of certain procedures used by the courts is recognized. Therefore *the timelessness of the rules is disproportional in relation to the temporality of societies, as those values change quickly while the law is not allowed to change*. The moderate positivism of Hart presents evidence of this problem and considers morality as a very important factor for the resolution of complex cases seemingly not reached by the limits of legality. Therefore the imperative character of the laws may only be seen through the analysis of the *rules* of the legal system, reducing the errors committed by excessive legality, as pointed out by Hart: "In 1944 a woman was prosecuted in England and convicted for telling fortunes in violation of the Witchcraft Act, I 735" (HART, 1994, p. 61).

At this point it is possible to show the first substantial conceptual contribution by Hart, that is, the distinction established by him between internal point of view and external point of view. The first “corresponds to the point of view of the agent that conforms to the model of behavior established by a rule and accepts it as it is”; in turn, the external point of view consists in that “of an external viewer that registers the generalized social practices, that is, the behavioral regularities.”

Regarding the individuals inserted within the external point of view, namely the lawmakers, it is essential to recognize that the behavioral rules are not established based on a threat of sanction, given that the conception of Law as a threat-based order is implausible. The philosopher states that in any legal system there are rules that do not consist in commands associated to sanctions that “do not impose duties and obligations”

(HART, 2005, p. 35), but rather rules that provide their recipients with powers to perform acts in accordance with the Law, including public powers to judge or legislate and private powers to establish or change legal relations.

From primary and secondary rules to the open texture of law

By affirming that the notion of coercive orders grounded on the habit of obeying cannot be understood as the key to jurisprudence, Hart points out that the law should be defined as the union of *primary and secondary rules* (see HART, 1994, p. 79 and segs.). In addition, Hart seeks to identify the internal mechanisms of the legal practice, which means that the great pathologies of jurisprudence lie both on the legality of the rules and on the problem of their interpretation. To Hart,

Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations. (HART, 1994, p. 81).

Differing from the moral rules that rule other types of behaviors, the primary rules establish certain legal obligations. In turn, the secondary rules are the effectiveness of the primary rules; they may create and change obligations. Thus the existing gap of guarantees of enforceability between the social and legal rules would be fought through the combination of primary and secondary rules. This would allow the definition of boundaries between law and moral, as the legal obligation is previously defined, while the moral obligations are subject to a social or private will. For this reason, “it is evident that only a small community closely linked by bonds of kinship, feelings and convictions in common, located at a stable environment, would be able to live under a regime of unofficial rules” (Cf. HART, 1994, p. 119).

In this sense it is only possible to think about primitive communities living without a legislative power, courts, or any type of authorities. Complex communities willing to have a social control in an arbitrary way are grounded on procedures that

recognize some text or individual that is authorized to deliberate under general rules. Therefore the essence of positivism is enunciated with the strict possibility that only the text (for example, a Constitution) or authorized individuals (courts and lawmakers) keep the legitimacy to create, change, and eliminate rules of the legal system.

By refusing the formalism, whose core idea is that the world may be adapted to a mechanical jurisprudence and that it is possible to freeze the meaning of the rule so that its general terms present the same meaning in all cases in which its application is discussed, and the skepticism, that is, the fact that the courts make decisions based on the inexistence of a standard meaning to the rules, Hart presents one of the passages that approximates his work to the philosophy of language of Wittgenstein:

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case. This salient fact of social life remains true, even though uncertainties may break out as to the applicability of any rule (whether written or communicated by precedent) to a concrete case. (HART, 1994, p. 135).

With the introduction of the concept of “open texture” Hart defends a type of inclusive positivism, that is, that the law is formed by areas of hard decisions, where not even the rules can guide the actual meaning of the legal rule. Therefore the legal hermeneutics would be the expected hypothesis to establish the best meaning to a rule, as it is not possible to discuss an actual meaning to the interpretation.

The term “open texture” was initially used by Friedrich Waismann, who maintained a solid contact with Wittgenstein between 1927 and 1936. Waismann used the notion of “porosität der Begriffe” (*open texture*), approaching the notion of “family resemblance” Wittgenstein (BIX, 1991; GLOCK, 1998, p. 127). Hart uses this concept to build a model of the positivist theory of law with a more moderate characteristic, without necessarily requiring an abandonment of his positivism of rules and notion of *legitimacy*. In this sense the indetermination presented by the words aggravate the fact that we gave some credit to the predictability of the legal decisions. Therefore the major problem of the law is essentially of linguistic nature.

Thus, Hart argues that the law consists of normative propositions related to the jurisprudence or the law that should, in the act of their enforcement, adapt to other type

of propositions, namely the descriptive propositions of facts – in the case of the law, socially built facts. The actual meaning of law (what the law is) is established within the scope of the articulation between these two types of propositions in the routine of the legal environment, namely in their use. For this reason, according to Hart, the previous legal theory was dominated by a false conception of language, as it sought that essence or pure entity to which the word law should refer. In this sense Hart uses elements derived from the pragmatic conception of language built by Wittgenstein.

As pointed out, when describing the law based on primitive communities in which social pressure is the only type of control, Hart lists failures in the constitution of these regimes, as non-official rules lead to conflicts in the internal relationship. These failures include uncertainty, the static character of rules, and the ineffectiveness of social pressure. On the other hand, the resolution of this pre-legal moment may occur, considering that

The remedy for each of these three main defects [unsureness, static and inefficacy, grifo nosso] in this simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the prelegal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system. (HART, 1994, p. 94).

The solution pointed out by Hart to these three failures consists in the complementation of the primary rules of obligation with the secondary rules. Initially, the solution for the uncertainty of the primary rules is the introduction of *recognition rules*. This rule specifies the characteristics considered as a conclusive indication that it is a rule of the group and that it should be supported due to its social pressure.

To the second case, the solution for the static character of the primary rules regime consists in the introduction of *modification rules*, as these rules confer power to an individual or group of individuals to introduce new primary rules to the behavioral life of a group or to eliminate former rules. And finally, in order to fix the failures related to the ineffectiveness of the diffuse social pressure, and also to become aware of whether or not a rule was violated, Hart named this group *judgement rules*, which are responsible for appointing the individuals that shall perform the trials and the

procedures that must be followed (see HART, 1994, p.110 and segs; HART, 1958, p. 593).

This arrangement is possible because the recognition rules point out which criteria must be identified with legitimate legal rules. Thus, the recognition rule allows the establishment of a legal validation, as although they are not explicitly declared, their existence is shown through the way specific rules are identified “by the courts or authorities, by private individuals or their lawyers and legal advisors and, in addition, they must be effectively accepted as official public standards of behavior by the authorities of the system” (HART, 1994, p. 150).

The debt of the legal positivism of Hart to the thought of Wittgenstein

The close relationship of Hart with the late thoughts of Wittgenstein, particularly in the *Philosophical Investigations*, has made the legal positivism less strict in its methodology. This is easily identified in one of the notes in *The Concept of Law*, in which Hart presents observations related to the first chapter:

Understanding of the different ways in which the several instances of a general term may be related is of particular importance in the case of legal, moral, and political terms. (...) For the notion of 'family resemblance': see Wittgenstein, *Philosophical Investigations*, i, paras. 66-76. Cf Chapter VIII, s. I on the structure of the term 'just'. Wittgenstein's advice (op. cit., para. 66) is peculiarly relevant to the analysis of legal and political terms. Considering the definition of 'game' he said, 'Don't say there must be something common or they would not be called 'games ', but look and see whether there is anything common to all. For if you look at them you will not see anything common to all but similarities, relationships, and a whole series at that.' (HART, 1994, p. 279-280).

In this sense Hart understands the law as a social practice, as the validation criteria consists in a social behavior established by the normativity of the rules. The establishment of a species of taxonomy of the different types of rules and their meanings is not possible in the “legal language games”. They work through *family resemblances*, without super concepts that can easily support the deduction of their interpretation and, consequently, work in a denotative manner. Due to the impossibility of clearly defining the boundaries of their interpretation, the legal concepts must be seen as a blur. In Wittgenstein's words:

The fundamental fact here is that we lay down rules, a technique, for a game, and that then when we follow the rules, things do not turn out as we had assumed. That we are therefore as it were entangled in our own rules. This entanglement in our rules is what we want to understand (i.e. get a clear view of).

It throws light on our concept of meaning something. For in those cases things turn out otherwise than we had meant, foreseen. That is just what we say when, for example, a contradiction appears: "I didn't mean it like that." (WITTGENSTEIN, 1996, §125).

As in the previous example, Wittgenstein describes the activity of following a rule as a social practice, mentioning “behaviors”, “habits”, and “institutions” (see PERUZZO JÚNIOR, 2018). This is suggested by the affirmation that “one cannot follow a rule privately” (WITTGENSTEIN, 1996, § 202; see STERN, 2005). The rules are pointed out as correction standards, that is, they do not describe what people say, but define what is to speak correctly and meaningfully inside a given context. Thus the *use* is the criterion for the meaning of legal language, which is only presented as significant because there is the understanding of the mechanisms that permeate the words within their respective *language games*. For example, regardless of being moral, political, or religious, a rule cannot be seen in isolation from the context in which it appears.

Thus the introduction of the Wittgensteinian thought that the language is an activity guided by rules and therefore its meaning is not something normative in all the contexts is seen by Hart as a new look over the validity and operation of the rules and concepts that structure the legal universe. In this case there is a particular type of legal positivism that differs from the legal positivism of Kelsen. If the rules can be evaluated based on their contexts, then it is possible that their normativity establishes the criterion for interpretation related to each specific case (see URUEÑA-SÁNCHEZ, 2017, p. 193-219).

Beyond the objections between law and moral, Hart is heir to the observations of the philosophy of language of Wittgenstein. The classical discussion between positivists and non-positivists in relation to the gaps of law, that is, where hard cases demand solutions that are beyond the rules or which would be the best criteria to be used to solve the generality of the social behavior, presents arguments that admit the possibility of an "open texture" in the legal system. Therefore it is not possible to recognize only one source of authority in complex legal systems, but many of them, considering that in addition to the legislative power, which holds the monopoly of laws, it is possible to recognize the customary laws and the legal decisions of the courts, since they are

established in the rules of recognition (see VALVERDE, 2007, p. 25-53; RODRIGUES and HEINEN, 2016, p. 193-215).

Final considerations

The observations presented about the legal positivism of Hart and the philosophy of language of Wittgenstein point out two positions found in the modern law: (i) the crisis in the legitimation process of the rules of recognition of the legal systems and, (ii) the equivocality of terms used to meet the normative conditions of the laws.

These points are meaningful as they are critical to the semantic structure of the grammar of the terms used in the legal speech in the courts and the current use of the legal language. The legal language presents the pathologies of its own internal structure – the interpretation and vagueness of the rules. Thus, leaving aside the positivist scientific ideal, Hart shares some Wittgensteinian presuppositions, and although he understands the law through basic structures, he affirms that it is necessary to consider the *open texture of law* as an unavoidable mechanism, especially for the *hard cases*.

Abstractly constructed legal concepts, including the law, are therefore questioned by Hart based on the conception of the meaning as use. In this sense, according to Hart, discussing the law from the general, descriptive point of view, focusing on what the law is and not on what it should be, relates to the investigation of practices seeking general truths, although these may be fallible. Nevertheless, it is important to observe that the jusphilosopher does not reject the need of a minimum content of the natural law as a “modest object”. *Survival* is a real element that, in the legal field, requires the investigation of the nature in the establishment of the law. Thus these questions, associated to a series of others, make Hart the embryo of the linguistic-hermeneutic turn that the contemporary critics very slowly start to observe within the very legal positivism.

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