AN ANALYSIS OF PROF. H. L. A. HART'S THE CONCEPT OF LAW

Bagada Ram Rathore

National University of Study and Research in Law, Ranchi

The concept of Rule of Law means predominance of an ordinary law over each and every citizen, regardless of that citizen's powers. The makers of the Indian Constitution incorporated the features of Rule of Law so that India is governed only by law and not by any ruler or by the nominated representatives of the people. The paper begins by providing the origin of the term and concept of Rule of Law. It shows how this concept was recognized in some countries in one or the other form. The paper majorly aims to discuss about the adoption of Rule of Law and its applicability in India. This includes discussion about various articles incorporated in the Constitution by the makers to secure certain basic features of the Rule of Law, a number of judgments delivered by the judges applying this concept and explaining its importance, including the case which is known to be a black mark on the Rule of Law. It also discusses about how despite various statutory safeguards and judgments, this concept is violated in India. The paper finally aims to answer whether the concept of Rule of Law is severely implemented and followed in India; whether the features given by A. V. Dicey are strictly incorporated; and whether the statutory safeguards and judgments are enough to secure Rule of Law in India. At last, it discusses about the relationship between democracy and Rule of Law.

INTRODUCTION

Herbert Lionel Adolphus Hart was a British philosopher who was professor of jurisprudence at the University of Oxford. His most important writings included Causation in the Law (1959, with A.M. Honoré), The Concept of Law (1961), Law, Liberty and Morality (1963), Of Laws in General (1970), and Essays on Bentham (1982). The Concept of Law is an analysis of the relation between law, coercion, and morality, and it is an attempt to clarify the question of whether all laws may be properly conceptualized as coercive orders or as moral commands. Hart says that there is no logically necessary connection between law and coercion or between law and morality. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality. Professor H.L.A. Hart's The Concept of Law as a combination of his answers to three basic questions: "(i) How does law differ from and how is it related to orders backed by threats? (ii) How does legal obligation differ from and how is it related to, moral obligation? (iii) What are rules and to what extent is law an affair of rules?" The critical analysis of Professor H.L.A. Hart's answers to these questions into four parts: Nature of a Legal System, Existence of a Legal System, Law and Morals, and Justice and Professor Hart's methods of analysis.

THE STRUCTURE OF THE CONCEPT OF LAW

An important feature of Hart's Concept of Law and a reason for its attractiveness and influence is that it has an apparently simple framework with a particular structure of

development and exposition. In the preface to The Concept of Law Hart claimed his aim was 'to further the understanding of law coercion and morality as different but related social phenomena' and that his work could be read in two ways: (i) as 'an essay in descriptive sociology', in which we recognise from an analysis of the language of everyday life, the centrality of rules and better understand the nature of rule-bound practices. This analysis of everyday linguistic usage is in turn positioned in an analytical account of the development of modern law from its pre-legal origins. (ii) As an essay in analytical jurisprudence directed at revealing or clarifying the central features of law. Achieving this aim involves working through the idea that this is a social concept article. According to Prof. H.L.A. Hart's the concept of law, there are certain matters which influence human behaviour. These can be divided into two categories, social habits and social rules.

SOCIAL HABITS: An example of a social habit might be the habit of a group to go to the cinema on Saturday evening. Habits are not rules. If some people in the group do not go to the cinema on Saturday evenings, this will not be regarded as a fault, nor render them liable to criticism. When group have a particular habit, although this may be observable by an outsider, no member of the group may be conscious of the habit- either that he is in the habit of going to the cinema on Saturday evening, or that others in the group do so. Certainly, members of the group do not in any way consciously strive to see that the habit is maintained. An example of a Social rule might be a rule that a man should take his hat off in church. If someone breaks the rule, this is regarded as a fault, and renders the offender liable to criticism. Such criticism is generally regarded as warranted, not only by those who make it but also by the person who is criticised. Further, for a social rule to exist, at least some members of the group must be aware of the existence of the rule, and must strive to see that it is followed, as a standard, by the group as a whole.

SOCIAL RULES: If something is a social rule, then we would find that such words as 'ought', 'must', 'should' are used in connection with it. Social rules are of two kinds.

i. Those which are no more than social conventions, for example rules of etiquette or rules of correct speech. These are more than habits, as a group strives to see that the rules are observed, and those who break them are criticised.
ii. Rules which constitute obligations. A rule falls into this second category when there is an insistent demand that members of the group conform, and when there is great pressure brought to bear on those who break the rule, or threaten to do so.

NATURE OF A LEGAL SYSTEM

In The Concept of Law, Prof. H.L.A. Hart cautiously analyses the concept of a social rule. He distinguishes rule-governed behaviour from habitual behaviour, and distinguishes legal rules from standards and from orders backed by threats. He also illuminatingly compares legal rules and moral rules. An essential element of social rules can be brought out by comparing behaviour according to rules with habitual behaviour. To the "external" observer, these types of behaviour are indistinguishable, for to him each appears to be regular and uniform. Professor H.L.A. Hart's rules, unlike habits, also have an "internal

aspect"; from the "internal point of view" of those who put up with by them, rules are generally regarded as reasons or justifications for action, and violations thereof are generally open to criticism. Thus, for Prof. H.L.A. Hart's rules can discuss rights or authority; simple habits cannot.

The operation of the secondary rules provides the basis for the existence of legal system as distinct from a mere collection of primary rules. Hart is relatively unclear as to how these rules came about: (i) rules which confer powers on citizens/legal subjects to vary their legal relations. An important element of his criticism of Austin is the failure of the 'command theory' of rules to incorporate, for example, the capacity or power to make a will or to enter into a contract. These types of legal rules seem to be encompassed as private power conferring rules; (ii) rules directed to legal officials, in particular 'judges' about how they are to identify valid rules, change and interpret them. The great bulk of his discussion of rules revolves around this type of rule. There are the 'public' powers – conferring rules referred to in his initial definition of secondary rules. The problem is whether or not these two different types of secondary rules are sufficiently similar to be included within the same concept. The fact that the rules are directed to two dentist categories of persons, i.e. citizens on the one hand and 'judges' on the other, suggests a negative answer.

PRIMARY AND SECONDARY RULES

Legal rules are of two kinds, 'primary' rules and 'secondary' rules. Primary rules are one which tells people to do things, or not to do things. Primary rules are "duty imposing" rules. They impose certain specific duties upon the citizens of a state to act in a certain manner, or they may be subject to certain legal sanctions. Hart characterizes primary rules as "basic" rules. They tell the citizen what one can and cannot do under the law. They lay down duties. These rules are to do with physical matters.

Secondary rules are one which let people, by doing certain things, introduce new rules of the first kind, or alter them. They give people (private individuals or public bodies) power to introduce or vary the first kind of rule. Secondary rules are not duty-imposing rules. They are what Hart calls power-conferring rules. They state the manner in which primary rules may be recognized, changed and adjudicated. For example, they grant Congress the power to legislate and private citizens the right to vote. They state the procedure one must follow in order to make a legal will. Secondary rules are, as Hart puts it, "rules about primary rules." Hart seeks to remedy these deficiencies by specifying three different types of secondary rules:

The rule of recognition – Hart believes that rule of recognition is the most important. The rule of recognition tells us how to identify a law. In modern systems with multiple sources of law such as a written constitution, legislative enactments, and judicial precedents, rules of recognition can be quite complex and require a hierarchy where some types rules overrule others Hart holds this out for the remedy for uncertainty. This determines what is or is not a valid primary rule for the society. The rule of recognition actively serves or stands in the place of Austin's sovereign because we can see that it stands diagrammatically at the top of

a legal system. It is a rule which determines what counts as law; it determines, for examples, the procedural limitations for the creation of a rule by the statement of parliament. It is the essence of a social practice which declares what will be recognised as a valid law.

Rules of change – indicating how the primary rules are to be created or existing ones altered.

Rules of adjudication – which specify the means by which decisions are to be taken as to whether a primary rule has been broken or not. This model of law, essentially a union of primary and secondary rules, is for Hart the essence of a legal system.

In a modern legal system, that is, under conditions of municipal life, the situation would normally be that the citizens generally obey the primary rules and officials running the legal system recognise the secondary rules from an internal point of view.

RULES OF RECOGNITION

Wherever there is a rule of recognition, Prof. H.L.A. Hart says people have a way of finding out what the primary rules are. In modern societies there may be various sources of law. These may include, for example, a written constitution, legislation, and judge's decisions. These may be able to override judges' decisions. In British system, judicial precedent is subject to legislation. Judicial precedent is, however, a separate source of law: it does not derive its authority as source of law from legislation.

In Prof. H.L.A. Hart's method, primary rules are "rules of obligation," i.e., rules that impose duties. As examples of such duties, he cites those essential by criminal and tort law, and says that under such rules "human beings are required to do or withhold from certain actions, whether they wish to or not." He contrasts legal obligations arising under primary rules with the method of being "obliged to" do incredible for fear of a sanction, and with the legal realists' analytical theory of obligation. The major factors that make a rule conceived and spoken of as imposing an obligation are (1) the "inner" point of view that human beings take toward it, i.e., their general demand for conformity to the rule, and (2) the serious social pressure human beings bring to bear on those who deviate or threaten to deviate. Obligation does not, however, consist essentially in feeling "obliged to" act or refrain.

The legal realists' analytical theory of obligation, according to which a person has an obligation if and only if "hostile reaction" to variation is expected, distorts the characteristic "internal" use of statements of obligation which is not to envisage but to say that a person's case falls under a rule. The predictive theory limits itself to the "external" point of view towards rules which is, in turn, limited to the outward, observable regularities of social behaviour.

According to Prof. H.L.A. Hart, this view merely cannot reproduce the way rules of obligation function in the lives of those who live under the rules and use them as guides to conduct and as the bases for claims, demands, admissions, criticism, or punishment.

In a particular society, there were no secondary rules but only primary rules of obligation, would a legal system exist? To this question, Prof. H.L.A. Hart's answer is no. Such a body of rules would not constitute a system, but would be a mere "set" of rules. To constitute a system, there would at least have to be a secondary rule of recognition "uniting" the primary rules. A "set" of primary rules alone would "exist" if the citizens viewed these rules from the internal point of view, i.e., only if such rules were consciously regarded as standards of behaviour and deviations there from were subjected to criticism. If this internal point of view were not widely disseminated, there could not, according to Professor Hart, "logically" be any rules of obligation.

Thus, to determine whether a legal system exists, we must inquire whether the primary rules of the system are generally obeyed and we must inquire whether (1) the officials recognize the secondary rules as such and (2) recognize such rules for the right reason. For Prof. H.L.A. Hart, the existence of a legal system is therefore a question of fact. Some, like Hans Kelsen for example, have thought that the existence of the secondary rule of recognition was not a question of fact. One virtue of Professor Hart's analysis is that he enables us to see that the existence of secondary.

LAWS AND MORALS

Natural Law and Legal Positivism: There are many different types of relation between law and morals and there is nothing which can be profitably singled out for study as the relation between them. Thus, 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 transcended the morality currently accepted.

The first is a question which may still be illuminatingly described as the issues between Natural Law and Legal Positivism, though each of these about law and morals. One of these is expressed most clearly in the classical theories of Natural law: that there is certain principle of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.

According to natural law theory, when there is a conflict between natural law and human law, natural law must take precedence. In this regard, natural law dictates that all human-made laws must be in accordance with fundamental natural law principles, such as Aquinas' notions of doing good, avoiding evil and promoting the common good. The natural law proponent believes that all law must be morally justified if it is to be legitimately called "law" at all. Both the relevant sense of the word 'natural' which enters into natural law, and its general outlook minimizing the difference, so obvious and so important to modern minds, between prescriptive and descriptive laws, have their roots in Greek thought which was, for this purpose, quite secular.

The doctrine of Natural Law is part of an older conception of nature in which the observable world is not merely a scene of such regularities, and knowledge of nature is not merely a knowledge of nature is not merely a knowledge of them.

Hart's Minimum Content of Natural Law: In the Concept of Law Hart suggested that there is a 'core of indisputable truth' in the doctrines of natural law. Again his tactics look back to Hobbes ad he claims to be merely using reason to identify what minimum sort of rules are required by the basic elements of the human condition. Five 'truisms' about humanity give a reason for postulating a 'minimum content' of social rules; these are:

1. Human vulnerability
2. Approximate equality
3. Limited resources
4. Limited altruism
5. Limited understanding and strength of will

Human vulnerability- by human vulnerability Hart wishes to draw attention to the fact that vis-a-vis the natural circumstances we find ourselves, we are exceedingly at risk. We are not, generally speaking, endowed with full protection against our environment, either socially or naturally, we need to protect ourselves and the legal system is one of those mechanisms which we use to protect ourselves.

Approximate equality- human beings are approximately equal. At the end of the day we might find it difficult to persuade those who are exceedingly strong to accept the limitations which those legal systems would decide to place to place on their ability … Nevertheless, we need to be aware of the fact that they may be inadequate.

Limited resources- there are not resources enough go round well. Hart is really drawing our attention to the fact that we do need some mechanism especially because of natural fact about the natural world which is that we do not have ready access to everything we want because the resources are limited. It follows of course that in times and places where particular resources are not in short supply we might expect a different analysis to apply.

Limited altruism- this has two aspects: (i) human beings indeed altruistic. But (ii) we must also allow for the fact that although human beings are altruistic they are altruistic in very haphazard ways. More importantly we have to take account of the fact that the reason why they act altruistically at all is often out of some sense of expectation that the reason why they act altruistically at all is often out of some sense of expectation that if they act nicely then people will act nicely back.

Limited understanding and strength of will- this really means we do not always know what is good for us. That is, we do not always know we should be doing in our own interests. Additionally, even when we do understand our best interests we may not be in a position to carry out what needs to be done.

One level these five factors are simply ways of trying to outflank the traditionally natural law demand for a moral criterion for the power of law and transform this into our recognition of problems which give us a basic need for certain types of legal and/or moral rules and normative systems. A legal system which did not offer a minimum level of protection for both our physical and psychological needs would scarcely be recognisable is a legal system at all. None of the external features of the existence of a legal system which he talks about seem to be relevant to the internal operation of a legal system.

LEGAL VALIDITY AND MORAL VALUE

The protections and benefits provided by the system of mutual forbearances which underlines both law and morals may, in different societies, be extended to very different ranges of persons. It is true that the denial of these elementary protections to any class of human beings, willing to accept the corresponding restrictions, would offend the principles of morality and justice to which all modern states pay, at any rate, lip service. Yet it is plain that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope, and often they have not done so.

Power and Authority – it is often said that a legal system must rest on a sense of moral obligation or on the conviction of the moral value of the system, since it does not and cannot rest on mere power of man over man.

The influence of morality on law – the law of every modern state at a thousand points the influence of both the accepted social morality and wider moral ideals. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values. Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer.

The criticism of law – sometimes the claim that there is a necessary connection between law and morality comes to no more than the assertion that a good legal system must conform at certain points, such as those already mentioned in the last paragraph, to the requirement of justice and morality. But it is not tautology, and in fact, in the criticism of law, there may disagreement both as to the appropriate moral standards and as to the required points of conformity.

Principles of legality and justice – it may be said that the distinction between a good legal system which conforms at certain points 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 behaviour is controlled by general rules publicly announced and judicially applied.

Legal validity and resistance to law – They may have formulated their general outlook, few legal theories classed as positivists would have been concerned to deny the forms of connection between law and morals discussed under the last five headings.

THE CONCEPT OF LAW

The Jewel of Modern Jurisprudence, or a Testament to its times: The main strand of the Concept of Law, downplayed the basic elements of coercion, command and habitual obedience in Law, replacing the images of power and violence in the jurisprudential imagination by conceiving of law as a system of rules upon rules, of social practices informed by their own criteria of validity and normative obligation. Hart presented the benign and functionalist face of liberal legality, transforming the early positivist theme of an external coercion enforcing the law and making the subject feel 'obliged' by threat of violence to remain lawful – the threat of sanctions – into an image of the legal subject's positivism had misunderstood law's obligatory nature viewing legality as something politically imposed on an otherwise chaotic social order to structure it, whereas legality was something which developed in evolutionary fashion through a growing complex system of different kinds of rules. Beginning with a fundamental recognition that law entails obligation, Hart was to develop a theory of law that rendered the source of this obligation an internal effect of the structure of a modern municipal legal system, and rather than highlighting domination, Hart spoke of 'the shared acceptance of rules.' The law, it seemed, belonged to as all; a period where law seemed to offer us possibilities of enablement rather than threatened coercion, and where one could be forgiven for believing that the rule of law had replaced that rule of men so obvious to Austin, Marx and Weber.

CONCLUSION

Prof. H.L.A. Hart's point of view a legal system as a union of primary and secondary rules and his explanation of natural law are only two of the many new thoughts that he has contributed. Prof. H.L.A. Hart's Concept of Law did not examine work on causation in the law nor his work on such basic mental concepts as motive and intention as these are used in the law, but his work on these subjects has in fact widened the traditional limitations of jurisprudence. Lastly, Prof. H.L.A. Hart writes with a clarity of expression that is surely a virtue in such an abstruse field, and, unlike many of his philosopher colleagues at Oxford, he publishes his views.

