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rt's Concept of Law and the Indian Constitution

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<p><strong>By: <a href="http://www.articlesbase.com/law-articles/harts-concept-of-law-and-the-indian-constitution-905116.html">Hart's Concept of Law and the Indian Constitution</a></strong></p>
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Introduction

It can be a matter of dispute whether legal positivism owes its birth to Hobbes, Bentham or Austin but most of the legal experts agree that the version of legal positivism given by H.L.A. Hart is the most appropriate one for the modern constitutional system. Hart replaced the images of power and violence in jurisprudential imagination by conceiving law as a system of rules upon rules of social practices informed by their own criterion of validity and normative obligation. For Hart, legality is not something which is politically imposed but is evolved through a growing complex system of different kinds of rules.

Before the advent of modern period legal theory was basically dominated by the natural law ideology which was the touchstone for testing the State law. In the modern period, Hobbes for the first time divorced positive law from natural law and made the State law independent of any external criteria. However, Hobbes did not fulfil the task of positivism fully as he did not distinguish between the actual law ("is law") and the ideal law ("ought law"). His State-made law was not only an existing law but also an "ought" law.

The task was accomplished by John Austin. Austin divorced the State law fully from any external criteria and pretensions of validity on the basis of "ought". His theory of legal system is based on his theory of sovereignty. According to Austin, a legal system exists if

- (a) its supreme legislator is habitually obeyed.
- (b) its supreme legislator does not habitually obey anyone.
- (c) its supreme legislator is superior to the law subjects relative to every law.

For Austin, legal system was set of all the laws enacted directly or indirectly by one sovereign. His criterion for membership of a law in a system is that a law belongs to a system if and only if the sovereign who enacted all other laws of that system enacted it.

Austin has very little to say about the structure of the legal system - which can consist of internal as well as external relations. Punitive relations are perhaps the most important internal relations implicitly recognized by Austin. A law containing an imperative part only is not an independent law at all, unless there is a corresponding punitive law. At best, it is an imperfect law to be interpreted perhaps as a part of another law, and having the effect not of imposing duty but of permitting an act. Another kind of internal relation recognised by Austin is what is called as genetic relation, that is, the relation between subordinate law and the obedience law which authorised its legislation. Austin's theory may be said to be based on the principle of independence

A theory of legal system is based on the principle of independence if according to it there is no logical necessity for a legal system to have an internal structure. It is based on the notion that every law can be an independent unit, the existence, meaning or application of which is not logically affected by other laws

The demand of personal obedience in Austin's theory means that the span of the life of the legal system determines the period of existence of the laws of the system and hence also of the legal system itself. Austin came out with the solution of "tacit" command for the problem of continuance of old laws. In fact, Austin's theory of a legal system is at best an explanation of a momentary legal system which contains all laws of a legal system valid at a certain moment.

There is not a moment at which a legal system exists but has no laws valid at that moment. Austin's theory does not satisfy this prerequisite

Kelsen's theory improved upon Austin's theory. In his theory, laws derived their validity not from the sovereign but from *grundnorm*. His theory could provide an internal structure of the legal system as well as an explanation for its continuance. Apart from these two aspects, Kelsen's theory was the same as that of Austin. It was based primarily on sanction and efficacy and was imposed from the top. Kelsen never clearly stated what *grundnorm* was and what was the validity of the *grundnorm*. At one point he said that *grundnorm* was the general acceptance that this legal system should exist and its validity was its efficacy. Thus, in this way Kelsen's theory was not very different from Austin's theory except in that a person or a body of persons was replaced by a norm which was basically a psychological factor.

These defects were largely rectified by H.L.A. Hart whose theory of legal system based on the combination of primary and secondary rule is regarded as the "high point of legal positivism" *The Concept of Law* was first published in 1961. It is considered useful and essential for understanding a theory that it is examined in its social background. Peter Wagner reflects on the social situation at the time of publication of *The Concept of Law* He sees the period around 1960 in Western [Europe](#) as the culmination of "organised modernity" which

"developed a particular kind of reflective self-understanding as conveyed in its social science.... Organised modernity was characterised by the integration of all individuals inside certain boundaries into comprehensively organised practices. No definite places in society were ascribed to individual beings according to pre-given criteria. Social mobility existed and was part of the liberties this society offered. This configuration achieved a certain coherence, or closure at about 1960 ... it appeared as a naturally 'interlocking order'"

Reflecting the social and political conditions of his time, Hart's concept of law is based on general social acceptance of law or legal system"

Hart's Perception towards Law

Deriving inspiration from linguistic philosophy of J.L. Austin and Wittgenstein that words should be understood in the context they are used, Hart concluded that law is what people practising it mean it to be. This is what he calls as internal aspect of the law. Although Hart did not go to the extent of Duguit in contending that laws derive their validity from social acceptance and he made the rule of recognition

A central part of [Herbert Hart](#)'s theory on [legal positivism](#), in any legal system, the **rule of recognition** is a master meta-rule underlying any legal system that defines the common identifying test for legal validity (or "what counts as law") within that system. He articulates its application thusly:

“

...to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.

”

— H. L. A. Hart

In Hart's view, the rule of recognition arises out of a convention among officials whereby they accept the rule's criteria as standards that empower and govern their actions as officials.^[1] The rule is cognizable from the social practices of officials acknowledging the rule as a legitimate standard of behavior, exerting social pressure on one another to conform to it, and generally satisfying the rule's requirements. To this end, as explained by Hart, the rule has three functions:

1. To establish a test for valid law in the applicable legal system,
2. To confer validity to everything else in the applicable legal system, and
3. To unify the laws in the applicable legal system.

According to Hart, any rule that complies with the rule of recognition is a valid legal rule. For example, if the rule of recognition were "what the Queen says is law", then any rule the Queen spoke would be a valid legal rule.

His criteria of validity but he accepted that there should not be a general disregard for the system among common people and officials. Although Hart was aware of the role of coercion and conflict in the universe of law but he tried to downplay the role of command and coercion and violence by conceiving law as a system of rules upon rules of social practices informed by their own criterion of validity and normative obligations. "Hart spoke of the shared acceptance of rules. The law it seemed belonged to us all; legal rules were not to be seen as external forces upon us but as our resources.

As stated earlier, for Hart legal system is a combination of PRIMARY AND SECONDARY RULES.

Primary rules are rules of obligation while secondary rules are parasitic upon primary rules and are rules about primary rules.

These secondary rules 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 operation.

While primary rules impose duties, secondary rules confer power, public or private. Secondary rules are necessary to cure the defects which a simple social system may have to face due to static nature of the primary rules, their uncertainty and their inefficiency regarding dispute resolution. The introduction of the remedy for each defect is a step from pre-legal into legal world; since each remedy brings with it many elements which permeate law, *"certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system"*.

The thesis made Hart to conclude that international law is a law because nations feel an obligation to comply with it but it still lacks the character of a legal system because of lack of secondary rules. In recent years the development of the principle of *jus cogens* in international law can be called a development towards the formulation of secondary rule of recognition.

Thus, the three defects of pre-legal system are cured by "rules of recognition", "rules of change" and "rules of adjudication". Rules of change and rules of adjudication are again related to rules of recognition because it is with reference to it that a particular rule is identified. Thus, for Hart, the existence of a particular rule does not depend upon the command of the sovereign but on the fact that a rule is recognised as valid by rule of recognition and courts have declared it to be valid.

Indian Concept Acc. to Hart's Ideology

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. Matoo Ramalingaa* ruled that in Hindu law a clear proof of custom overrides the written text of law, the situation has changed after independence. Only the customs which are recognised and accepted by Parliament or the courts have the force of law.

Pre-constitutional laws are given recognition by Article 372 of the Indian Constitution "but subject to the provisions of ... Constitution".

Hart criticises Austin's definition of law as a command of the sovereign backed by sanctions. He contends that a legal system does not resemble a gunman situation writ large. A person may succumb to a gunman's threats and FEEL OBLIGED TO do or obey his order. But he is not UNDER AN OBLIGATION TO obey the order. But under a legal system he may feel that he is under an obligation to obey the rule although there is no chance of being detected.

One of the criticisms against the Indian Constitution is that it was not framed by a Constituent Assembly which could be treated as representing all Indians and that most of the provisions of the Constitution are borrowed from outside and are not rooted in Indian tradition. It is also contended that the Constitution was never put before the people for ratification. Therefore, it signifies an imposition on the people rather than their acceptance giving validity. The criticism is not, it is submitted, justified because the members of the Constituent Assembly were people in whom the general population had confidence.

It is evident from the results of elections conducted under the new Constitution. It is also true that people have accepted the Constitution and its philosophy because so far there has not been any general opposition of its not coming directly from the masses. The people of India not only feel themselves under an obligation to obey the Constitution but they are also in fact seeking remedy from the Constitution against existing laws and circumstances.

This is clear from the decision in *Supdt., Central Prison v. Dr Ram Manohar Lohi* this case a pre-Constitution law was opposed and the right to oppose it was sought from Article 19(1)(a) of the Constitution of [India](#). The fact that new rights are recognised as fundamental right under Article 21 of the Constitution and that the courts are being approached to recognise and enforce the directive principles of the Constitution proves the contention that people of India have accepted the present constitutional system and it is not imposed on them from above.

Hart emphasised on INTERNAL AND EXTERNAL ASPECTS OF A RULE.

An external aspect of a rule, which is also present in social habits, consists in the regular uniform behaviour which an observer can record. Internal aspect of the rule distinguishes a rule from social habit. When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there be such a habit no member of the group need in any way think of the general behaviour or even know that the behaviour in question is general; still less need they strive to teach or intend to maintain it. By contrast, a social rule sets the standard to be followed by the group as a whole. In order that a social rule exists some must look upon it as to be followed by others, deviation from it is criticised, demand for conformity is made upon others.

There need not be any feeling of "being bound". There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard and this should display itself in criticism (including self-criticism), demands for conformity and in acknowledgement that such criticisms and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must" and "should", "right" and "wrong".

Again, the government action subsequent to the Supreme Court decision in *Mohd. Ahmed Khan v. Shah Bano Begum* was criticised on the ground that it is against the spirit of the Constitution being in contravention of Article 14 and Article 44 of the Constitution of India.

RULE OF RECOGNITION according to Hart forms the foundation of the legal system.

Such a rule is accepted by both private persons and officials and is provided with authoritative criteria for identifying primary rules obligation. These include reference to authoritative text, legislative enactment, customary practice and general declaration of specified persons or to past judicial decisions in particular cases.

In a modern legal system where there are a variety of sources of law, the rule of recognition is correspondingly more complex. The criteria for identifying the law are multiple and commonly include a written constitutional enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking this criteria in an order of relative subordination and primacy. There is a difference between "subordination" and "derivation".

In the day-to-day life of a legal system, rule of recognition is very seldom expressly formulated as a rule. For most part, the rule of recognition is not stated but its existence is shown in which particular rules are identified either by courts or other officials or private persons or their advisors.

The use of unstated rules of recognition by courts and others in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from natural expressions of the external point of view.

Under the Indian legal system, although the Indian Constitution is the ultimate rule of recognition, it presents certain baffling complexities—

— It allows the existence of parallel legal systems in the shape of personal laws many of which still derive their validity from religious institutions. Article 372 of the Indian Constitution allows continuance of pre-constitutional laws. It includes personal laws also.

Article 44 of the Constitution provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. These provisions may be interpreted to mean that the Constitution for the time being recognises their existence. But it may be relevant to note that the laws which conflict with provisions of the Constitution that are thought to be part of the basic structure like Article 14 are still tolerated.

Fluctuations by way of the Interpretation

— There is a hierarchy of rules of recognition and the Constitution is at the top. But there are perplexing exceptions-

(i) Under Article 240(2) the President can override parliamentary legislation in relation to Union Territories. The President may make regulations for any purpose for which Parliament could make law.

(ii) Under Schedule (5) Part (5) parliamentary legislation in relation to tribal areas in certain matters can be modified. State's power to legislate on certain specified entries is subject to power of Parliament under the Union List, e.g. Entry 23 of State List subject to Entry 54 of List I, Entry 24 of List II is subject to Entries 7 and 52 of List I.

(iii) Parliament can by its own law effectively alter the distribution of powers. Articles 2 to 4 can be amended by ordinary parliamentary legislation which conflicts with the principle of federalism which the Constitution seeks to protect.

However, since these provisions are part of the Constitution itself they cannot be said to be in conflict with Hart's theory of ultimate rule of recognition. Moreover, in *Indian Aluminium Co. Ltd. v. Karnataka Electricity Board* it has been said that the entries in the Constitution only demarcate the legislative fields of the respective legislatures and do not confer legislative power as such. This conflict in the Constitution brings us to the question of basic structure. Parliament has the power to amend the Constitution. But the power is subject to substantive as well as procedural limitations.

While procedural limitations are given in Article 368, substantive limitations are pointed out by the Court in *Kesavananda Bharati v. Union of India* as the principle of basic structure. Basic structure in simple terms can be said to indicate what Parliament, a creation of the Constitution, cannot do. In other words, power of Parliament to amend the Constitution is only limited to the areas outside the sphere of basic structure. It is the core of the ultimate rule of recognition. It tells what the ultimate rule of recognition does not give to Parliament. Normally, basic structure is said to be the *grundnorm* of the Indian legal system. But the analogy will be erroneous because then most of the provisions of the Constitution itself will become invalid when tested against the basic structure, e.g. the above-mentioned provisions conflict with separation of powers and federalism and to hold this will be beyond the powers of the judiciary under the ultimate rule of recognition.

One question, which is normally posed is, what gives the judiciary power to say what the basic structure is? Is the existence of basic structure dependent on the decision of the judiciary? The answer can be given by drawing an analogy from Hart's minimal rules. According to Hart, these rules are minimal conditions for the persistence of social groups i.e. if certain rules did not exist the social group would not "survive". Thus, we can say that there are minimal rules for the existence of a legal system. If these rules do not exist the legal system would not survive and by enunciating the basic structure the judiciary is only pointing towards these rules.

However, from the inefficiency of a particular rule general disregard for the system should be distinguished. One who makes an internal statement concerning the validity of a particular rule of a system may be said to presuppose the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy. Thus, while in *Supdt., Central Prison v. Ram Manohar Lohia* limited right of civil disobedience was granted under Article 19(1)(a) it cannot be so exercised as to threaten the legal system and the sovereignty and integrity of the country. Thus, it cannot be so exercised as to generate a general disregard for the system but opposition and criticism of certain laws is permissible because of the democratic framework of the country.

Hart's idea of OPEN TEXTURE OF LAW is his another important contribution to legal theory. He recognises the limits of rules and accepts that since all conditions cannot be anticipated, there cannot be predetermined rule to suit every situation in society. Thus, legislators lay down the rules according to the aim of the law. These rules can regulate the clear cases of the paradigm. But there are indeterminate cases which the legislators could not visualise in the beginning. For these indeterminate cases the core meaning of the rule has to be extended to the "penumbral" meaning where the Judge performs an extra-legal function and makes a choice. Thus, according to Hart, in such cases the Judge has to exercise his discretion and a prudent Judge tries to accommodate the prevalent social conditions while interpreting the words. According to Hart, even if the Judge does not extend the meaning of the word and sticks to the "core" meaning, he is still exercising the discretion though making a conservative choice.

, While in interpreting Article 12 the Supreme Court extended the penumbral meaning of any other authority to include instrumentalities of the State within the meaning of the term "State", they also came up with the principle of basic structure pointing out the principles on which the Indian Constitution is based which cannot be violated by the legislature. Taking guidance from the general structure and aim of the Constitution the Supreme Court has given a totally new interpretation to Articles 14 and 21.

Hart in agreement with Hobbes thought that these conditions are the foundation on which society is based. Men have come together for these reasons. Thus, if these truisms will be ignored the foundation of society and the legal system will be lost and the system will lose

its base and efficacy. Thus, although these truisms do not validate the rules, rules cannot ignore them if general efficacy of the system is to be maintained.

In the Indian legal system, although the Supreme Court in *A.K. Gopalan v. State of Madras* and *A.D.M., Jabalpur v. Shivakant Shukla* maintained a strict positivist attitude, in *Golak Nath v. State of Punjab*, *Maneka Gandhi v. Union of India* it adopted the natural law tone and has in Article 14 and Article 21 introduced criteria like "reasonableness", "anti-arbitrariness" and "due process" for testing the validity of laws which can be called external criteria.

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Grounds of Morality

Finally, what is the role of law and the legal system in an individual's life? What should be the sphere of law? Should law enforce MORALITY on its subjects? Hart differs from Devlin in this respect. Devlin contends that society has the right to enforce morality because a "recognised morality" is as necessary to society as a recognised government and that society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential for its existence. Although Devlin accepts that a balance should be maintained between rights and interests of the society and rights and interests of the individual, there are certain principles which the legislature should bear in mind while legislating.

Hart contends that while public morality should be enforced because its absence amounts to nuisance to another person, care should be taken while enforcing private morality and a balance has to be maintained between individual liberty and morality. According to Hart, the private morality should be made effective by means of persuasion, dialogue and debate rather than coercion.

The Indian legal system does not totally approve of Hart's theory in this regard. In fact the Indian Constitution is not only a formal text but also a dream and an instrument to bring about social reform. Thus, Article 17 penetrates into private lives of citizens by abolishing "untouchability" in any form. Under the "Protection of Civil Rights Act, 1955" passed by Parliament under Article 35 of the Constitution, discrimination on the ground of untouchability has been made a punishable offence not only in public places but also in privately owned places of worship and the State Governments are empowered to impose collective fines on the inhabitants of an area involved in or abetting the commission of offences related to "untouchability"

In *Saroj Rani v. Sudarshan Kumar Chadha* and in *Gian Kaur v. State of Punjab* the Supreme Court enforced private morality. A Constitution Bench overruled the earlier decision of the

Division Bench of the Supreme Court in the case of *P. Rathinam v. Union of India* by holding that the right to die cannot be included in the right to life under Article 21.. Morality is expressly mentioned in Articles 25 and 26 as a ground for restrictions. Under Article 25 the Constitution guarantees freedom of conscience and freedom of profession, practice and propagation of religion subject to public order, morality and health. In the same way under Article 26, every religious denomination or any section thereof has the right to manage its religious affairs subject to public order, morality and health. Therefore in *Acharya Jagdishwaranand Avadhuta v. Commr. of Police, Calcutta* the Court held that tandava dance in procession or at public places by Anand Margis, carrying lethal weapons and human skulls, was not protected by Article 25 or 26 as it was against public order and morality.

Even under Article 14 the Supreme Court under the new concept of arbitrariness, enforces the prevailing morality by striking down a law as unreasonable. Thus, in *Air India v. Nergesh Meerza* the Air India Employees Service Regulations were challenged on the ground that they provided for different service conditions for Air Hostesses and Assistant [Flight](#) Pursers (AFPs) and it was alleged that they were discriminatory against women. The Supreme Court found that Air Hostesses and AFPs worked under two different categories of services and the Air Hostesses on the whole were not discriminated against. However, even though it found that there was a reasonable classification and no violation of the principle of equality, the Court struck down a regulation providing for termination of services for Air Hostesses on the first pregnancy as arbitrary because it insulted the Indian motherhood

. However, in *R.K. Garg v. Union of India* the majority of the Supreme Court spoke in a different tone. In this case the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and the Act which replaced it was challenged. The Act granted certain immunities to persons who had invested unaccountable money in the Special Bearer Bonds. They were not required to disclose the nature and source of acquisition of the Special Bearer Bonds. It prohibited the commencement of any enquiry or investigation against such person. The Court by a majority of 4 to 1 upheld the validity of the Act on the ground that the classification made by the Act between persons having black money and persons not having black money was based on intelligible *differentia* having rational relation with the object of the Act. The object of the Act was to unearth black money for being utilised for productive purposes. Bhagwati, J. speaking for the majority, refused to strike down the law on the ground of morality, saying that:

"It is necessary to remember that we are concerned here only with the constitutional validity of the Act and not with its morality. Of course, when we say this we do not wish to suggest that morality can in no case have relevance to the constitutional validity of a legislation. There may be cases where the provisions of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational and hence violative of Article 14. But the test in every such case would be not whether the provisions of the statute offend against morality but whether they are arbitrary and irrational having regard to all the facts and circumstances of the case. Immorality by itself is not a ground of constitutional challenge."

Gupta, J., however, gave dissenting opinion saying that:

"The concept of reasonableness does not exclude notions of morality and ethics. I do not see how it can be disputed that in the circumstances of a given case considerations of morality and ethics may have a bearing on the reasonableness of the law in question."

Conclusion

Based on the general acceptance of the people, Hart's legal system comprises of primary rules of obligation and "secondary rules of recognition", "rules of adjudication" and "rules of change". Existing within the framework of certain minimal rules this legal system has enough flexibility to adapt itself to the changing needs. Except for the five truisms, Hart's legal system like Aristotle's Politics is amoral. Principles of morality are no touchstone to test the validity of the rules of legal system. They can, however, become legal rules after passing through the process prescribed by the legal system.

The Indian legal system is a fairly developed legal system comprising of both primary rules of obligation and secondary rules of recognition, adjudication and change. While the primary rules consist of various statutory laws and recognised customs, secondary rules are contained in the Constitution of India. The Constitution of India is based on the philosophy and principles debated and accepted by the people of India during the national movement. Hence, it is "We the People of India" who have framed the general legal framework of our country and therefore feel under an obligation to comply by it. The general legal framework is the source of validity or the "rule of recognition" for other rules and governmental action. While the Constitution has enough inbuilt flexibility to change itself to the changing needs there are certain minimal rules termed as "basic structure" whose sanctity has to be respected as they comprise the basic framework or identity of our legal system.

As for the "rules of adjudication", the Indian legal system contains a very integrated judicial structure with the Supreme Court of India at the top. The Supreme Court of India and High Courts of the States have the authority to interpret the Constitution also. In the exercise of this power, while basing their judgments on general principles, structure and aims of the Constitution, they have moved beyond the "open texture of law". A clear example of this is the replacement of "procedure established by law" under Article 21 by the "due process of law".

However, it is on the question of morality that the Indian legal system seems to clearly disagree with Hart's thinking. Thus, not only morality is explicitly used in Articles 25 and 26, and implicitly in Article 19(1)(g), even while judging the validity of particular laws against the Constitution of India the Court takes into account moral principles. What is important here is not the actual decisions which can be either way, given the fact that morality is largely subjective, but the consideration of moral principles as part of constitutional values

by the courts. This is clear from the views of the judiciary on the two issues of restitution of conjugal rights and the right to die.

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