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FACULTY OF JURIDICAL SCIENCES

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LECTURE: 1

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Lecture-14

Lecture- 14: H.L.HART

H. L. HART

Professor Hart is regarded as the leading contemporary representative of British positivism. His identical book "the concept of law" was published in 1961 and that shows that he is a linguistic, philosopher, barrister and a jurist.

Professor Hart has criticised the Austinian conception of law by linking it with his own original concept of law viewed from the positivists standpoint. He has rejected any system of law based simply on coercive orders on the ground that this view is patterned on criminal law when to a large extent the modern legal system confers both public and private legal powers, for instance, in the case of the law relating to wills, contracts, marriage etc. According to him many laws do not have sanction attached to them for instance customary laws, enabling laws and laws imposing duties on public authorities.

Hart instead pleads for a dual system consisting of two types of rules, viz., primary and secondary rules.

The primary rules which impose duty upon individuals are binding because of the popular acceptance such as rule of kinship, family sentiments etc. These being unofficial rules, they suffer from three major defects namely-

- Uncertainty
- Static character
- Insufficiency

Primary rules lay down standards of behaviour and are rules of obligation, that is, rules that impose duties.

The secondary rules which are power conferring enable the legislators to modify their policies according to the needs of the society. In fact they seek to remedy the defects

of primary rules, primary rules are ancillary to and concern the primary rules in various ways; for instance; they specify the ways in which primary rules may be ascertained, introduced, eliminated or varied and the mode in which their violation may be conclusively determined.

Hart takes the view that a society which is so legally undeveloped as to have no secondary rules but only primary rules of obligation, would not really possess a legal system at all but a mere 'set' of rules. For Hart, therefore it is the union of primary rules and secondary rules which constitute the core of a legal system. For a legal system to exist there must be general obedience by the citizens to possess 'an internal point of view'. In such a case, according to Hart, the importance of the internal point of view relates not to a body of citizens but to the officials of the system.

These officials must not merely 'obey' the secondary rules but must take on 'inner view' of these rules, and this is a necessary condition for the existence of a legal system. Official compliance with the secondary rules must therefore, involve, both a conscious acceptance of these rules as standards of official behaviour, and a conscious desire to comply with these standards. Hart refers to the internal aspects or "inner point of view" that human beings take towards the rules of a legal system. According to him, law depends not only on the external social pressure which are brought to bear on human beings to prevent them from deviating from the rules but also on the inner point of view that human beings take towards a rule imposing an obligation.

RULE OF RECOGNITION

It appears from the above that Professor Hart has subscribed to the theory of the union of primary and secondary rules. The primary rules lay down standard Of behavior (duties), while the secondary rules relate to the identification, creation, change, and application of the powers. He has dealt with law as equivalent to 'legal system'. Dias observes that Professor Hart distinguishes between rules imposing duties and rules creating powers. A very large part of law consist of prescriptive patterns of conduct, and they are accordingly assigned pride of place as 'primary

rules.' i.e., those imposing duties. The means by which these are created, extinguished and modified are 'secondary rules' i.e., those conferring powers. Included in this category is the important 'rule of recognition' which is used 'for the identification of primary rules of obligation.' It refers only to formal criteria and thus excludes morality. Only with the union of these two sorts of rules can there be a legal system as a self-propagating thing."

Dias, while commenting on the above view of Professor Hart, observes that a club may prescribe patterns of behavior for its members and may also possess machinery whereby such prescriptions are added to, modified applied and identified as the rules of that club. There is no reason why the structure of the system, which respectively prevails in the club and in the state, should not exhibit analogous characteristics by way of patterns of conduct, sanctions and provision for development. What is needed, therefore, is some means of identifying the one as 'the law f the club' and the other as the 'law of the land.' For this purpose some references to the courts as parts of the means of identification would appear to be unavoidable. Secondly, the 'rule of identification' does not appear to be a power so much as the acceptance of a power (or powers) to invest primary rules with the quality of 'laws'. Hence it does not fit quite snuggly into a category containing powers. Thirdly, acceptance of a rule of recognition, i.e., criterion of validity rests on social facts. If Professor Hart is talking, as he purports to do in terms of a system, which is a continuing thing, then all factors that bring about each and every part of it and keep them going enter into account. In this way social and moral considerations may well set limits on the rule of recognition at the time of its acceptance precisely in order to provide certain fundamental safeguard. If so, the rule will have built-in limitations that prevent it from validating certain forms of abuse of power. So Professor Hart's exclusion of morality from his 'rule of recognition' is open to question. But, with reference to a continuum, morality is an indispensable factor, not only in the genesis, but also in the continuation of laws. The fourth criticism is that there is a basic confusion in his frames of reference. The result is that for the limited purpose of identifying 'laws' his concept seeks to accomplish more than is necessary for the purpose of portraying law, it is inadequate. Fifthly, he distinguishes between rules creating duties and rules creating powers, and

bases a legal system on their union. But it is questionable whether so sharp distinction can be drawn. For example, it has been pointed out that the same rule may create a power plus a duty to exercise it, or a power plus a duty not to exercise it. Finally, Professor Dworkin has pointed to the importance of 'legal doctrines' (principles, standards ad policies), e.g., unjust enrichment, presumption of innocence, etc., which do not derive their quality of law from the criterion of validity. To regulate them to 'discretion' is inconsistent with the judicial acceptance of them as 'legal'. Professor Hart's concept is applicable only to rules, not to everything that is contained in a legal order. Professor Hart's picture of law is thus incomplete in certain respects. It is certainly less definite and suggestive than that unfolded by Kelsen's conception.

POINTS OF DIFFERENCE BETWEEN ANALYTICAL SCHOOL AND HISTORICAL SCHOOL OF JURISPRUDENCE:

	Analytical School	**Historical School**
1.	Law is the creation of state.	Law is found and not made. Law is self existent.
2.	Without a sovereign, there can be no law	Law is an antecedent to the state and exists even before a state organisation comes into being.
3.	The hall-mark of law is enforcement by the sovereign.	Law is independent of political authority and enforcement. It is enforced by the sovereign because it is already law; it does not become law because of enforcement by the sovereign.
4.	The typical law is statute	The typical law is custom
5.	Judges should confine themselves to a purely syllogistic method	In constructing a statute judges should consider the history of

		the legislation in question.
6.	Law rests upon the force of politically organised society	Law rests on the social pressure behind the rules of conduct which it enjoins.
7.	Emphasis is on empirical a priori method	Emphasis is no comparative method.
8.	Law is the command of the sovereign.	Law is the rule whereby the invisible border

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)
1.	Professor Hart is regarded as the leading contemporary representative of British positivism	true	false
2.	Professor Hart has criticised the Austinian conception of law by linking it with his own original concept of law viewed from the positivists standpoint	true	false
3.	The primary rules which impose duty upon individuals are binding because of the popular acceptance such as rule of kinship, family sentiments etc	true	false
4.	Primary rules lay down standards of behaviour and are rules of obligation, that is, rules that impose duties.	true	false
5.	The secondary rules which are power conferring enable the legislators to modify their policies according to the needs of the society	true	false

Answers: 1-(b),2-(a), 3-(a),4-(a), 5-(a)