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Hart's Philosophy of Law- An Overview

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ABSTRACT

Herbert Lionel Adolphus Hart (1907-1992) – a British philosopher, was a professor of jurisprudence at the University of Oxford. Prof. Hart has been a linguistic, philosopher, barrister, and a jurist. He is regarded as the leading contemporary representative of British Positivism. The Concept of Law (1961) remains his most influential book. Apart from this, his important writings include Causation in the Law (1959, with A.M. Honoré), Law, Liberty and Morality (1963), Of Laws in General (1970), and Essays on Bentham (1982).

KEYWORDS

Law, Morality, Positivism, Coercion, Primary Secondary rules

1. LEGAL POSITIVISM- A RECAP

Jurisprudence is often thought of as a long running battle between two camps: the “legal positivists” and the “natural lawyers”¹. It is an intellectual reaction against naturalism. Both of these labels are enormously complex, diverse and are obviously distorted.

Positivism² as a school of thought developed in 19th century. Prof. H.L.A Hart pointed out different meanings to the term Positivism, although he majorly deviated to some of its concepts. Before analyzing that, it's important to summarize the basic tenets of positivism:

- That the laws are commands laid down by supreme legislative body called Sovereign. Where the sovereign is habitually obeyed by everyone else in the jurisdiction, and the sovereign does not obey anyone. This top-down approach of law is associated with Bentham and Austin, the founders of British positivism.
- According to Austin, law is a Command which entails obedience from bulk of population, thus, law is backed by sanction. Sanction i.e., coercion or fear is what supplies motive for obedience. He further says that law is strictly divorced from justice. Instead of

¹ N.E. Simmonds, 'Central issues in Jurisprudence Justice, Law and Rights' 77 (Sweet & Maxwell publications, London 1986).

² The term 'Positivism' was coined by August Comte – a French Thinker. It is a thought that is concerned with law *as it is* (positum). The exponents of this school are concerned neither with the past nor the future of law, but the law as it exists.

being based on ideas of good or bad, it is based on power of superior over inferior.

- That the analysis of legal concepts is worth pursuing, distinct from sociological and historical inquiries. They do not deny altogether the value of historical and sociological analysis but, maintain that they should be kept separate from formal analysis.
- That the decisions can be deduced from pre-determined rules without recourse to social aims, policy or morality. They hold that it is only the precedent or statute that imparts quality to law. Even if a precedent or statute is unjust or bad it will nevertheless be law.
- That validating laws on the basis of whether or not they confirm to norms of divine will or morality is a mere futility. Although an unjust law will continue to function as law.
- That, 'what the law is' has to be distinguished from 'what law ought to be'. This makes distinction between *law* and *morality*.³

As a result of wide connotations, the debate about legal positivism has occupied a central place in jurisprudence for a long time.

Prof. Hart distanced himself from the Austinian command theory of law. He put together the components of his alternative approach towards legal theory. Though he remained firmly associated with the tradition of legal positivism to which the command theory also belonged, yet he set out to dissociate that tradition from the misrepresentations and distortions which he had exposed in the Austinian account of law. Instead of trying to tinker with the command theory to remedy its shortcomings while staying within its confines, he sought to displace that theory and to pursue the tradition of positivism along a markedly different path.⁴ Thus Hart's theory is an entirely different view in regard to nature of law having moral and sociological implications. And Prof. Hart developed his theory by exposing flaws in Austin's work i.e., "*Province of Jurisprudence Determined*" in his influential book i.e. "*The Concept of Law*"

³ See. V.D Mahajan *Jurisprudence & Legal Theory* 438 (Eastern Book Company, 5th edn., Lucknow, 2016).

⁴ See Matthew H. Kramer, *The Legal Positivism of H.L.A. Hart*, Legal Studies Research Paper Series, Faculty of Law, University of Cambridge, 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347611 (Last visited on 5th May, 2020)

2. HART'S IDEA OF LAW

"The Concept of Law" (1961) is an analysis of the relation between law and society. Hart's main objective has been to explore the understanding of law, coercion, and morality. It is an attempt 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. He also explains that to conceptualize all laws as coercive orders or as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. 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.

2.1. *Law – Apart from Coercion*

Unlike other Positivist theorists, Hart equates law with the system of rules i.e. *primary and secondary*. He therefore rejects the concept of law formulated by John Austin that proposes that all laws are commands of a legally unlimited sovereign. Austin's nature of law may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals. Laws may require individuals to undergo punishment for injuring other individuals. They may also specify how contracts are to be arranged and how official documents are to be created. They may also specify how legislatures are to be assembled and how courts are to function. They may specify how new laws are to be enacted and how old laws are to be changed. They may exert coercive power over individuals by imposing penalties on those individuals who do not comply with various kinds of duties or obligations. However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them.

2.2. *Primary and Secondary Rules*

Hart makes a distinction between basic or primary rules and secondary rules. Primary rules impose duties or obligations upon individuals which they are required to do or abstain from certain actions, irrespective of their wish. Primary rules suffer from three main defects, viz,

Uncertainty of what the rules are and what their scope is;

Static character of rules. Since change is a slow process and in a community there remains no such mechanism of deliberately introducing the new rules or to alter the position created by primary rules;

Inefficiency of determining disputes about the rules, their incidence and their violations.

The aforementioned defects are remedied by the introduction of *Secondary* rules. As per Hart, introduction of secondary rules mark a step from pre-legal to legal world. To let primary rules function effectively, *secondary rules* may also be necessary in order to provide an authoritative statement of all the primary rules. Secondary rules are power⁵ conferring rules and are in a sense parasitic upon or secondary to primary rights. They provide that individuals may by doing certain things introduce new rules of the primary type, extinguish or modify old rules, or in various ways determine their incidence or control their operations.

In other words, Secondary rules may be necessary in order to allow legislators to make changes in the primary rules, if the primary rules are found to be defective or inadequate. Secondary rules may also be necessary in order to enable courts to resolve disputes over the interpretation and application of the primary rules. The union of primary and secondary rules constitute law or a legal system.⁶

The secondary rules of a legal system may thus include:

Rules of Recognition, provides remedy for the uncertainty of the primary rules. It authoritatively settles doubts as to what the rules are and stipulates how legal rules are to be identified followed and enforced in a community.⁷ It explicitly provides an answer to the question of *what the law is*. For instance, U.K has a single rule of recognition, there what the Queen enacts becomes law. It is the ultimate source of the legal system like Austin's sovereign.⁸

Rules of Change, remedies the static nature of primary rules. It empowers certain individuals to introduce new rules while replacing the old ones.⁹

⁵ Powers may be either public or private.

⁶ *Supra* note 3 at 460.

⁷ Dr. S.N. Dhyani *Fundamentals of Jurisprudence-The Indian Approach* 186 (Central Law Agency, Allahabad 2nd edn., 1997).

⁸ *Id.* at 188

⁹ *Id.* at 186

Rules of Adjudication, remedies the inefficiency of primary rules. It confers power on certain individuals to ascertain whether the rules have been followed, or violated. It empowers them to make respective pronouncements. For that matter, these rules also identify the individuals that have authority to adjudicate and specify procedure to be followed in course of adjudication.¹⁰

Last but not the least, there are two fundamental essentials which must be satisfied in order for a legal system to exist:

- Primary rules of obligation must be generally obeyed,
- Public officials must accept the secondary rules of recognition, change, and adjudication as standards of official conduct. If both of these essentials are not satisfied, then primary rules may only be adequate to establish a pre-legal form of government.

For the primary rules of a legal system to function effectively, the rules must be sufficiently clear and intelligible to be understood by those individuals to whom they apply. If the primary rules are not sufficiently clear or intelligible, then there may be uncertainty about the obligations which have been imposed on individuals.

Vagueness or ambiguity in the secondary rules of a legal system may also cause uncertainty as to whether powers have been conferred on individuals in accordance with statutory requirements or whether legislators have the authority to change laws or whether courts have jurisdiction over disputes concerning the interpretation and application of laws.

2.3. *Internal and External Aspect of Law.*

Hart distinguishes between the "external" and "internal" aspect with respect to how the rules of a legal system may be described or evaluated. The 'internal' point of view, on one hand, is that of individuals who are governed by the rules of the legal system and who accept these rules as standards of conduct. It is the feeling by an individual of being in some sense obligated to follow the rule, otherwise known as the critical reflective attitude. It is from this internal sense that the law acquires its normative quality.¹¹ The 'external' aspect of rules may be evident in the regular pattern of conduct which may occur among a group of individuals. The external

¹⁰*Ibid.*

¹¹ The concept of law *available at*:

https://en.wikipedia.org/wiki/The_Concept_of_Law (last visited on 8th May, 2020).

aspect is an independently observable fact that people do tend to obey the rule with regularity.

The "internal" aspect of rules distinguishes rules from habits, in that habits may be viewed as regular patterns of conduct but are not usually viewed as standards of conduct. The external aspect of rules may in some cases enable us to predict the conduct of individuals, but the 'internal' aspect of rules are considered more in order to interpret or explain the conduct of individuals. Austin's command theory mainly focuses on the external aspect of law. As per his theory, individuals obey law on the reason of compulsion, threat or force, which is reflective of external aspect of law.

2.4. *International law*

International law is described by Hart as problematic, because it may not have all of the elements of a fully-developed legal system. International law may in some cases lack secondary rules of recognition, change, and adjudication. International legislatures may not always have the power to enforce sanctions against nations who disobey international law. International courts may not always have jurisdiction over legal disputes between nations. International law may be disregarded by some nations who may not face any significant pressure to comply. Nations who comply with international law must still be able to exercise their sovereignty.

3. LAW AND MORALITY

Concept of law and morality has remained a long term dispute among various schools of thought. According to positivists, law is distinctive of morality. Although Hart is a legal positivist, yet morality is implicit in his concept of law. Morals being normative in character, set a standard of behavior for the individuals, for the acceptance and observance of the rules in absence of any threat, for its enforcement. Consequently, members of a community or a society abide by the rule both as a duty and an obligation. Unlike other Positivists, Hart takes morality seriously. Hart's positivism contains within it a minimum content of natural law. He has built the concept of natural law explicitly with positivism and calls it *simple version of natural law*. This has made Hart a positivist as well as naturalist.

According to him, law and morality are close. Sometimes they may overlap or run supplementary and complimentary to each other, although they are not necessarily related. Morals and legal obligations may be similar in some situations such as the obligation to be honest and truthful or the obligation to respect the rights of other individuals.

However, they may also differ in some situations; say in case of homosexuality, it's immoral although legal. Similarly, in case of live-in relationships, court marriages etc law and morals are unrelated.

Thus, 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. The word 'necessary' stipulates that law and morals may or may not co-exist in law.

3.1. *Hart- Fuller Debate on Law and Morality.*¹²

The Hart–Fuller debate is an exchange between Lon Luvois Fuller¹³ and H. L. A. Hart which demonstrated the gulf between the Positivist School and Natural Law Philosophy. From the above stated facts, it becomes clear that Hart took the positivist view in arguing that morality and law were separate. On the other hand, Lon Fuller's reply argued for morality as the source of law's binding power.

Hart being a positivist does not believe that there is a necessary connection between law and morality. Although he acknowledges that there is a close relationship between law and morality, and does not diverge with the view that the development of the law has been immensely influenced by morality. Yet, he does not believe that they are interdependent on each other. Hart denounces necessary relationship between legal system and morality or justice. He holds that question of *what law is* must be separated from the question of *whether it is moral or not*.¹⁴

On the other hand, Lon Fuller – a naturalist, considers laws as a way of achieving social order by regulating human conduct. Such a law is in turn derived from the norms of justice having moral aspect. He argues that for a law to be valid, it must confirm to certain moral test. Lon Fuller rejects the positivist approach to law and emphasizes that fidelity to law can be only achieved if the law is in accordance with morals at all stages, be it at the time of making of the law or its application by the court. People will comply with the law only if they are convinced that the law is based on strong moral foundations enacted for their common good. Fuller further criticizes Hart's

¹² This debate has been published in the Harvard Law Review in 1958.

¹³ Lon Luvois Fuller – a noted legal philosopher, who criticized legal positivism and defended natural law theory.

¹⁴ Hart Fuller debate on law and morals, *available at*:

<https://www.lawteacher.net/free-law-essays/judicial-law/hart-and-fuller-debate-9262.php> (Last Visited on 14th may, 2020)

definition of law which insists that law and morality need to be separated.¹⁵

While taking the debate further, in the Hart- Fuller Debate an important case law i.e, '*The Grudge Informer Case*' has been discussed that demonstrates the differing views of naturalism and positivism on law and morality, particularly in the context of Nazi laws. Facts of the case are:

"A German woman denounced her husband to the authorities in accordance with the anti-sedition laws of 1934 & 1938 on the grounds of making derogatory remarks about Hitler. The husband was prosecuted, convicted and sentenced to death penalty. Although sentenced to death, he was not executed but was sent as a soldier to the Eastern front. He survived the war and upon his return he instituted legal proceedings against his wife. The wife argued that she had not committed a crime because a court had sentenced her husband in accordance with the relevant law of the time. However, his wife was convicted of 'illegally depriving another of his freedom', a crime under the Penal Code, 1871, which had remained in force throughout the Nazi period.

The court described the Nazi laws as "contrary to the sound conscience and sense of justice of all decent human beings".¹⁶

According to Harts positivist views, the decision given by the Court was wrong, because Hart believes that no matter how heinous the Nazi laws were, they were in accordance with the Law, hence valid. While, Fuller recognized the court's decision because it created respect for law and morality. This justifies the courts overlooking of the earlier sedition laws of 1934, and, subsequently upholding the wife's conviction. Without the courts applying a moral concept in the application of the law, the courts would have had to acquit the wife.

Apart from the above stated debate, Hart's interpretation of the relation between law and morality differs from that of *Ronald Dworkin*, who in *Law's Empire* suggests that every legal action has a moral dimension. Similarly, *John Stuart Mill – a British Philosopher* argues that law should not impose its concept of morality on individuals. They should be left free to choose their own conduct, unless their conduct does not harm others.¹⁷

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ The Hart v Fuller Debate, available at:

<https://www.slideshare.net/AugustineFerdinand/the-hart-v-fuller-debate> (Last

There are conflicting opinions when it comes to definition of morals as morals tend to change over time, so what was deemed immoral 50 years ago may no longer be so. Moreover, in a modern pluralistic society, for instance, among Muslims, polygamy is allowed while in Western countries it is immoral. Similarly, conflict on the issue of homosexuality which has invoked mixed reactions from different societies.

Reading out the narratives of H.L.A. Hart, we perceive a new lease of life provided to Positivism. Hart's model corresponds to real-life legal systems as unlike Austin, it does not insist on an unlimited sovereign. Secondly, it believes in both internal as well as external aspects of law, focusing more on internal aspect of law. Secondly, Hart unlike other positivists holds a view that law and morals are not necessarily related, yet there is a contingent relation between the two. However his notion of law equally stands criticized by the Natural Law theorists on certain grounds like Ronald Dworkin who states that every law is backed by morals. Secondly, Lord Lloyd criticizes the reduction of legal system to rules. Nonetheless Hart's contribution is hailed as the most important and comprehensive work of legal philosophy.