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H. L. A Hart's The Concept of Law: Revisited

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Abstract

Hart, in the book, figure out and tried to solve, 3 recurrent issues/persistent questions in the "law". Answering Q.1, How does law differ from and how is it related to orders backed by threats? Hart opined that there can be "variety of imperative" Hart opined that, all the "orders" do not necessarily possess the "internal" property (of law), that is, "having an obligation" to obey. So, Austinian conception of law as the "sovereign's coercive orders" is a failure. Answering Q.2- How does legal obligation differ from moral obligation? Hart states that, Justice and Morality are interrelated phenomena. For this he proposed the "truisms" concerning human condition, and consisting of "common universal elements "crumbling with Fuller theoretical ideas (of inner morality). Hart opines that it shows that, as long as these hold good, there are certain rules of conduct which any social organization must contain if is it to be viable. According to Hart, such rules do in fact constitute a "common element in the law and conventional morality" of all societies (which Hart called "minimum content of natural law") which have progressed to the point where these are distinguished as different forms of social control. Answering Q.3- What are rules and to what extent is law an affair of rules? Hart states that, there is a need for "a fresh start", as the Austinian conception of law as the "sovereign's coercive orders" is a failure. Hart opines that, remedy of inconsistency of primary rule can be done by substituting it by secondary rule. According to Hart, the "rule skepticism" exist in law due to the "open texture" in formalism.

Key Words: Habit of Obedience, Rule of Recognition, Minimum Content of Natural Law, Fresh Start, Primary Rule, Secondary Rule, Open Texture of Law

1. Introduction

In the "preface" of the book, "The Concept of Law" Hart opined that the objective of the book is to "further the understanding of law, coercion, and morality as different but related social phenomena."[1] In preface, he also emphasized that the book may also regarded as an essay in "descriptive sociology." In the preface he even acknowledged Professor J.L. Austin for using his "linguistic philosophy" by stating that, "a sharpened awareness of words to sharpen our perception of the phenomena." Also, in the book, Hart considered: how "being obliged" differ from "having of obligation"; how the statement that a rule is a valid rule of law differs from a prediction of the behavior of officials; what is meant by the

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[1] H. L. A. HART, THE CONCEPT OF LAW vi (2d ed., Clarendon Press, Oxford 1996).

ascertain that a social group observes a rule and how this differs from and resembles the assertion that its member habitually do certain things. He even emphasized that,

> "One of the central themes of the book is that neither law nor any other of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called "internal" and "external" and which can both be made whenever social rules are observed."[2]

According to Hart, Law is a social phenomenon and its study involves recognition of the characteristic of human condition. In the book, Hart identifies and tries to find answer to 3 recurrent issues/persistent questions in the "Law". Which he identifies as:[3]

Q.1 How does law differ from and how is it related to orders backed by threats?
Q.2 How does legal obligation differ from moral obligation?
Q.3 What are rules and to what extent is law an affair of rules?

2. Answering Q.1- How does law differ from and how is it related to orders backed by threats?

Hart tried to answer the above question through Chapter- II, III, and IV entitled "Laws, Command, and Order", "The Variety of Law", and "Sovereign and Subject" respectively. In order to reformulate the claim of Austin that, laws or rules set by men (political superior) to men (subject) consists of the order backed by threats, failing to obey such command leads to the serious consequences (sanction).[4] Hart opined that there can be "variety of imperative" such as:[5]

- "Pass the salt please"- request
- "Do not kill me"- plea
- "Don't move"- warning
- "Hand over the money or I will shoot"- order

Here, comes the confusion as there are various types of imperatives. So, which are the orders to be followed is difficult to pick. For the solution Hart opined that, all the "orders" does not necessarily possess the "internal" property (of law), that is, "having an obligation" to obey. For example, the order, "money or life" by the gunman forces person of "being obliged" however s/he may not be "have an obligation" to the gunman. Since, the gunman's order has all the properties of "command theory", that is, order backed by threat and the possible consequences of sanction if not followed.

[2] *Ibid.*
[3] *Ibid.* at 6-13.
[4] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13 & 15 (Indian Economy Reprint, Universal Law Pub. Co., New Delhi 2012).
[5] HART, *supra* note 1, at 18-19.

However, Hart states that these are not the standard ways in which the law functions. Hart opines the functioning of law is of coercive as defined by Austin, however he has some twist in the tail. As Hart supposed the order to be "general" and "specific or particular" accordingly who gives the order. The order to be "general" when given by the sovereign body, that is, "Queen in the Parliament" and of "specific or particular" if given by the sub-ordinate body. Hart also viewed that such order should have the "standing or persistent character", that is, it need to be followed time after time by class of persons and the "sanction or punishment" need to be given by the court.

2.1 Amongst Varieties of Law: Enacted Laws May Not Necessarily Contain Legislator's Actual Desire

According to Hart, not all "laws" orders people to do or not to do things.[6] (For example some of the law has educative purposes, such as, the reproductive health law, copyright law etc.). He even emphasized that the "enacted laws" may not necessarily contain any legislator's actual desire, intentions, or wishes. As, the legislator who voted for any Act (for example- the Finance Act or Medical Act) may not necessarily know what it meant? Since some laws might be technical and everybody may not know the content of the Act. There are also some laws which "confer powers" on private individuals to make will, contract or marriages. There are also laws which "confer power" to officials, for example, judge to try cases, minister to make rules, or a country council (or the administrator) to make by-laws. He also emphasizes custom to be source of laws in most legal system.

Hence, Hart opined that, these "variety of laws" need to be studied through:

i. The Content of Laws
ii. The Range of Application
iii. Modes of Origin

2.2 Interrelation Between Sovereign and Subject: "Habit of Obedience" Instead of "Habitually Obeying" is the Basis for the Effective Functioning of Law

According to Hart, in any society where there is law, there actually is a sovereign, characterized affirmatively and negatively by reference to the "habit of obedience": a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons. However, Hart tried to analyzed some of the properties of "habit of obedience." His first concern was:[7] (i) the continuity of the authority to make law possessed by a succession of different legislators; and (ii) the persistence of laws long after their maker and those who rendered him habitually obedience has perished.

[6] *Ibid.* at 26.
[7] *Id.* at 50-51.

His second concern was: position occupied by the sovereign above the law. To which Hart tried to analyses that:[8] (i) whether the "legally illimitable" status of the supreme lawgiver is necessary for the existence of law; and (ii) whether the presence or the absence of legal limits on legislator power can be understood in the simple terms of habit and obedience into which this theory analyses these notions.

2.2.1 The Habit of Obedience and the Continuity of Law: Leads to "Critical Reflective Attitude"

Hart supposes, Rex (absolute monarch), after the successful reign, dies. Now, Rex-II (son of Rex) starts to issue general orders. In this situation, Hart suspects that,

> "The mere fact that there was a general habit of obedience to Rex-I in his lifetime does not by itself even render probable that Rex-II will be habitually obeyed. .... we shall not be able to say of Rex-II's first order, as we could have said of Rex-I's last order, that it was given by one who was sovereign and was therefore law."[9]

That is, there is nothing to make him sovereign from the start. Only after we know that his orders have been obeyed for some time shall we be able to say that "a habit of obedience" has been established. In other words, acceptance of a rule by a society at one moment does not guarantee its continuous existence. Because "habits are not normative".[10] Then what will be the status of Sovereign-Subject here? For this Hart replies, till this stage is reached there will be an "interregnum" (that is, Intermediate Confused State) in which no law can be made or established. According to Hart, such a state of affairs is of course possible and has occasionally been realized in troubled time, viz after the revolution, change of guard (Rex-I to Rex-II).

Now the question arises: How does a habit differ from a rule?

According to Hart, there is one point of "similarity" between social rules and habit: in both cases the behavior in question must be general though necessarily invariable; this means that it is repeated by most of the groups when occasion arises (for e.g.- taking out Hat when entering church or greeting elders etc.). So, if the behavior of the group "converges at a point" then that is considered a "habit" and deviation from the regular course need not be a matter for any form of criticism. However, if such convergent behavior is "rule" then the deviation is generally regarded as "lapses or faults" open to criticism. And threatened deviation meet with pressure for conformity. Also, pressure differs with different types of rules. Similarly, a "social rule" has an "internal" aspect, in addition to the "external" aspect. That is, "social rules" possess both internal + external

[8] *Id.* at 51.
[9] *Id.* at 53.
[10] *Id.* at 60.

aspect. However, "social habits" possess only "external" aspect and which are observable. Hart clarifies it by stating,

> "A social rule has an 'internal aspect' , in addition to the 'external aspect' which it shares with a social habit and which consists in the regular uniform behavior which an observer could record. This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have "reflective critical attitude" to this pattern of behavior."[11]

Hart stress that, "there should be a "critical reflective attitude" to certain pattern of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgement that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'." However, Hart warned that "internal aspect of rules" are not "felling" i.e. "feel bound." Feeling is not neither necessary nor sufficient for the existence of "binding" rules.

2.2.2 The Persistence of Law: Depends upon the "Habit of Obedience"

Citing the example of a women who was prosecuted in England in 1944 with respect to the "Witchcraft Act,1735" Hart, opined that the "Persistence of Law" depends upon the "habit of obedience." Hart, explain this by stating,

> "One ingenious attempt to do this has been made: Hobbes, echoed here by Bentham and Austin, said that 'the legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws'."[12]

However, Hart stressed that, this recognition does not take the form of an "explicit" order as in the case of statutes made by the now living legislator, but of a "tacit" expression of the sovereign's will. American realist John Chipman Grey opined that, "The law of the State or of any organized body of men is composed of rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal right and duties."[13] According to Hart this "realist" notion of "statue made by a past sovereign is not a law unless applied by the court in the particular case" as an absurd. For realist Hart's reply is,

> "If this theory is right, it follows that the courts do not enforce it because it is already a law: yet this would be an absurd inference to draw from the fact that the

[11] *Id.* at 56.
[12] *Id.* at 63.
[13] J. C. GRAY, THE NATURE AND SOURCES OF LAW 84 (2d. ed., Macmillan, New-York 1924); cited from PROF. HILAIRE MCCOUBREY & DR. NIGEL D. WHITE, TEXTBOOK ON JURISPRUDENCE 205 (3d. ed., Blackstone Press Limited, London 1999).

> present legislator could repeal the past enactment but has not exercised this power."[14]

2.2.3 Legal Limitations on Legislative Power: If not Given by the Political Sovereign Authority

According to Hart, there could only be the legal limits on legislative power if the legislator were under the order of another legislator whom he habitually obeyed; and in that case he would no longer be sovereign. That is, if he is a sovereign he does not obey any other legislator and hence there can be no legal limits on his legislative power.[15] However, it should be noted that, Hart does not mean that there are no limits on the sovereign's power but only that there are no legal limits on it. So, what ways, the sovereign may in fact defer, in exercising legislative power. It is because it is either from fear of the consequences of flouting it, or because he thinks himself morally bound to respect it. So, if a fear of popular revolt or moral conviction leads him not to legislate in ways which he otherwise would, then it would also be considered as "limits" on his legislative power.

2.2.4 The Sovereign Behind the Legislature: As Federal Constitution Poses Substantive Limitations

Hart opines that, in modern world many legal systems consist a body, normally considered to be the supreme legislature within the system, is subject to legal limitations on the exercise of its legislative power. However, the enactments of such a legislature within the scope of its limited powers are plainly considered to be law. Nevertheless, Hart had termed the expression as "Substantive Limitation." Hart states that,

> "Plain examples of substantive limitations are to be found in federal constitutions such as those of the United States or Australia, where the division of powers between the central government and the members states, and also certain individual rights cannot be changed by the ordinary processes of legislation."[16]

3. Answering Q.2- How does legal obligation differ from moral obligation?

Hart had tried to answer the question in Chapter-VIII, IX and X entitled, "Justice and Morality", "Laws and Morals", and "International Law" respectively.

[14] HART, *supra* note 1, at 64.
[15] *Ibid.* at 66.
[16] *Id.* at 72.

3.1 Justice and Morality: Need for the Distinction as it Cannot be limited to Thomist Tradition of Natural Law

Hart insisted that, until the "necessary" relationship with morality is made explicit and its central importance seen, the mists which have so long clouded the understanding of law cannot be dissipated. Hart further adds that, they (that is, Thomistic tradition of Natural Law) claim that for a legal system to exist there must be a widely diffused though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally iniquitous laws ("lex injusta non est lex"). However, according to Hart concern need for the:[17] (i) distinction within the sphere of morality of the specific idea of justice and the special features which account for its peculiarity intimate connection with law. (ii) characteristics which distinguishes moral rules and principles not only from the legal rules but from all other forms of social rule or standards of conduct. (iii) many different senses and ways in which legal rules and morals may be said to be related.

3.2 Principle of Justice: is Administration of Resources

Hart insists "justice" lies on the "administration of resources." "just" and "unjust" could almost equally well be conveyed by the words "fair" and "unfair." So, "fairness" is plainly not coextensive with morality in general. For this Hart states,

> "'Just' would be the appropriate expression of the approval of a law distributing the burden of taxation according to the wealth; so 'unjust' would be appropriate for the expression of disapproval of a law which forbade colored people to use the public means of transport or the parks".[18]

Hart further opined that,

> "Treat like cases alike and different cases differently", the then central element in the idea of justice, to be incomplete. This is because any set of human beings will resemble each other in some respects and differ from each other in other. So, Hart insisted, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form."[19]

So, according to him "justice" and "injustice" of laws may be viewed as "distributing" among individuals' burden and benefits. Some of the benefits are tangible, like poor relief, of food rations; others are intangible, like protection from bodily harm given by the criminal law, or the facilities afforded by laws relating to testamentary or contractual capacity, or the right to vote.[20]

[17] *Id.* at 157.
[18] *Id.* at 158.
[19] *Id.* at 159.
[20] *Id.* at 163.

Provision for the poor can be made only out of the goods of others; compulsory school education for all may mean not only loss of liberty for those who wish to educate their children privately, but may be financed only at the cost of reducing or sacrificing capital investment in industries or old-age pensions or free medical services. So, when the choice has been made between such competing alternatives it may be defended as proper on the ground that it was for the "public good" or the "common good." However, Hart skeptic about the process of identifying such basic good. He states,

> "It is not clear what these phrases mean, science there seems to be no scale by which contributions of various alternatives to the common good can be measured and the greater identification."[21]

3.3 Moral and Legal Obligation: Proper Intention or Motive Vs. External Behavior

According to Hart, legal and moral rules when properly understood, could not ever have the same content. Here, Hart states,

> "...while legal rules only require 'external' behavior and are indifferent to the motives, intentions, or other 'internal' accomplishment of conduct; morals on the other hand do not require any specific external actions but only a good will or proper intentions or motive."[22]

According to Hart, there are 4 cardinal related features which collective serve to distinguish morality not only from legal rules but also forms of social rules. They are:

i. Importance
ii. Immunity from deliberate change
iii. Voluntary character of moral offence
iv. The form of moral pressure

3.4 Moral Ideals and Social Criticism: Obligation and Duty to meet Rationality and Generality

According to Hart, "moral obligation" and "duty" are the bedrock of the social morality, however, they are not the whole. There are forms of morality which extends beyond the accepted share morality, the realization of these is not taken as a duty but achievement deserving praise. Such as- bravery, charity, benevolence, patience, or Chasity; are shown by the saint or hero. Other moral virtues like- temperance, patience, bravery, or consciousness are in a sense ancillary: they are qualities of character shown in exceptional devotion to duty or in the pursuit of substantive moral ideals in the face of special temptation or danger. Hart opines that,

[21] *Id.* at 167.
[22] *Id.* at 172-73.

> "It is always possible, when we come to examine the accepted morality either of our own or some other society, that we shall find much to criticize; it may, in the light of currently available knowledge, appear unnecessary repressive, cruel, superstitious, or unenlightened. It may cramp human liberty, especially in the discussion and practice of religion or in experimentation with different forms of human life, even when only negligible benefits are thereby secured for others."[23]

Above all, a given society's morality may extend its protections from harm to its own members only, or even only to certain classes, leaving a slave or helot class at the mercy of their masters' whims. So, implicit in this type of criticism which (even though it might be rejected) would certainly be accorded recognition as 'moral' criticism, is the assumption that the arrangements of society, including the accepted morality, must satisfy two formal conditions, one of "rationality" and the other of "generality." Thus, according to Hart, such moral criticism of society as that enshrined in watchword like,

> "Liberty, fraternity, equality, and pursuit of happiness draws its moral character from the fact that it invites reform, either in the name of some value or combination of values already recognized (though perhaps to an inadequate extent) in all actual social moralities or in the name of a version of these, refined and extended so as to meet the two demands of "rationality" and "generality."[24]

3.5 Laws and Morals: Hart's Submission to Natural Law Philosophy

About the relationship between Law and morality Hart opined that, it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcendent the morality currently accepted.[25] However, it does not mean that, legal system must include, tacitly if not explicitly, a reference to morality or justice. On the "truisms" concerning human nature and the world in which men live, Hart opines that it shows that, as long as these (truism) hold good for any social organization, must contain it, if it is to be viable. According to Hart, such rules do in fact constitute a common element in the law and conventional morality of all societies (which Hart called "minimum content of natural law") which have progressed to the point where these are distinguished as different forms of social control.

[23] *Id.* at 183.
[24] *Id.* at 183.
[25] *Id.* at 185.

3.5.1 Human Vulnerability[26]

According to this "truism", the minimum criteria of survival which men have in associating with each other is "thou shall not kill", which is the most characteristic provision of law and moral. So, according to Hart, the common requirements of law and morality consists for the most part not of active services to be rendered but of forbearance. Of these the most important for social life are those that restrict the use of violence in killing or inflicting bodily harm. In this truism Hart shouldered the basic premise of Natural Law Theory, that is, "preservation of life."

3.5.2 Approximate Equality[27]

Although men differ from each other in physical strength, agility, and even more in intellectual capacity; however, according to Hart, no individual is so much powerful than others that he would able to dominate or subdue them for more than a short period. So, this fact of approximate equality, according to Hart, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation. In this truism Hart opined that there is much to gain in human life by mutual co-operation than forbearance.

3.5.3 Limited Altruism[28]

Men are not devils dominated by a wish to exterminate each other. But if men are not devils, neither are they angles; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearance both necessary and possible. So, according to Hart, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled.

3.5.4 Limited Resources[29]

It is a merely contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil (that is, by division of labor). The "institution of property" has distinctive kind of rules excluding persons generally other than the owner; at all times and places life itself depends on this minimal forbearance. However, according to Hart, these rules are "static"; in contrast, the recognition of promise (for human toil) that is, the perennial need for co-operation make the "dynamic" or obligation-creating rule necessary in social life. So, according to Hart, where altruism is not unlimited, a standing procedure providing for such self-binding operations is required

[26] *Id.* at 194-95.
[27] *Id.* at 195.
[28] *Id.* at 196.
[29] *Id.* at 196.

in order to create a minimum form of confidence in the future behavior of others, and ensure the predictability necessary for co-operation. In short, in this truism Hart insisted that the State should shoulder the basic doctrine of "socialism" through the standard procedural guidelines.

3.5.5 Limited Understanding of Strength and Will[30]

According to Hart, the facts that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefit are obvious. Most men are capable of seeing them and of sacrificing the immediate short-term interests which conformity to such rules demands.

They may indeed obey, from variety of motives:
(a) some from prudential calculation that the sacrifices are worth the gain;
(b) some from a disinterested interest in the welfare of others; and
(c) some because they look upon the rules as worthy of respect in themselves and find their ideals in devotion to them.

On the other hand, some have limited understanding of will, which leads to: neither understanding of long-term interest nor the strength of goodness of will. All are tempted at times to prefer their own immediate interest and the absence of special organization for their detection and punishment, many would succumb to temptation. According to Hart, although the advantage of mutual forbearance is so palpable that the number and strength of those who would co-operate voluntarily in a coercive manner will normally be greater than any likely combination of malefactors. So, except in very small closely-knit society, submission to the system of restrain would be folly if there were no organization for the coercion of those who would than try to obtain the advantages of the system without submitting to its obligations.[31]

3.6 Legal Validity and Moral Value: Complement with the Minimum Content of Natural Law

Hart claims that, there is some further way in which law must conform to morals beyond that which is exhibited in minimum content of natural law. Hart has identified 6 of them:

3.6.1 Power and Authority

According to Hart, the dichotomy of law based "merely on power" and law which is accepted "as morally binding" is not exhaustive. Those who accepts the authority of a legal system look upon it from the internal point of view, and express their sense of its

[30] *Id.* at 197.
[31] *Id.* at 197-98.

requirement in internal statements couched in the normative language which is common to both law and morals.[32]

3.6.2 The Influence of Morality on Law

The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider morals ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. For example- in US the ultimate criteria of legal validity explicitly incorporate "principles of justice" or substantive moral values. No, positivist could deny that these are facts, or the stability of legal system depends in part upon such types correspondence with morals.[33]

3.6.3 Interpretation of Law

Law needs interpretation if they are to be applied in concrete case (i.e. open texture). Very often the judges' choices (that is, blind arbitrary choice or mechanical deduction) are guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. So, there is "weighing" and "balancing" characteristic of the effort to do justice between competing interest.[34]

3.6.4 The Criticism of Law

In the criticism of law, there may be disagreement both as to the appropriate moral standards and as to the required points of conformity (of law).[35]

3.6.5 Principles of Legality and Justice

It may be said that the distinction between a good legal system which conforms at a certain point to morality and justice, and a legal system which does not, is a fallacious one, because a minimum of justice is necessarily realized whenever human behavior is controlled by general rules publicly announced and judicially applied.[36]

3.6.6 Legal Validity and Resistance to Law

The enactment which enjoyed or permitted iniquity should not be recognized as valid, or have the quality of law, even if the system in which they were enacted acknowledged no restriction upon the legislative competence of the legislature.[37]

[32] *Id.* at 202-03.
[33] *Id.* at 203-04.
[34] *Id.* at 205-06.
[35] *Id.* at 206.
[36] *Id.* at 206.
[37] *Id.* at 206.

3.7 International Law: Considered as a Weak Law

According to Hart, absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanction make international law a weak law. The absence of these institutions means that the rules for states resembles that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. Hart doubt on the "source" of international law. So, he states that, international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying "sources" of law and providing the general criteria for the identification of rules.[38]

However, it should be noted that, the Source of International law as stated in International Court of Justice Statute (ICJ Statute) are as follows:[39]

a. International conventions, whether general or particular, establishing the rules expressly recognized by the contesting states;
b. International customs as evidence as general practice accepted as law;
c. General principles of law recognized by civilized nations;
d. Subject to the provisions of Article 59, Judicial decisions and the teachings of highly qualified publicists of various nations as subsidiary means for the determination of rules of law.

However, the ICJ Statute further states that, the decisions of the ICJ does not create any binding precedents to others except to the parties in respect to the particular case.[40]

On "Obligation and Sanction" in international law Hart opined that, there is absence from the system of centrally organized sanctions. He further states that, neither Article 16 of the Covenant of the League of Nation nor Chapter VII of the United Nation Charter introduced into international law anything which can be equated with the sanctions of municipal law. Hart also emphasized that the process of law enforcement in international law has been paralyzed by "veto" power state and says that it exists only on the paper.[41] However, it should be noted that, after the establishment of International Criminal Court (ICC) in 1998 and functioning from 2002, this notion needs to be redefined. Although the ICC follows the "complementary principle"[42], and has jurisdiction only on "Genocide, Crime Against Humanity, War Crime, and Crime of Aggression"[43], however, considered as the effective mechanism for the global sanctioning system.

On "Obligation and the Sovereignty of State" Hart opined his skeptic view as,

[38] *Id.* at 214.
[39] Statute of International Court of Justice, Article 38 (1).
[40] Statute of International Court of Justice, Article 39.
[41] H. L. A. HART, THE CONCEPT OF LAW 216-17 (2d ed., Clarendon Press, Oxford 1996).
[42] Statute of International Criminal Court, Article 17.
[43] Statute of International Criminal Court, Article 5.

> "One of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be bound by, or have an obligation under, international law."[44]

According to Hart, States can only bound by self-imposed obligation, that is, "auto-limitation" derived from the promises which the state makes to international community mostly through treaty law. Though these promises may have been given only "tacitly" or has to be "inferred."[45]

Quoting Kelsen, Hart states that, there is one suggested formal analogy between international and municipal law. Accordingly, like municipal law international law possess a "basic norm" (or what Hart termed "rule of recognition") by reference to which the validity of other rules of the system is assessed, and in virtue of which the rules constitute a single system. However, the above hypothesis is opposed by Hart as- the analogy of structure is false as international law simply consists of a set of separate primary rules of obligation which are not united as the system.[46]

However, it is to be noted that, then and now, time has changed a lot and so did the international law. International law has now had some sort of obligatory character in the breach of "International Humanitarian Law", "Customary International Law" and there is "universal jurisdiction" provision applicable in the breach of grave human right violation, protected by "International Human Right Law." However, other area the "authority" of "International Law" counts only if (related) "treaties" or "conventions" are ratified by the concerned States.

4. Answering Q.3- What are rules and to what extent is law an affair of rules?

Hart tried to answer this question in Chapter-V, VI, and VII entitling "Law as The Union of Primary and Secondary Rules", "The Foundations of a Legal System" and "" Formalism and Rule Skepticism" respectively.

4.1 Need for A Fresh Start: As the Austinian Conception of Law is a Failure

Hart criticized the Austinian conception of "law" as the "sovereign's coercive orders." Hart opines that the "over-simple theory of law" as the sovereign's coercive orders failed to reproduce some of the silent features of a legal system, which were either distorted or altogether unrepresented. Hart has identified various ways by which the Austinian theory failed and asked for the second summary. So, the ways by which the theory failed are:

[44] H. L. A. HART, THE CONCEPT OF LAW 220-25 (2d ed., Clarendon Press, Oxford 1996).
[45] *Ibid.* at 224-26.
[46] *Id.* at 233-36.

Criminal Statute, mostly resembles orders backed by threats, however applies to those who enact it and not merely to others. Hart adds,

> "There are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as order backed by threats…. 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."[47]

Hart even suggested that, the notion of a "tacit order" seems to have no application to the complex actualities of a modern legal system. Also, Hart opines that, treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distorts the ways in which these are spoken of, and actually used in social life. To illustrate it, Hart writes, this has no better claim to our assent than the theory that all the rules of a game are 'really' directions to the umpire and the scorer.[48] So, Hart opines that Austinian theory fails. The root cause of failure is that, the ideas of orders, obedience, habit, and threats do not induce, and cannot by their combination yield the idea of rule, without which we cannot hope to elucidate even the most elementary forms of laws.

So, according to Hart, this notion of failure needs for a "fresh-start"

4.1.1 The Idea of Obligation: Is a "Gunman Situation"

Hart claimed that, "The Idea of Obligation" as suggested by Austin in his theory is a "gunman situation." He illustrates it as, if "A" orders "B" to hand over his money and threatens to shoot him if he does not comply. Here, Hart claims, if B obey then B was "obliged" to hand over his money. However, B did not "have an obligation" to hand over his money. Hart illustrates the "obliged situation" by stating that, the statement that a person "was obliged" to obey someone is a psychological one referring to the "beliefs and motives" with which an action was done. But the statement that someone "had an obligation" to do something is of a very different type and there are many signs of this difference.[49] Then how different is "have an obligation"? Hart clarifies it by criticizing as,

> "Some theorists, Austin among them, seeing perhaps the general irrelevance of the person's beliefs, fears, and motives to the question whether he had an obligation to do something, have defined this notion not in terms of the subjective facts, but in terms of the "chance" or "likelihood" that the person having the obligation will suffer a punishment or evil at the hands of others in the event of disobedience."[50]

[47] *Id.* at 79-80.
[48] *Id.* at 81.
[49] *Id.* at 82.
[50] *Id.* at 83.

Hart further explains, "rules of etiquette" or correct speech are of certain rules: they are more than convergent habits or regularities of behavior; they are taught and efforts are made to maintain them; they are used in criticizing our own and other people's behavior in the characteristic normative vocabulary. e.g. "you ought to take your hat off" (say, when entering the church). Hart state that, rules imposing obligations may be customary if the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. i.e. there may be no centrally organized system of punishments for breach of the rules; and the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanction.[51]

However, Hart warns that, the fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feeling of compulsion or pressure.

4.1.2 The Elements of Law: Remedy of Inconsistency of Primary Rule by Substituting it by Secondary Rule

The social structure where the only means of social control is that general attitude of the group towards its own standard modes of behavior (that is, rules of obligation) are often referred as "custom" however Hart preferred to use the terminology "primary rules of obligation" or simply "primary rules." Hart chooses so, as it is often believed that the customary rules are very old and supported by less social pressure than other rules.

So, according to Hart, if a society is to live by such primary rules alone, there are certain conditions which must clearly be satisfied. Those conditions are as follows:

The rules must contain in some form of restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other. Though such a society may exhibit the tension between those who accept the rules and those who reject the rules, except where fear of social pressure induces them to conform. So, in primitive communities, though there were dissidents and malefactors, the majority live by the rules seen from the "internal point of view". Hence, only in a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules.[52]

So, according to Hart, when a society moves from pre-legal to legal world, such a simple form of social control must prove "defective." and will require supplementation in different ways. As,

[51] *Id*, at 86.
[52] *Id*. at 92.

i. Primary rules are uncertain
ii. Primary rules are static
iii. Primary rules are insufficient

The remedy for each of these 3 main defects in this simplest form of social structure consisting in supplementing the "primary rules of obligation" with "secondary rules." While "primary rules" are concerned with the actions that individuals must or must not do, however these "secondary rules" are all 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.

The remedy for the defect of primary rules is given by Hart as follows:[53]

(i) The simplest form of remedy for the "uncertainty" of the regime of primary rules is the introduction of "rule of recognition" a rule for conclusive identification of the primary rules of obligation. However, in a developed legal system the "rules of recognition" are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of (a) there having been enacted by a specific body (b) their long customary practice, or (c) their relation to judicial decisions. If conflict arises among the "identifying criteria" then custom and precedent are subordinate to statute.

(ii) The remedy for the "static" quality of the regime of primary rules consists in the introduction of "rules of change." The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules and to eliminate old rules. There will be a very close connection between the "rules of change" and the "rule of recognition." i.e. if "rule of change" exist then "rule of recognition" will necessarily incorporate a reference to legislation as an identifying feature of the rule. Hart opines that, without such private power-conferring rule society would lack some of the chief amenities which law confers upon it.

(iii) The remedy for the "inefficiency" of primary rules is introduction of "rules of adjudication." However, "minimal form of adjudication" consists in such determinations. The rule which confers jurisdiction will also be a "rule of recognition" identifying the primary rules through the judgments of the courts and these judgments will become a "source" of law. However, it should be noted that, the reliability of "rule of adjudication" fluctuates both with the skill of the interpreter and the consistency of the judges.

Concludingly, Hart warns that, though the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, however, this cannot by itself illuminate every problem.

[53] *Id.* at 95-96.

4.2 Rule of Recognition: Provides Legal Validity for a Legal System

In modern municipal system, secondary "rule of recognition" is accepted and used for the identification of primary "rules of obligation". This is the situation, according to Hart, to be called the foundation of a legal system. Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. These criteria include reference:

a) to an authoritative text;
b) to legislative enactment;
c) to customary practice;
d) to general declarations of specified persons;
e) to past judicial decisions in particular cases.

So, in 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 constitution, enactment by a legislature, and judicial precedents. In day-to-day life of a legal system its "rule of recognition" is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources or suggested sources of law.[54]

He further adds, for the most part the "rule of recognition" is not stated, but its existence is "shown" in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. According to Hart, there is a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, has a special authoritative status conferred on it by other rules.[55] So, in this respect the "rule of recognition" of a legal system is like the "scoring rule of a game." That is, identifying criteria towards winning the game. The use of unstated "rule of recognition" by courts and others, in identifying particular rules of the system is characteristic of the "internal point of view". According to Hart,

> "If this use of an accepted rule of recognition in making internal statements is understood and carefully distinguished from an external statement is understood and carefully distinguished from an external statement of fact that the rule is accepted, many obscurities concerning the notion of legal 'validity' disappears."[56]

[54] *Id.* at 101.
[55] *Id.* at 101-02.
[56] *Id.* at 103.

That is, 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. However, Hart warns that, there is no necessary connection between "validity" of a particular rule and its "efficacy" unless the "rule of recognition" of the system includes among its criteria the provision that no rule is to count as a rule of the system if it has long ceased to be efficacious. Hence, the statement that a rule is "valid" is an internal statement recognizing that the rule satisfies the test for identifying what is to count as law in his court, and constitutes not a "prophecy" of but part of the "reason" for his decision.

4.3 New Questions: Difficulty Arising After the Abandonment of Austin's Habit of Obedience

Here, Hart has identified various difficulty arising after the abandonment of Austin's "habit of obedience" to a legally unlimited sovereign; and substituting it for the conception of an ultimate "rule of recognition" which provides a system of rules with its criteria of validity.

The 1st difficulty is that of classification between rules and conventions- Although these are exhaustive cases, there may be some confusion. For example- as Dicey states that the constitutional arrangement of UK consist partly of laws strictly so called (statues, orders in council, and rules embodied in precedents) and partly of conventions which are mere usages, understandings, or customs.[57] Here, Hart states that, the Queen may not refuse her consent to a bill duly passed by Peers and Commons; there is, however, no legal duty on the Queen to give her consent and such rules are called "conventions" because the courts do not recognize them as imposing legal duty. So, the base of legal systems there are something which is "not law", which is "pre-legal", "meta-legal", or is just "political fact."

The 2nd set of difficulty arises out of the hidden complexity and vagueness of the assertion that a legal system "exists" in a given country or among a given social group. So, when we make this assertion, we in fact refer in compressed, portmanteau form to a number of heterogeneous social facts, which are usually concomitant. Austinian formula of a general "habit of obedience" to orders fails to reproduce or distorts the complex facts which constitute the minimum conditions which a society must satisfy if it is to have a legal system. According to Hart, this is one necessary condition required for the "existence" of the legal system, that is, where laws impose obligations or duties these should be generally obeyed or at any rate not generally disobeyed.[58]

However, in day-to-day existence consists also in the official creation, the official identification, and official use and application of law. So, in no ordinary sense of "obey" are legislators obeying rules when, in enacting laws, (they conform to the rules conferring

[57] *Id.* at 111.
[58] *Id.* at 112.

such powers are reinforced by rules imposing a duty to follow them). Nor in failing to conform with these rules do they "disobey" a law, though they may fail to make one. Nor does the word "obey" describe well what judges do when they apply the system's "rule of recognition" and recognize a statue as valid law and use it in the determination of dispute.[59]

Hence, as long as the law which are valid by the system's tests of validity are obeyed by the bulk of the population, then according to Hart, this surely is all the evidence needed to establish that a given legal system exists. However, according to Hart, this evidence is not the sufficient condition to describe the relationship to law involved in the existence of a legal system. In fact, it must be supplemented by a description of the relevant relationship of the system to the secondary rules which concerns them as officials. Here what is crucial is that there should be a unified or shared official acceptance of the "rule of recognition" containing the system's criteria of validity.[60]

There are 2 minimum conditions necessary and sufficient for the existence of a legal system. They are: (i) Those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and (ii) Its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.

4.4 The Pathology of Legal System: Breakdown in the Complex Congruent Practice of a Legal System

According to Hart, evidence for the existence of a legal system be drawn from two different sectors of social life. They are: First, the "normal unproblematic case" where the rules recognized as valid at the official level and are generally obeyed. However, sometimes, the official sector may be detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the criteria of validity in use in the courts.[61] So, according to Hart, the variety of ways in which this (that is, the second condition) happen belongs to the "pathology of legal system".

For they represent a breakdown in the complex congruent practice which is referred to when we make the external statement of fact that a legal system exists. So, there is a partial failure of particular system. Such breakdown may be the product of different disturbing factors, such as "revolution", "enemy occupation", and "simple breakdown of ordered legal control in the face of anarchy or banditry without political pretensions to govern is yet another." In each of these cases, there may be half-way stages during which the court function by using criteria of legal validity of the older legal system, either on the territory or in exile.

[59] *Id.* at 113.
[60] *Id.* at 115.
[61] *Id.* at 117-18.

4.5 Rule Skepticism in Formalism: Exist due to Open Texture in Law

According to Hart, in any large group, general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. So, two principal devices have been used for the communication of such general standard, one of them makes a maximal and the other a minimal use of general classifying words. The first one is "legislation" and the other is "precedent."[62] Hart opines that, there will indeed be "plain cases" constantly recurring in similar contexts to which general expressions are clearly applicable (for example, if anything is a vehicle a motor-car is one) but there will also be cases where it is not clear whether they apply in other cases or not (for example, does "vehicle" used here include bicycles, airplanes, roller skates?). [63] So, whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over.....they will have what has been termed as "open texture."

As, peace and quiet in the park is to be maintained or defended for those children whose pleasure or interest it is to use these things. In fact, all systems, in different ways, compromise between two social needs: The need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance. Weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. Hart further state, "Descriptions of the English 'theory' of precedent are, on certain points, still highly contentious: indeed, even the key terms used in the theory, "ratio decidendi", "material facts", "interpretation", have their own penumbra of uncertainty. However, Hart stated that, he tried to focus the "open texture" in the case of statute and the creative judicial activity within it."[64]

According to realist, the then "Law" is under-determinative of decision in particular cases (say "Hard Cases" as stated by Dworkin or "Open-Texture" as stated by Hart). So, there are free "space or gap" for the judges to move.[65] The "space or gap" is illustrated in the following Venn-diagram:

[62] *Id.* at 124.
[63] *Id.* at 126.
[64] *Id.* at 134.
[65] Manish Nepal, *An Insight into the American Legal Realism: An Analytical Approach*, NEPAL LAW REV., Year 42, Vol. 29, No. 1 & 2 (2020-21), at 410.

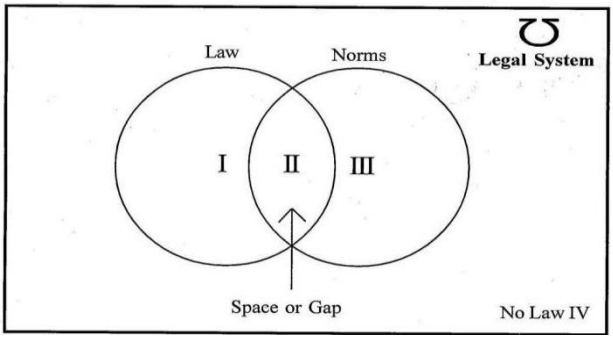


Diagram 1: Space or Gap in the Legal System

In the above Venn-diagram Region-I is the region depicting the region with the clear rules, where no interpretation is required. The Region-IV is the region in which there is "no rules", so the accused have the right to be acquitted on the ground of having no law. The Region III is the region where people are guided by the "norms" either legal or moral (the interpretation of "legal and moral norms" is beyond the scope of the paper). And, the Region-II is the region where there is no clear law, that is, having "space or gap" in the law.[66]

Hence, the "open texture" of law means that there are, indeed, areas of conduct where much be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.

5. Conclusion

Hart, in the book, figure out 3 recurrent issues/persistent questions in the "law". Answering Q.1, How does law differ from and how is it related to orders backed by threats? Hart opined that there can be "variety of imperative" Hart opined that, all the "orders" does not necessarily possess the "internal" property (of law), that is, "having an obligation" to obey. For example, the order, "money or life" by the gunman forces person of "being obliged" however s/he may not be "have an obligation" to the gunman. So, Austinian conception of law as the "sovereign's coercive orders" is a failure. According to Hart, there is one point of "similarity" between social rules and habit: in both cases the behavior in question must be general though necessarily invariable; this means that it is repeated by most of the groups when occasion arises (for example, taking out Hat when entering church or greeting elders etc.). So, if the behavior of the group "converges at a point" then that is considered a "habit".

Answering Q.2- How does legal obligation differ from moral obligation? Hart states that, Justice and Morality are interrelated phenomena. Hart insisted that, until the "necessary"

[66] *Ibid.* at 411.

relationship with morality is made explicit and its central importance seen, the mists which have so long clouded the understanding of law cannot be dissipated. Hart further adds that, they (that is, Thomistic tradition of Natural Law) claim that for a legal system to exist there must be a widely diffused though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally iniquitous laws. On the "truisms" concerning human nature and the world in which men live, Hart opines that it shows that, as long as these hold good, there are certain rules of conduct which any social organization must contain if is it to be viable. According to Hart, such rules do in fact constitute a common element in the law and conventional morality of all societies (which Hart called "minimum content of natural law") which have progressed to the point where these are distinguished as different forms of social control. According to Hart, absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanction make international law a weak law.

Answering Q.3- What are rules and to what extent is law an affair of rules? Hart states that, there is a need for "a fresh start", as the Austinian conception of law as the "sovereign's coercive orders" is a failure. Hart has identified various ways by which the Austinian theory failed and asked for the second summary. However, Hart warns that, the fact that "rules of obligation" are generally supported by serious social pressure does not entail that "having an obligation" under the rules is to experience feeling of compulsion or pressure. Hart opines that, remedy of inconsistency of primary rule can be done by substituting it by secondary rule. According to Hart, the "rule skepticism" in law exist due to the "open texture" in formalism. For example, if anything is a vehicle a motor-car is one but there will also be cases where it is not clear whether they apply or not. As, does "vehicle" used here include bicycles, airplanes, roller skates?

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