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H.L.A HART AND THE CONCEPT OF LAW : A JURISPRUDENTIAL INSIGHT

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ABSTRACT

Herbert Lionel Adolphus Hart , is a British legal philosopher who is well known for his famous work, The Concept of Law which was published in 1961. This book developed and concentrated on Hart's theory of Legal positivism and the relationship between law, coercion and morality. However, Hart says that there is no such interconnection as laws are rules of law made by humans, within the framework of analytical philosophy. According to him, the idea of obligation are merely nothing but rules of law maintained in a society as they are vital for the maintenance of a good society. These rules are classified into two, namely Primary rules and Secondary rules.

Hart became a barrister and practiced successfully at the Chancery Bar from 1932 to 1940. Later, he preferred to accept the offer of a teaching fellowship at the New college, Oxford. In 1952, he was elected Professor of Jurisprudence at the Oxford University. It was during that summer, he wrote his most famous book, The Concept of Law, though it was not published until late 1961. In the view of analytical jurisprudence, His works remains to be one of the most successful one to appear in the common law world. Hart's shadow floats over these disagreements and his theory remains by far the most interesting and internally consistent version of legal positivism. This is why we need to go back at Hart's writings and discover his intuitions about law, legal theory and the concept of justice.

INTRODUCTION

The Concept of Law provides an enlightenment to a number of traditional jurisprudential questions such as "what is law ?", "must law be rules ?" , and "what is the relation between law and morality ?". Hart answers these questions by placing law into a social context while at the same time leaving the capability for rough analysis of legal terms, which in effect "awakened English jurisprudence from its comfortable slumbers".[1] This book is considered to be one of the most famous one in the view of Analytical jurisprudence.

HART DEFENDING THE THEORY OF LEGAL POSITIVISM

The theory of Analytical positivism, commonly called as Legal positivism was proposed by John Austin in the book named, The province of the Jurisprudence determined(1832). According to Austin, Law is the command of the sovereign, backed by sanctions. The three crucial components of his concept are the words 'command, sanction and sovereign'[2] .Austin believed that law is a

[1] POSTEMA, GERALD & ENRICO PATTARO, LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD: A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 261 (ed.2011).

[2]Gautam Bhatia, Jurisprudence and the Philosophy of Law- A blog to discuss jurisprudence, legal theory,

species of command. He further defined a command as nothing but an intimation or expression of a wish to do or forbear from doing something, backed up by the power to do harm to the actor in case he disobeys. Furthermore, the person to whom the command is given is under a "duty" to obey it, and that is what creates a sanction.

However, this command theory propounded by Austin is subject to a number of complications when presented as a complete description of the operation of positive law. The legal theory of H.L.A Hart was founded upon a critique by the form of the classical command model which led to a revised 'positive analysis' founded not upon a combination of command and force but the combination and operation of rules in a legal system.

Hart commences from the basic proposition that, **"The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory"**.[3] Hart denies that the classical positivist model of law, as an implicitly coercive expression of political power, and it sufficiently accounts for the character of law as obliging social character. He also argues that an equation of the obligatory character of positive law with moral obligation is equally inadequate and thus rejects naturalist theory on the ground that it insufficiently distinguishes the particular character of legal obligation.[4]

This theory given by Hart was called as the theory of modified positivism. However, Hart himself expressed the goal of this theory that it is "an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion and morality, as types of social phenomena".[5]

The Concept of Law mainly explains us Hart's dissatisfaction towards Austin's theory. According to Hart, the idea that law consists merely of orders backed by threats is insufficient to explain the modern legal systems. Austin believes that all laws are simply coercive orders imposing duties on individuals. Hart is of the view that laws may differ from the commands of a sovereign, because they only apply to those individuals who enact them and not to other subjects.

CRITICISM

The 5th chapter in the Concept of Law begins with the four main critics given by Hart to Austin's theory.

a) Firstly, Law, even a criminal statute, is unlike the coercive demands of a gunman, spoken generally rather than to a particular person and applies even to those enacting it.
b) Secondly, Some laws do not impose duties but rather create powers, whether public or private.

the philosophy of law and moral philosophy (May 11, 2008), http://legaltheoryandjurisprudence.blogspot.in/2008/05/.

[3] H.L.A. HART, THE CONCEPT OF LAW 7(ed.2012).

[4] H.MCCOUBREY&N.D.WHITE , TEXTBOOK ON JURISPRUDENCE, 32(ed.1996).

[5] H.L.A. HART, THE CONCEPT OF LAW 17(ed.2012).

c) Thirdly, there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription.[6]
d) Fourthly, the idea of unlimited sovereignty which is free of all legal constraint fails to take account the continuity of law which is a crucial factor of a modern legal system, without reference, again, to a distorted explanation of tacit command.

Hart emphasizes that these failures are, in his opinion, not incidental but fundamental, where the basic components of command theory are not capable of any combination which will give an idea of what he argues which is to be the essential element of law. Thus he states that, **"What is most needed as a corrective to the model of coercive orders or rules, is a fresh conception of legislation as the introduction or modification of general standards of behavior to be followed by the society generally"**.[7]

This involved a fundamental remolding of positivist concerns as the building block of legal theory. In the view of above, Hart feels that these theories have failed as they failed to take into account the rules of law and that is what constitutes the element of law.

NATURAL LAW v. POSITIVISM

Legal positivism – both soft and hard – may be contrasted with the natural law theory propounded by Finnis as he bases his concept of law on the requirements of practical reasonableness. There are certain grounds where natural law and legal positivist theory share a common ground. They are:

1. Firstly, as Finnissays that his approach is based on the tradition of analytical jurisprudence.
2. Secondly, they help toto examine and justify the authority of law.
3. Thirdly, they both pledge to the view that there is no prima facie moral obligation to obey an unjust law.
4. Fourthly, they both accept the significanceof the rule of law.

There are, of course, a number of key differences between the two approaches.[8]They are:

1. Firstly, at the most general level, legal positivists feel that there is no connection between law and morality. Natural lawyers, reject this view.
2. Secondly, most positivists accounts of law end up to be descriptive and analytical, while the latter are concerned with evaluating society and law.
3. Thirdly, it is the different views concerning the relationship between practical reason and the moral point of view as an aspect of practical reason(and this may have a number of practical consequences).[9]

[6] *Id.* at 79.
[7] *Id.* at 44.

[8] 5 D.BEYLEVELD&R.BROWNSWORD, THE PRACTICAL DIFFERENCE BETWEEN NATURAL-LAW THEORY AND LEGAL POSITIVISM (ed.1985).
[9] A good, short (and eminently readable) account of this question is Neil MacCormick's essay,

MINIMUM CONTENT OF NATURAL LAW

Hart's formulation of the minimum content of natural law is the thought that in order to exist in a society, there must be rules. He was influences by David Hume and further laid down the following fundamental characteristics:

Human Vulnerability: We are all prone to physical attacks.
Approximate equality: Even the strongest must sleep at times.
Limited altruism: selfishness of people.
Limited resources: We need food, clothes, and shelter and they are limited.
Limited understanding and strength of will: We cannot be relied upon to live with our fellow men.

Because of these limitations there is seen a necessity for rules which protect the lives of peopleand property, and which ensure that promises are kept. But, despite this view, Hart is not saying that law is derived from morals or that there is a necessary conceptual relationship between the two[10]. Nor is he suggesting that if we accept his 'minimum content' of natural law this will guarantee a fair or just society.

OBLIGATION AND INTERNAL ASPECTS OF RULES

The existence and interaction of rules are fundamental to Hart's legal theory, and appear to be obviously the substance of law[11]. All societies have social rules which include rules of morals,games etc., as well as relating to obligation rules which imposes duties or obligations on people. The latter may be further divided to moral rules and legal rules .Due to the result of our human limitations is why there is a need for obligation rules in all societies: the 'minimum content of natural law'.Legal rules are further classified into primary rules and secondary rules. Hart says, Law is a union of primary and secondary rules that is the key to the science of jurisprudence.

Hart feels that Austin's theory, though flawed, began from the stand point of view that law makes human conduct obligatory and not optional to any. He is concerned to demonstrate that far more significant than commands, sovereignty, and sanctions, is the social source of legal rules: they are a manifestation of our actual behavior, our words and our thoughts[12].

There is a difference, yet to be explained, between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it[13]. The former is often a statement about the beliefs and motives on which an act is performed. But the statement that someone had an obligation to do something is of a very different type. The Austanian model
cannot explain why if you are threatened by a gunman who orders you to hand over your

Contemporary Legal Philosophy: The Rediscovery of Practical Reason, 10. Journal of Law and society 1(1983).

[10] RAYMONDWACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 99(ed.2009).

[11] H.MC COUBREY&N.D.WHITE, TEXTBOOK ON JURISPRUDENCE34(ed.1996).

[12] RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY101(ed.2009).

[13] H.L.A. HART, THE CONCEPT OF LAW 17(ed.2012).

money or he will shoot you, that though you may be obliged to comply, you have no obligation to do so- because there is no rule imposing an obligation on you[14].

He also says, in order to understand the general idea of an obligation, one must turn to the existence of social rules which create that obligation. Being under an obligation implies the existence of a rule, however, it is noteworthy that rules can also exist without obligating anyone [15]. Hart says that to determine whether rules give rise to obligations is the social pressure behind them. Rules supported by sufficient social pressure are important because they are consistent for a good societal balance and life.

Now, let us move on to the explanation of Primary rules and Secondary rules given by Hart. Under rules of one type, which may well be considered the basic or primary type, human beings are required to do or abstain from performing few acts, 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[16].

i. Firstly, rules of the first type impose duties, while rules of the second type confer powers, public or private.

ii. Secondly, rules of the first type infer actions involving physical movement or changes while the latter provide for operations which lead not merely to physical movement or change, but to the creation of duties or obligations on individuals.

The secondary rules are further classified into three types namely, Rule of recognition, Rule of change and Rule of adjudication.

ELEMENTS OF LAW

Hart says that a society can exist without courts as in the case of primitive communities and in some parts of the world till date in villages. To explain this view point, Hart presumes a society where there are only primary rules of obligation where people have to conform with one another if they have to live in proximity with another. The second condition which makes it crucial for this type of society to function is that the people who accept the rules must be in majority. But however, the above conditions can only be applied to a small community where the bonds of kinship, mutual sentiments, and belief are present in abundance to survive a system of unofficial rules.

There would be three defects in such type of society that is persistent only by primary rules.

a) The primary rules may be 'uncertain' in application,that is to say that no procedures would exist for their interpretation and the determination of their scope where this was not intrinsically clear[17].

[14] *Id.* at 83.

[15] JiaSajjal, H.L.A Hart Notes: Concept of Law; Chapters 2,3,4,5,6(Nov. 10, 2016), http://www.academia.edu/6705968/H_L_A_Hart_Notes_Concept_of_Law_Chapters_2_3_4_5_6.

[16] H.L.A. HART, THE CONCEPT OF LAW 81(ed.2012).

[17] H.MC COUBREY&N.D.WHITE, TEXTBOOK ON JURISPRUDENCE 38(ed.1996).

b) The rules would be 'static' with the only method where there is a slow development of customary practice. .
c) The maintenance of such rules will be 'inefficient' as it granted the lack of mechanisms for determination of disputes about their application.

The remedy for each of these defects in this simplest form comprises supplementing the primary rules of obligation with secondary rules which are rules of a different kind. Thus they may all be said to be on a different level from the primary rules, and while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are merely concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined[18]. In order to remedy these defects, Hart feels the importance to merge the primary rules of obligation with secondary rules. It is this combination that will change the society from being pre-legal to legal.

REMEDIES

- **REMEDY FOR UNCERTAINITY**: In order to cure the defect of uncertainty, Hart introduces master rule, 'Rule of recognition'. It is essential for the existence of a legal system. Unlike the other two rules, it appears, to be duty-imposing; it requires those who exercise public power (particularly the power to adjudicate) to follow certain rules. This gives rise to an element of circularity[19] for the criteria of recognizing the validity of certain rules necessarily include- as a criterion of validity-- the valid enactment of rules by the legislature in exercising its power conferred by the rule of change.
- **REMEDY FOR STATICITY**: In order to remedy the static nature of rules, Hart feels that it is necessary to introduce the 'Rules of change'. These rules are required to overcome legislative or judicial changes to both the primary rules and certain secondary rules. This process of change is regulated by secondary rules which confers power on individuals or groups to enact a legislation in accordance with certain procedures. These rules of change are also 'lower-order' secondary rules which confer power on ordinary individuals to modify their legal position. Thus, power-conferring secondary rules of change appear to have two meanings in Hart's model[20].
- **REMEDY FOR INEFFICIENCY**: In order to cure this defect, it is important to introduce what Hart refers to as 'Rule of adjudication'. Certain rules confer an authority on individuals to pass judgment mainly in cases of violation of primary rules. This power is normally associated with a further power to punish the wrongdoer or compel the wrongdoer to pay damages.

INTERNAL AND EXTERNAL ASPECT OF RULES

Hart argues against Austins model that the predictive theory concentrates only on the external aspects of behavior.However,

[18] H.L.A. HART, THE CONCEPT OF LAW 81(ed.2012).
[19] *Id*. at 108.
[20] RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 102(ed.2009).

there exists a second aspect of rules, namely, the internal aspect. Hart feels that there exists another concept of rules, concentrating on the attitude.

Using the internal viewpoint, people within the legal system judge, evaluate and criticize their conduct and that of their peers. While the external viewpoint is purely descriptive, made by an observer outside the system ("In England, they recognize as law…"), the internal viewpoint is evaluative ("It is the law that…")[21]. The external observer may be able to evaluate the extent to which the rules of the legal system produce a pattern of conduct on the part of individuals to whom the rules apply. The 'external' aspect of rules may in some cases enable us to predict the conduct of individuals, but we may have to consider the 'internal' aspect of rules in order to interpret or explain the conduct of individuals[22].

Hart also relates these two aspects of rules with the primary and secondary rules. He says:

1. Hart explains internal aspect of rules in a legal system arguing that it is a necessary condition that the citizens to the primary rules, only take an external viewpoint towards primary rules. They may not view the rules as standards or even take a chance to obey them. But this seems unnecessary, all that is needed is the existence of the external viewpoint, so that the detached observer can look upon the behaviour of the citizenry, and on that basis alone, find the law to be in good, practical working order.
2. It is at the level of secondary rules that the internal aspect comes in. Hart argues that it is crucial for the working of the legal system that the officials are to identify and apply the primary rules through the means of secondary rules, and take the internal viewpoint towards those. This is so because it is the only way in which reasons or justifications of enforcing, creating or changing obligations can arise.

FOUNDATIONS OF A LEGAL SYSTEM AND ITS OFFICIALS

It has already been seen that it is Hart's view that a legal system may be said to 'exist' only if primary rules are obeyed and officials accept the rules of change and adjudication.

In Hart's words, **'The assertion that a legal system exists is therefore a Janus-faced statement looking both to obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour'.**[23]

It is not clear whether these conditions are seen by Hart as a historical or developmental theory or whether it is a purely hypothetical model that enumerates the function of these rules or as a heuristic device to recognize the existence of a legal system—as J.W Harris puts it,

If a country is in a state of turmoil and the political scientist is trying to assess whether it has that social grace commonly known as 'law', wheel in the

[21]Gautam Bhatia, Jurisprudence and the Philosophy of Law- A blog to discuss jurisprudence, legal theory, the philosophy of law and moral philosophy (May 11, 2008), http://legaltheoryandjurisprudence.blogspot.in/2008/05/.

[22] H.L.A Hart's The concept of law, http://www.angelfire.com/md2/timewarp/hart.html.

[23]H.L.A. HART, THE CONCEPT OF LAW 117(ed.2012).

patient and apply this two-pronged stethoscope—'Are your primary rules generally observed?' 'Do your officials accept your secondary rules?'[24]

Hart is not suggesting that members of society need to 'accept' the primary rules or the rule of recognition; it is only the officials who need to adopt an 'internal point of view'[25].He says that if a rule is not widely accepted, it become rejected morally and politically but that is not constitutes a legal system. The rule is validated not by its efficacy but just its emanation from the rule of recognition.

MINIMUM CONDITIONS FOR THE EXISTENCE OF A LEGAL SYSTEM

Hart feels that efficacy and validity of a rule are part of one another.

The criteria for the existence of a legal system is that:

- ✓ The officials of the legal system must have an internal attitude towards the rule of recognition of the system, and what is crucial is that there should be a unified acceptance of the rule of recognition to validate it.
- ✓ The valid legal rules of the system must be generally obeyed by both officials and private citizens. He thus contends essentially that whereas 'primary rules' are addressed to all citizens, including officials in their personal capacities, 'secondary rules' are contrived for official rather than 'private consumption'[26].
- ✓ Hart states that a legal system exists when both the official sector(officials) and private sector(citizens) similar in their view of law, and when such coincidence happens, we find the validity.
- ✓ Where unity among officials partly breaks down due to disagreement over certain constitutional issues, this could lead to the breakdown of the system of law.

DEBATE BETWEEN H.L.A HART AND RONALD DWORKIN

A valuable starting point of Hart is from 'Positivism and the Separation of Law and Morals' where he states five points of legal positivism :

1. Laws are commands of Human Beings.
2. There exists no necessary connection between law and morals.
3. That a legal system is a closed logical system where decisions deduce from logical rules.
4. That the analysis of legal concepts is worth pursuing, rather than from sociological and historical enquiries and critical evaluation.
5. That moral judgments cannot be established as statements of fact.

Hart maintains that a legal system, is a combination of primary and secondary rules of which the most important he believes is the 'rule of recognition'.He argues the most important feature of the secondary rules is the 'rule of recognition', as through this rule, conduct can be regulated even during moral disagreements. Wherever such a rule of recognition is accepted, both private individuals and officials are provided with power for identifying primary rules of obligation. Thus Hart believes that the basis of any legal system is where the

[24]J.W. HARRIS, LEGAL PHILOSOPHIES 123(ed.1997).

[25] RAYMONDWACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY107(ed.2009).

[26] H.MCCOUBREY&N.D.WHITE , TEXTBOOK ON JURISPRUDENCE, 38(ed.1996**).**

primary rules are identified by the secondary rules of recognition.

Dworkin's opinion is demonstrated by the use of his interpretive theory and and claims that once law is identified (pre-interpretive stage), it should also be justified (interpretive stage).

Dworkin says that law consists not merely of rules, but a court when it has to decide on a hard case will rely upon moral or political standards, principles and policies in order to reach to a conclusion.

Dworkin criticized Hart's theory in many ways:

1. Dworkin argues that the continually changing nature of law needs that it should be analyzed in terms of justice, legal principles and morals, not just plain facts.
2. Hart says, where the law is incomplete not providing an answer for a question, judge has discretionary power to fill the gap creating a new law. But Dworkin criticized, saying the law never runs out and it always contains the matter where the judge has to apply his mind to find the answer.
3. Dworkin criticizes the 'Rule of recognition' given by Hart.Dworkin's argument is that Hart's rule of recognition is based on content, because of its source and linguistic merits, rather than what it actually aims to achieve. He states there is no rule of recognition which distinguishes between legal and moral principles and a judge in a hard case must therefore appeal to principles which include his own conception of what is the best interpretation of the network of political structures and decisions within his community[27].
4. Dworkin describes principles as a standard to principles, which include his own concept interpretation of the network of political structures and decisions within his community be observed, as it would help to bring about fairness in law. He says, laws relate to rules, but also to principles. These principles, unlike rules, are important when two principles lead to different conclusions, the judge must take into account the relative weight of each.But when a conflict arises, one can be valid based on another given by a higher court.
5. Dworkincriticizes Hart's descriptive theory of law saying it is misguided because it cannot precisely take into view the insiders view point of law, which he believes is essential in understanding the legal system.
6. Hart states that there is no inherent connection between law and morality, and there can be legal rights and duties, with no moral justification. Whereas, Dworkin criticizes this in favour of the view that there must be some form of prima-facie moral grounds for the existence of legal rights and duties. So for him legal rights must be understood as a species of moral rights, and that constituted as a crucial element in his legal theory.
7. Dworkin criticizes by saying, Hart is telling us what any legal system is, but his defect lies in his assertion that all legal

[27]Concerning the Hart and Dworkin Debate (Mar.24, 2018), https://www.lawteacher.net/free-law-essays/constitutional-law/concerning-the-hart-and-dworkin-debate-constitutional-law-essay.php#citethis.

systems, at all times, hard cases are decided by judges having the discretion that he ascribes to them.

While Hart's theory is probably the dominant view among analytically prevailing philosophers of law, it is also subject to competing interpretations persistent criticisms and misunderstandings. Many others have argued on both sides including Joseph Raz, Jules Coleman, Harold Granville, John Finnis, Hans Kelsen, Lon Fuller and Kenneth Himma to name but a few.Due to the number of other jurists that have argued on both sides of the debate, it seems that this argument will continue and in future evolve in better arguments.

CONCLUSION

Professor Hart was one of the most important legal and political philosophers of the twentieth century, and his theory of modified positivism is still gaining a lot of appreciation and importance in the present day. Hart's analysis of primary and secondary rules enunciates a very useful framework for understanding the sources of law and how one can distinguish valid laws from invalid ones without entering into subjective moral territory. Hart's system creates a way to overcome some of the inconsistences in Austin's theory, while also incorporating some of the more normative shades of the law without accounting for any moral claims. Hart observes that people feel an obligation to follow primary laws, even where they are under the verge of being caught. Since Austin defines laws as demands issued by a sovereign under threat of sanctions, this observation cannot be explained by Austin's theory. Hart argues that this obligation does not come from the moral content of the law, but from its validity, which is why we need secondary laws to determine the validity of the primary laws. Because people who take the internal perspective to the law ,they accept to be bound by laws that are valid according to the conditions set forth in the rule of recognition and in the secondary laws derived from this rule. I do feel, however, that Hart's theory on judicial decisions fails to address the reality of how judges see their role in the legal system, as creators of new law. This article derives its conclusion about the opinion of Hart, that sometimes legal system leaves in compensatory injustice, and in such cases where injustice is arbitrarily served for the common good, all persons must be treated alike just by equal considerations, and that's how his theory can be made effective in our present day

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