HART'S 'CONCEPT OF LAW' AND AUSTIN

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INTRODUCTION

Herbert Lionel Adolphus Hart (1907-92) was a British philosopher and was also a professor of Jurisprudence at University of Oxford. Before World War II, he practiced law for nine years as a chancery barrister before associating himself with the British War Office where he remained till World War II. His most important writings included Causation in the Law (1959, with A.M. Honoré), The Concept of Law (1961), Of Laws in General (1970), Law, Liberty and Morality (1963) and Essays on Bentham (1982). The Concept of Law is considered to be a notable and an acclaimed contribution to the study of legal philosophy and jurisprudence. It has had far reaching effects not only on jurisprudence but also on political and moral theory. This book is an essential read for philosophers and lawyers throughout the world who want a better understanding of the philosophical basis of law.

In his book *The Concept of Law*, Hart has analysed the relation between law, coercion, and morality, and has also attempted to clarify the question of whether all laws may be properly conceptualized as coercive orders or as moral commands. Hart says that there is no logically necessary connection between law and coercion or between law and morality. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality. Imposing a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which law may perform should be done in order to conceptualize all laws as coercive orders or as moral commands. He argues that to describe all laws as coercive orders is to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application.

Hart conceives law as a social phenomenon because it can only be understood and explained by reference to the social practices of a community. Rules must exist in a society to survive collectively. Laws are rules that may forbid an individual to do various actions or may impose

certain obligations on them. Laws may punish a person to undergo punishment for injuring another person. They may also specify how contracts are to be arranged and how official documents should be made or how courts are to function. Laws may exert coercive power over individuals who do not follow the duties and obligations by imposing penalties on them. However not all laws are to be considered as coercive because there are some laws which provide powers or privileges to the individuals.

Hart's "Concept of Law"

According to H.L.A Hart's the concept of law, social habits and social rules affect the human behaviour. An example of Social habits might be the habit of a group of college friends to go out for dinner in a restaurant every Friday night. In Social rules we find words like ought, must, should. It can be of two types:

1. Rules which are no more than social customs such as rules of etiquette or rules of correct speech.
2. Rules which constitute obligations. When there is an insistent demand for members of a group to conform and when pressure is brought to those who break these rules.

In the concept of law, Hart distinguishes the different types of obligations. In his model, rules are followed because of society's acceptance of rule being binding and not because of a sanction. In order to understand legality, it is essential to understand the full character of rules and the nature of behaviour bound by rules. Hart distinguishes between the "external" and "internal" view with respect to how the rules of a legal system maybe described. The external point of view is from the perspective of an observer who does not have to abide by the rules of a legal system. The internal aspect is of an individual who is governed by these rules of the legal system and who accepts these rules as standards of conduct and it also shows that law is not simply sanction threatening, directing or predicting but rather obligation imposing.

As per Hart, legal rules (the key to science of jurisprudence) are to be found in the union of primary and secondary rules. Primary rules impose duties or obligation and the secondary rules confer power either private or public.

Primary rules: Rules that impose obligations or duties. These rules directly govern our behaviour by telling us what we ought to do and what we ought not to do. Even the most primitive society displays obligation rules.

Secondary rules: Small groups may survive by just primary rules as there are not many complexities. However, when the society becomes larger and more complex, there is a need for more sufficient rules. In a society, primary rules must be combined with secondary rules in order to advance from the pre-legal to the legal stage od determination. A society which only consists of primary rules faces certain drawbacks such as: These rules are uncertain as to what these rules are and their scope, they are static and the maintenance of primary rules is inefficient because of the absence of authoritative arbiters of disputes.

So, secondary rules are as Hart puts it "rules about primary rules" and he seeks to remedy the deficiency by primarily categorizing them as: rules of change, rules of recognition and rules of adjudication.

Hart believes that The rule of recognition is really important as it tells us how to identify a law. There are multiple sources of law in the modern society such as a written constitution, legislative enactments, and judicial precedents. Rules of recognition can be extremely complex and it requires a hierarchy where some type of rules over the others. Rules of change indicate how the primary rules are to be created or existing ones altered. Rules of adjudication are the rules which specify the means by which decisions are to be taken as to whether a primary rule has been broken or not.

This union of primary and secondary rules is the essence of a legal system according to Hart.

Therefore, secondary rules are necessary to provide a power to introduce or vary the first kind of rule so that all the primary rules of a legal system can function effectively. These secondary rules allow the legislators to make the necessary changes in primary rules if they are found to be defective or inadequate. They also enable courts to resolve disputes over the interpretation and application of primary rules.

There are two minimum requirements which must be satisfied in order for a legal system to exist: 1) private citizens must generally obey the primary rules of obligation, and 2) public officials must accept the secondary rules of recognition, change, and adjudication as standards

of official conduct.2 If both of these requirements are not satisfied, then primary rules may only be sufficient to establish a pre-legal form of government.[1]

According to Hart, there is no necessary logical connection between the content of law and morality, and that the existence of legal rights and duties may be devoid of any moral justification. [2] Hart defines legal positivism as the theory that there is no logically necessary connection between law and morality. However, he describes his own viewpoint as a "soft positivism," because he admits that rules of recognition may consider the compatibility or incompatibility of a rule with moral values as a criterion of the rule's legal validity. [3]

Hart considered international law to be problematic because it may not have all of the elements of a fully developed legal system. International law in some cases may lack secondary rules of recognition, change and adjudication. Sanctions may not always be imposed upon the nations that disobey international law by an international court.

HART'S CRITICISM OF AUSTIN'S THEORY

Austin defined law as "the command of the sovereign, backed up by sanctions". He believed that law is a species of command. He further defined a command as "an intimation or expression of a wish to do or to bear from doing something, backed up by the power to do harm to the actor in case he disobeys". The person to whom command is given is under a duty to obey it and the threatened harm is defined as sanction. In short for Austin, "law so called" consists of a command given by a sovereign enforced by a sanction. The element of command is crucial to Austin's thinking and this is why sometimes his concept of law is also called as "command theory" or the "imperative theory" of law.

Hart believed that the idea that law merely consists of orders backed up threats is not adequate to explain modern legal systems. Modern legal systems have laws governing contacts, marriages, wills etc. and he calls these types of laws "power conferring rules" and argues that

[1] H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1994), p. 116

[2] H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1994), p. 268
[3] H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1994), p.250

these are rules which allows an individual to define the scope and limit their rights, obligations and liabilities rather than orders backed by threats.

According to Hart, Austin's theory only explains law from the outside. Law is a social phenomenon and its also necessary to understand the internal perspective of those who participate in legal institutions. Hart believed that it was wrong to define concepts like obligation and authority only in terms of external conduct.

Hart criticised the Austin's image of law which is an image of one person or group imposing their will on another through commands and sanctions. Hart illustrated his point through a famous distinction given by Kelsen about the demands of a gangster to a bank clerk to hand over whatever money the bank clerk has and the demands of a tax official addressed to a citizen of a country to pay tax money. Hart distinguished these situations by the terms of authority and generality. According to Hart, "To command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority." The bank clerk is under no "obligation" to perform as ordered even though he may be coerced to hand over the money and feel "obliged" to do so. Hart distinguishes between "being under obligation" and that of "being obliged" and clarifies that while the first links with authority, the second does not.

Moreover, Austin failed to explain why in a modern society its assumed that everyone is subject to the same laws which also includes officials of the state and even judges. Additionally, Austin is of the opinion that sovereign power is indivisible and it cannot be shared between two or more persons or bodies of persons and it ignores the fact that customary law and judge made law may arise from and derive from independent authority from sources different from that of legislation. This is why Hart specifies Austin's model as a top-down idea of law and regards it having a lesser importance in the modern world.

OVERVIEW OF HART'S CONCEPT OF LAW

To sum it up, one of the greatest merits of Hart's theory is that he managed to upgrade legal positivism to correspond more closely to the way legal rules actually work which goes way beyond dealing out coercive sanctions.

The Indian legal system is a fairly developed system and consists of both primary and secondary rules. The Constitution of India is the ultimate rule of recognition. Although under Article 51 of the Indian Constitution, it is provided that the State shall endeavour to promote international peace and security and respect its international obligation yet no rule of international law which is in conflict with the Indian Constitution can be binding on the Indian people and courts.

Primary rules of obligation in the Indian legal system include customs which are recognised by courts and various statutes. This is evident from the changing status of customs. Although before independence the Privy Council in Collector of Madura v. Mootoo Ramalinga[4] ruled that in Hindu law a clear proof of custom overrides the written text of law, the situation has changed after independence.

In any legal system, there may be cases in which existing laws are vague or indeterminate and that judicial discretion may be necessary in order to clarify existing laws in these cases. Hart also argues that by clarifying vague or indeterminate laws, judges may actually make new laws. He explains that this argument is rejected by Ronald Dworkin, who contends that judicial discretion is not an exercise in making new laws but is a means of determining which legal principles are most consistent with existing laws and which legal principles provide the best justification for existing laws.[5]

Dworkin (1977) argues that Hart's theory of law is insufficient in that it doesn't explain all aspects of law. In his criticism of Hart's account, Dworkin stipulates that Hart fails to incorporate principles into his description of what law is. However, since Dworkin's criticisms emerged, the degree to which Hart's theory, in fact, fails to acknowledge certain legal principles as law is unclear.

Prof. H.L.A. Hart's point of view a legal system as a union of primary and secondary rules and his explanation of natural law are only two of the many new thoughts that he has contributed. Lastly, Prof. H.L.A. Hart writes with a clarity of expression that is surely a virtue in such an

[4] (1968)(12 MIA 397)
[5] H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1994), p.272

abstruse field, and, unlike many of his philosopher colleagues at Oxford, he publishes his views.

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