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Herbert Hart's Doctrine of Indeterminacy in Law (1949–1961): Main Stages of Development

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Abstract. This article challenges a traditional account of a British philosopher and jurist H.L.A. Hart's doctrine of indeterminacy in law, according to which this doctrine is associated with the ideas of "open texture" of legal terms / rules and problems of judicial decision and discretion, expressed in *The Concept of Law* treatise (1961) and, partly, in the essay *Positivism and the Separation of Law and Morals* (1958). The article reconstructs development of Hart's corresponding views and distinguishes three main stages of this development associated with the author's 1949, 1953–1957, and 1958–1961 texts. In these texts problems of indeterminacy appear in different contexts, forms, roles, and so on, irreducible to the ideas of "open texture". As a result the article substantiates conclusions about an earlier dating of Hart's doctrine, its broader content, complex structure, diversity of terminology, etc., that helps to provide its more balanced assessment and use.

Keywords: H.L.A. Hart, indeterminacy in law, open texture, legal language, legal concepts, ascriptivity, analytical jurisprudence, legal reasoning, judicial discretion, legal positivism, analytical philosophy of law.

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Introduction

Views of a prominent British legal thinker Herbert Hart (1907–1992) dealing with indeterminacy in law is a subject of countless researches in Western philosophical-legal literature starting from the second half of the 20th century. Herewith a traditional account associates Hart's corresponding doctrine (a) with the idea of "open texture" of legal terms / rules; (b) with the author's conception of judicial decision (legal reasoning); 3) with *The Concept of Law* (1961) and, possibly, *Positivism and the Separation of Law and Morals* (1958) as basic relevant texts; etc. Similar viewpoints are also present in Russian legal literature (Didikin, Ogleznev, 2012; Drobyshvskiy, 2015; Kozlikhin, Poliakov, Timoshina, 2015; Martyshyn, 2016; Moyiseyev, 2004; etc.).

Basing on a study of H.L.A. Hart's 1949–1961 texts this article proposes a different view. Contrary to the traditional account, Hart's doctrine of indeterminacy in law, historically reconstructed, is a much earlier and broader one. Problems of indeterminacy appeared in the author's writings since his first 1949 essay and developed till 1961 treatise and further, addressing different tasks and topics irreducible to the famous conception of "open texture" of law. Thus the article will (1) distinguish three stages in development of Hart's doctrine in question, and (2) draw some conclusions as to its general characteristics.

Three stages in development of H.L.A. Hart's doctrine of indeterminacy

So now basing on the author's writings (taken as dividing criteria) it's possible to speak of *three stages* in development of his doctrine of indeterminacy in law up to 1961 treatise. (The fourth stage could also be distinguished referring to Hart's debate with R. Dworkin and his corresponding texts (Hart, 1983b; 1983c; 1994, Postscript)). Being interrelated with each other and having conditional borders, these stages though differ in disciplinary types, goals, theses, arguments, discursive apparatus, so issues of indeterminacy appear in various contexts, forms, plays various roles, etc. (Kasatkin, 2014, ch. 3 § 2).

The *first* stage is associated with the 1949 philosophical essay, *Ascription of Responsibility and Rights* (Hart, 1949). Here H.L.A. Hart defends an "ascriptive", i.e. nonfactual and normatively-charged, use of a concept of action (and of "social" / institutional concepts in general) and inadequacy of its object (ostensive) and formal-logic descriptions. In this regard he points to indeterminacy and defeasibility (i.e. presumptive applicability) as specific traits of legal concepts which make unsatisfactory their descriptive definition through a "closed" logical formula of always necessary and sufficient conditions of their application. (Contrary to common opinion, Hart retains much of his 1949 commitment: the author's "renunciation" of the 1949 article (Hart, 1968a, Intro.) is rather pragmatic and concerns secondary points leaving large intact his general conception of ascriptivity (Kasatkin, 2014, ch. 3 § 3)). Herewith indeterminacy acts as a peripheral notion within a problem sphere of linguistic-analytical philosophy emphasizing complex and open character of a particular speech practice ("language game") – that of legal discourse taken in a precedent legal system with regulations through concrete examples, lack of exact definitions and a broad judicial discretion (Kasatkin, 2016b).

The *second* stage is connected with H.L.A. Hart's 1953–1957 essays: *Definition and Theory in Jurisprudence* (Hart, 1983a), *Philosophy of Law and Jurisprudence in Britain (1945–1952)* (Hart, 1953), *Theory and Definition in Jurisprudence* (Hart, 1955), *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer* (Hart, 1957). In these papers the author elaborates his own (reformed) project of analytical jurisprudence as a philosophical-linguistic explanation of key legal terms resting on specificity of legal language and a corresponding method of "philosophical definition" (accounting for meaning and speech function of legal terms). Within this project Hart especially stipulates an area for indeterminacy questions. He decenters a problem of indeterminacy of legal terms for analytical jurisprudence, stressing a priority of elucidating their basic features (meaning, connections with facts and norms, role in legal conclusions).

At the same time the author advocates possibility and importance of neutral reflection of indeterminacy in analytical jurisprudence (Hart, 1955, s. IV–V; 1957, s. IIIa, IIIc). On one hand he demonstrates various techniques of explaining vagueness (as well as ambiguity and complexity) of legal concepts / terms (Hart, 1957, s. IIIc). On the other hand he draws contours of a descriptive analytical theory of adjudication including explication of cases of indeterminacy of legal terms / rules, stating situations of choice, systematization of arguments for and against given decisions, etc. (Hart, 1955, s. V–VI; Kasatkin, 2017).

The *third* stage involves the 1958 essay *Positivism and The Separation of Law and Morals* (Hart, 1958, s. III) and the 1961 treatise *The Concept of Law* (Hart, 1994). Here indeterminacy is primarily seen in light of proper representation of legal reasoning, nature of rules and their ability to predetermine legal outcomes, and so in a more general context of adequacy of positivistic interpretation of law as a socially established normative system. H.L.A. Hart famously defends importance of rules as standards able to predetermine a decision in (being dominant) clear cases, but requiring judicial discretion in borderline situations. Thereby the author emphasizes a value of legal positivism, giving a (distinct from J. Austin and H. Kelsen) linguistic-philosophical justification of the positivist thesis of indeterminacy and discretion, and justifying a “middle” position between formalism, legal realism (normative skepticism) and, also, natural law theories (Hart, 1958; 1994; Kasatkin, 2012; 2016a). (In this period Hart also clearly demonstrates non-identity of legal reasoning to logical deduction (Hart, 1958, s. III; 1953), and formulates a doctrine of (judicial) discretion as a rational responsible choice in indeterminacy situations — a doctrine that didn't receive his further elaboration, being claimed in expanded form in the author's “lost” and recently discovered 1956 essay *Discretion* (Hart, 2013) and, quite briefly, in 1958 essay (Hart, 1958, s. III)).

Conclusion. The offered historical reconstruction of Hart's views shows some valuable implications for a more sound picture of H.L.A. Hart's doctrine of indeterminacy in law which

is irreducible to his ideas of “open texture” expressed in 1961 *The Concept of Law* (and, partly, in 1958 *Positivism and The Separation of Law and Morals*) and concerned with nature of legal terms, rules and adjudication.

First, such doctrine has earlier dating and textual sources. It could already be found in Hart's first 1949 essay and is present in several important writings by the author up to 1961 treatise and further. The same is entirely true for the author's conception of legal reasoning, judicial decision and discretion.

Second, such doctrine is a much broader one. It appears in different contexts and for different purposes, having more diverse content, theses and arguments. In particular, it addresses problems of general methodology of explaining legal / social concepts, a project of analytical and positivist jurisprudence, a conception of normative legal regulation, of judicial decisions, reasoning, discretion, and so on.

Third, to Hart's doctrine of indeterminacy in law could be attributed a complex structure. The doctrine proceeds at different “levels”: (a) ones of methodology and subject-matter (which could as well be found in chapters 1 and 7 of *The Concept of Law* (Hart, 1994)); (b) of legal theory and legal practice / practical ideology (present in Hart's discussion of a “formalist fallacy” (Hart, 1958, s. III)). Moreover, being primary and mainly a descriptive conception, the author's doctrine could incorporate some normative or policy arguments (e.g., considerations as to a clear theoretical and practical explanation (Hart, 1958a, s. I–III; 1958, s. I–III), a need for balance between determinacy and indeterminacy in legal system and justification of a moderate discretion (Hart, 1994, ch. 7), as to possible limits of stretching language in adjudication (Hart, 1960, s. V), etc.).

Forth, Hart's doctrine of indeterminacy in law is expressed with different discursive apparatus. Thus, its well-known term, “open texture”, is not exclusive for the author's discussion of these issues. In the 1950s works Hart prefers to talk of “core” and “penumbra” of a meaning or of “clear” and “borderline” cases of applying terms / rules (Hart, 1957; 1958), having only two uses of “open texture” expression before 1961 (Hart, 1953, s. IV; 1957, s. I).

Therefore, a historical reconstruction of H.L.A. Hart's relevant views and their development grants a richer picture of his doctrine of indeterminacy in law (with ideas of "open texture" being an integral part of it). Many of Hart's 1961 positions have a detailed justification in his earlier 1949–1950s texts allowing a more balanced assessment and use of the author's contentions and arguments (in comparison to those present in the 20th century literature including Hart's debates with L. Fuller, R. Dworkin, etc.).

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Доктрина неопределенности в праве Герберта Харта (1949–1961): основные этапы развития

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Аннотация. В данной статье оспаривается традиционный взгляд на доктрину неопределенности в праве британского философа и правоведа Г.Л.А. Харта, согласно которому эта доктрина ассоциируется с идеями «открытой текстуры» правовых терминов / правил и проблематикой судебного решения и усмотрения, выраженными в трактате «Понятие права» (1961) и отчасти в очерке «Позитивизм и разделение права и нравов» (1958). В статье реконструируется развитие соответствующих взглядов Харта и выделяются три основных этапа такого развития, связанные с текстами автора 1949, 1953–1957 и 1958–1961 гг. В указанных текстах проблемы неопределенности предстают в различных контекстах, формах, ролях и т.п., несводимых к идеям «открытой текстуры». В итоге в статье обосновываются выводы о более ранней датировке доктрины Г. Харта, о ее более широком составе, комплексной структуре, разнообразии терминологического аппарата и пр., что позволяет обеспечить ее более взвешенную оценку и использование.

Ключевые слова: Г.Л.А. Харт, неопределенность в праве, открытая текстура, юридический язык, правовые понятия, аскриптивность, аналитическая юриспруденция, юридическое рассуждение, судейское усмотрение, юридический позитивизм, аналитическая философия права.

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