

**NOTES CORNER****NOTES ON JURISPRUDENCE****Positivist Theory of Law– H. L. A. Hart:  
Hart’s Concept of Law**

---

*Elise G. Nalbandian\**

Written works on Hart’s theory of Law usually start with clarifying the position this theory enjoys in modern legal positivism and indeed in 20<sup>th</sup> Century Jurisprudence. First published in 1961, “The Concept of Law” continues to be regarded as one of the most important works of legal philosophy. Following the publication of the second edition of the book containing the “epilogue” which clarifies Hart’s opinions of his theory, this book, the theory and its author remain supreme figures in the world of Jurisprudence.

This can be confirmed by his proponents as much as his critiques, the most prominent of which includes Dworkin. In fact, when Dworkin embarked on his mission to define what the law was, his criticism against positivism formed the base of his theory. In his extended and continuously developing critique which is itself a very prominent part of Jurisprudence, Dworkin paid a great deal of attention to criticising Hart’s theory as he contended that Hart’s theory was the “ruling theory of law.” Before studying the actual text of “The Concept of Law” and its critiques, it is first important to understand the platform upon which Hart developed this theory which became a hallmark and defining theory of jurisprudence.

**1. The theoretical background to Hart’s concept of law**

Hart presents his approach to law as an alternative to previous attempts made to explain the nature of law. He rejected the imperative positivism as developed by Austin, Kelsen and even Bentham arguing that these theories provided a narrow and inadequate definition of law. Hart’s main point is that the questions *what is law?* cannot be effectively and simply defined based on specific key features of law, examples of which can include the coercive ele-

---

\* LL.B LL.M, Lecturer in Law, Faculty of Law, St. Mary’s University College

ments (as the imperative positivists tend to do) or its moral dimension (as the natural lawyers tend to do). Such singular and narrow approach, according to Hart, will not serve any useful purpose as it will obscure many different important elements of the law which should not be ignored in the development of an “adequate” explanation of the nature of law. Hart therefore identified that the nature of law can only be dealt with properly if three recurring issues (which none of the previous theorists had looked at completely and at the same time) are dealt with. These three key recurring issues he identified were the relationships that exist between:

- a) **Law and coercion:** Hart believed that a comprehensive answer about the nature of law would need to consider how the law differed from coercion as well as considering the way it is related to orders backed by threats.
- b) **Law and morality:** Unlike other positivists before him, Hart did not totally reject morality from the study of the nature of law, rather he acknowledge that a study of how legal obligations differed from and are similar to moral obligation needed to be made.
- c) **The nature of rules:** Hart indicates that ignoring the nature of rules was a major error that previous jurists had made. His opinion was that rules and the extent to which law is an affair of rules needed to be studied.

In fact this third recurring issue was the most important for Hart as he argued that earlier jurists had tended to limit their considerations to only the first or second recurring issues. A good example of this type of argument can be seen in Hart's arguments whereby he states that the problem of imperative theories of law is that these approaches have by and large lacked the concept of rules. This deficit has caused them to regard law as an external system of coercion which in turn has caused them to ignore what Hart called “the internal element” of legal obligations which leads people to obey laws even when there is no threat of force forcing their compliance.

Another issue which was central to Hart's study was the ‘*open texture*’ of words and therefore of law. Language is a major consideration in law as any attempt to communicate requires use of words which signify notions of reality. However, as numerous studies in the field of linguistic philosophy indicate, of which Hart was a keen proponent, words are problematic as instruments of communications as they may carry within them various meanings or can be interpreted differently depending on contexts. Thus any definition which has to be constructed out of words can actually be obscured by the same words which, according to Hart, can lead to misunderstanding and misinterpretation of legal theories as well as laws.

---

In Hart's opinion, this problem is linked to the fact that ambiguity in language cannot be cured by studying the facts or the aims of the laws due to the following reasons:

- a) **Relative ignorance of facts:** When creating laws, it is not possible or even realistic to deal with particular circumstances or to cover all material issues that may confront anyone seeking to use the law to resolve disputes.
- b) **Relative indeterminacy of aim:** The legislator also cannot fully or accurately anticipate future developments and thus it is not possible to ascertain the best way to deal with new situations which may arise to which existing laws may need to be applied and thus the open-textured nature of language can be useful in such a situation.
- c) **Relative uncertainty of what the law is:** In past theories, international law and so called customary law were both rejected as laws due to the fact that both were argued to lack salient features normally associated with law, such as a legislature or a system of courts with no clear explanation as to why this was the case.

All these factors considered together convinced Hart that in actual fact, it is not possible to address all these issues in a single definition and approach that adequately reveals the nature of legal rules. It is for this reason that Hart recognised law as a complex social phenomenon which is linked to other social phenomena in various ways. Such an approach would naturally make it difficult to answer the question *what is law?* And would require a more comprehensive approach than those adopted in previous times.

Hart therefore presented his theory as an exercise in analytical jurisprudence arguing that a wholistic theory would appreciate the law as a system and not as a single-tiered moral or imperative compulsion as long as what can be called law ultimately is that which has been created and posited by the proper law-making authority. Furthermore, Hart's recognition that law is a social phenomenon which can be understood and explained in terms of social facts requires a more complicated approach which encompasses an understanding of various social facts including the attitudes of people towards language used in expressing conceptions of the law morality and coercions all as issues which are common social phenomena. Thus, Hart attempts to explain the law in terms of social context and this can also be described as an exercise in descriptive sociology.

It is to be noted that Hart remains to be a positivist because he does not reject morality. Hart himself would not accept any description of him as any

---

type of jurist other than as a positivist (such as sociological jurist). As a committed positivist, his intention was to provide an improved positivist account of law and what he therefore produced has become known as “soft positivism”.

## 2. Hart's concept of law: Critique of earlier positivistic approaches

Hart's “The Concept of Law” starts with a long and general rejection of imperative positivism. The gist of his criticisms has been summarized in previous notes, particularly those on Austin. Hart argued that the command theorists, in emphasizing force as the core component of law, have studied only the external element of law which only focuses on the ‘bad man's view’ of the law. Hart's argument was that in focusing only on commands of a sovereign and the actions of officials in imposing sanctions, the internal element of law has been ignored. This is what Hart calls the ‘*internal aspect or point of view*’ which makes people feel a sense of obligation to obey the law. Hart's project therefore draws a sharp distinction between the notions of “being obliged” and to be under an obligation.

“*To be obliged*” is to be forced to act in a certain way because of some threat, such as when an armed attack orders a person to hand over money, and on the other hand, “*to be under an obligation*” means to feel within oneself a sense of duty to act in a certain way without some external stimulus compelling such action. Hart argues that the command theories explain only in terms of the former notion which is not totally discountable but is inadequate because the law operates both in an external and an internal fashion to induce compliance. However, Hart also notes that the law acts more as an *internal inducement* to action and that the external element comes into play only in the occasional event of a breach, when officials act to apply sanctions. Hart's justification for arguing that the external element is less important is that such an argument lacks any concept of the issue of rules.

Hart defines rules as *statements of accepted standards of behavior*. Where there is any type of rule – preferably a rule of law - which most people are aware of, there is no need to have officials constantly watching over citizens to ensure compliance because most of these citizens would comply regardless of the existence of force since they accept the rule as a standard. Hart indicates that people use the rule to judge their own behaviour and that of others, and criticize acts which do not comply with the rule.

In Hart's explanation of the external and internal elements of law, it becomes clear that every legal rule has an internal and external aspect.

---

- a) The external aspect of rules (*being obliged*) refers to an observable pattern which can be seen in human conduct prompted by habits as well as rules.
- b) The internal aspect of rules (*having obligations*) refers to a critical reflective attitude (CRA) of members of society towards the specific *pattern* of behavior as a common standard or guide which they have to follow.

So ultimately for Hart, it is a contrast between external and internal attitudes that makes it possible for us to understand what it means *to have* and *to breach* legal rules. Hart's explanation of this issue is as follows:

If an external attitude is adopted towards the rules then firstly, there will not be an acceptance that legal rules which then influence human behavior as a result of the rule; and secondly, the rule being breached becomes a sign or a prediction of what is going to happen based on observable behavior. This is the extreme external view that an observer who does not accept the rules may make. Statements from this point of view predict sanctions for the deviations while this perception will never be able to describe the conduct of people who live in society peacefully in such a manner that sanctions against them becomes unnecessary. Hence this understanding of the law will be "one will be punished if he does x" rather than "I ought to do X as it is a legal rule")

On the other hand, an internal attitude is when people know and accept restrictions derived from their obligations (which come from legal rules). This does not mean that rules have to have the moral approval of the people who live by them. This Critical Reflective Attitude is not the peoples' need to conform to the rules to avoid criticism. Thus this internal aspect exists when people who are members of a group *accept and are committed* to use the rules as a standard for their behavior of society. The term "acceptance" is problematic as it may refer to undesirable ideas of what the internal attitude may be. Hart makes it clear that laws do not derive their validity from social acceptance, and his most important arguments underline the existence of a Rule of Recognition which is the standard by which a law can be recognised as a law. Hart appreciates that the internal aspect is difficult to have in every single individual and so he admits that the core of officials/people who are committed to the CRA are the central case and everyone else who adopts an internal attitude for prudential reason will be penumbral.

### **3. The union of primary and secondary rules**

For Hart, law is first and foremost a matter of rules as has been emphasized repeatedly throughout the text. This is due to the fact that law is a system of

---

social rules and to this extent it is similar to morality, which also is constituted of social rules. Both types of rules are 'social because they arise within a social context, apply to a social activity and have social consequences.' However, the rules of law are different from those of morality in a number of fundamental ways.

The main distinction arises out of the fact that legal rules have what Hart calls a systemic quality. What this means is that rules of law are of different types and that each of them categories interact with the other in a manner which enables them to be called a system rather than say 'a body of rules.' Rules of morality generally lack this systemic quality. The rules of law can be classified into two main groups, *namely primary and secondary rules*, and it is the interaction between these groups which justifies the description of legal arrangements in certain societies as being a legal system.

### 3.1- Primary Rules

These are basic duty-imposing rules of law. They specify what people ought and ought not to do, can and cannot do and in this way they create obligations which members of a society are required to comply. Examples are rules of criminal law, tort and so on. In more mature legal systems, these rules are normally created, validated, enforced and changes by officials.

It is possible to envisage a pre-legal society which may not have institutions such as legislature, courts etc. In such societies, there may still be rule of law because there would be certain rules which are accepted by the majority of the citizens as accepted standards of behavior and to which weight and authority are given by consensus. The validity of these rules as law would then depend on what Hart calls the '*internal point of view*' of the citizens in the community, which describes a critical reflective attitude enabling citizens to feel a sense of obligation to obey such laws. This type of arrangement would however, not be a legal system as such and it would raise a number of problems for the citizens such as:

- a) *The problems of uncertainty*- it would always be difficult to determine whether there exists a certain rule of law or whether it was some other type of rule, such as a rule of morality, custom or religion;
  - b) *The problem of the static nature of laws*- even where rules of law were known, new situations might arise which would need the immediate modification of an existing rule to cover that situation or failing that, the creation of an entirely new rule to resolve a problem. It would be easy to create with sufficient expedition, a new rule through the process of establishing consensus amongst all citizens;
  - c) *The problem of inefficiency*- where rules of law were broken, there would
-

always be difficult in ascertaining the reality and the extent of the breach as well as determining the extent of compensation or the severity of punishment. Self-help schemes in this respect would result in wastage of resources.

In order to resolve these difficulties, there would be a need for a different set of rules which would determine the processes of creation, validation, transformation and adjudication in respect of the primary rules of law.

### **3.1- Secondary Rules**

Secondary rules deal with three problems: first the problem of uncertainty about what the law is (the secondary rule is called the rule of recognition and states whether the law is valid), second the problem of rigidity of rules (which requires rules of change allowing laws to be varied), and third the problem of how to resolve legal disputes (from which rules of adjudication arise). Hart describes these rules as power-conferring rules which allow for those who receive the power to legitimately cure the problems of the primary (duty-imposing) rules.

Hart includes the concept of a *Rule of Recognition* (RoR) as one and possibly the most important of the Secondary Rules of Law. This RoR is the ultimate rule providing criteria by which validity of the other rules of a system are assessed and this cures the uncertainty of the primary rules. According to Hart, RoR is not in itself assessed and cannot be valid or invalid since it is merely a complex social fact about official attitudes and practices (and so it has to be accepted by the officials of the system who have an internal attitude about this RoR). Hart contends that the union between primary and secondary rules is the key to the science of jurisprudence and within it these two hold a distinction between power-conferring (secondary rules) and duty imposing (primary rules). In short, there are two criteria for RoR: (1) All valid rules must be obeyed, and (2) valid rules must be validated by RoR which must be effectively accepted as common public standards of behaviour.

## **4. Summary of criticisms against Hart:**

Hart's theory is indeed a holistic theory which tries to cover validity of law to issues of obedience. Yet, the theory has been subject to some criticisms. The first set of critiques criticize the description of the internal and external aspects and the critical and reflective attitude. The second category of the critiques argues against the Rule of Recognition provision in Hart's theory.

Three jurists have been mentioned for their prolific critique of Hart's theory specifically over the issue of the internal and external aspects including

---

MacCormick, Finnis and Cotterrell. The core issues that critiques forward in this regard against Hart can be summarized as follows:

- a) Hart has failed to consider situations where neither the extreme internal or extreme internal attitude functions; and
- b) Hart does not pay enough attention to distinguishable elements of the internal aspect such as the split between the cognitive/reflective element of the critical reflective attitude and the volitional/critical element of this aspect. In fact, Hart ignores the reflective/cognitive element of the internal aspect.

#### **4.1- Criticisms against the internal-external aspects in Hart's theory**

##### **4.1.1- MacCormick**

MacCormick contends that Hart has not fully explored the full implications of the difference that exists between the internal and external aspects but also within the aspects themselves. Hart, according to MacCormick, has only properly looked at the extreme external aspect and when looking at the internal aspect, Hart has generalized what this aspect is about to the point where he seems to be suggesting that the internal aspect is fully volitional/critical while ignoring the reflective/cognitive element.

MacCormick argues that there is a reflective/cognitive element in between the two aspects which he calls the 'hermeneutic aspect and proposes as the third aspect as a solution to the two problems he has mentioned. This third, 'hermeneutic' aspect links the external and internal aspects to explain the position of the agents within the law who are neither volitionally (willingly, accepting and being committed to) involved with the law or legal rules nor are they fully detached observers who only see the external aspect of rules and predict the outcomes to deviations from the patterns of behavior in society.

These agents under the hermeneutic aspect tend to be external observers who do not accept the rules but will still comment on the group's internal understanding of the law at a cognitive level. The existence of this aspect means that the opposition between the internal and external understanding (of what it means to breach legal rules) is not nearly complex enough for Hart's theory to function without also utilizing MacCormick's contribution of the hermeneutic cognitive element.

##### **4.1.2- Cotterrell**

Cotterrell points out that Hart's theory is about the majority of citizens having a critical reflective attitude when it comes to understanding rules. But when

---

it is about the existence of the legal system in question, Cotterrell holds that only a few officials need to have an internal attitude. This for Cotterrell, this sounds like Austin's sanction based theory in that laws in a legal system will only need to be understood by select officials and that the acceptance of these laws by the wider public will be coincidental.

#### **4.1.3- Finnis**

According to Finnis, Hart's theory has elements of natural law. Finnis firstly accepts the importance of an internal attitude and then he goes on to point out that if Hart chooses to keep his original theory as it is and not accept the hermeneutic aspect, his theory will have an element of natural law. Finnis argued that the attitude of being committed to a law is definitionally linked to some notion of duty or order-maintenance, and a CRA will still require the official or person to morally commit himself/herself to the legal rule and legal system and even the CRA may have a moral base. If Hart's theory accepts the hermeneutic third aspect, as suggested by MacCormick, then Hart's idea entails the need for the selection and prioritizing of factors. Such selection will be according to the agents themselves, and in effect, morality will creep in through the back door even more than Hart's allowance for the minimum content of natural law.

### **4.2- Criticisms against Hart's Rule of Recognition (RoR)**

The other large body of criticism leveled against Hart stems from his inclusion of the concept of a Rule of Recognition as one of the Secondary Rules of Law. The critiques forwarded by Raz, Dworkin and D'Entreve belong to this category.

#### **4.2.1- Raz**

Raz goes along with Hart's RoR in that a rule has to conform to some criteria set in another rule of the system. Raz also sees the validity of ultimate RoR's as a matter of social and political facts. He does however question Hart's views on validity of the RoR. Raz thinks that RoR's are valid because they belong to a legal system in response to the problem that Hart does not try to validate the RoR. Raz also presents several other objections or corrections to Hart's view of the RoR:

- a) RoR is as much a power-conferring rule as it is a duty imposing as well as a tool to settle unregulated disputes. So Hart saying it is purely power-conferring is wrong as RoR imposes duty upon all those applying law to recognize and apply laws satisfying the criteria of validity. RoR also provides means for resolution of conflicts between laws. Hence Hart has misunderstood the nature of RoRs.
-

- b) Hart makes it clear that RoR is a vague and open-textured concept – it might even be incomplete as it does not contain validity of rules of Public International Law. So, long as the rule is incomplete, there will be unsolved problems in clarifying what the primary rules are. Also there may not be a system of conflict resolution.
- c) Raz contends that there must be more than one Rule of Recognition as one ROR is not enough and furthermore ROR provides no complete answer to the problems of the scope of the Legal system (momentary legal systems in a state may often have to apply laws of other legal systems).
- d) RoR has to be accepted by the officials for a legal system to exist. However, acceptance has its own problems as there is a need to show that it is a law that underlies the constitutions and the whole legal system.
- e) The nature of the RoR is ambiguous: Is it a law or is it a fact? Hart calls it a social fact, Raz calls it a political one and Natural Law opposes this and says it is a meta-legal area of law where morality may be factored in.
- f) Finally Raz states that Hart has overlooked questions of relation of law and state. This has two different effects with regards to the scope of the laws as well as the continuity. The continuity of the legal system is tied up to that of the political system and therefore must be affected by the fate of non-legal norms that are part of the political system. Hence in not recognizing this, Hart's system lacks a very important angle. As to the scope of the law- sometimes the courts are under a duty to apply norms from other social and political systems, and so do they become part of the legal system or is it being enforced as it is part of law's function to support other social system.

#### **4.2.2- Dworkin**

Dworkin goes further in that he queries what the acceptance of the RoR consists of. Is it rooted in fear (then we get a repeat of Austin). Dworkin also claims that RoR is unable to account for validity of legal principles –that Hart glosses over and under-represents. Dworkin states that there is a clear distinction between legal principles and legal rules (even if both do point to particular decisions about legal obligations in particular cases). Principles have weight and dimension as compared to legal rules where two rules conflict, and principles are relevant and judges use them to work out the conflict. Underlying principles also explain the connection between cases but have no connection to RoR. Dworkin's more fundamental critique is that the RoR merely says that whatever is accepted as being legally binding is legally binding. This for Dworkin is not a test at all – thus he says Hart's argument is circuitous as the test is one which would have been formulated even if he had not formulated it.

---

### 4.2.3- D'Entreve

D'Entreve contends that Hart's claim that there is a minimum content of natural law in positivism to guarantee the stability of a system is problematic. As far as D'Entreve is concerned, this implies that Hart admits that positive law is closely linked to natural law while trying to maintain that laws need not fulfill any criteria of morality. If the RoR, as Hart insists, has no morality criteria in it, what happens is that in a case where a law is inequitable, the judge will have to say "the law is valid according to the RoR but I refuse to apply it in the name of a higher cause" which actually allows natural law to trump positive law. This, according to D'Entreve, doesn't only allow a minimum content of natural law, but is making natural law superior.

### Concluding Note

In spite of the somewhat numerous criticisms leveled at Hart's concept of law, it is very important to once more keep in mind that this theory has had a wide-ranging influence in shaping legal thinking in the latter half of the 20<sup>th</sup> century and the beginning of the 21<sup>st</sup> century. Even Hart's critiques such as Dworkin and Raz have conceded to the importance of this theory and its influence on the study of modern jurisprudence. Moreover, Hart's characterization of his concept of law cannot be captured in the writing of one summarized note such as this note whose scope does not allow it to fully take into consideration the response Hart had been working on before his death in 1992. Although his responses were published in the form of notes, Hart's understanding of his own theory and his response to the criticisms were expounded in these notes in which Hart has countered a lot of the critiques while reconciling his theory with some of them. This simply indicates, as always, that jurists and students of Jurisprudence need to keep in mind that no theory and no criticism is completely correct thereby necessitating the need to critically examine various thoughts and theories with a view to synthesizing them in light of the issues involved and the distinct setting we are in. \_\_\_\_\_■

---