Himachal Pradesh National Law University, Shimla (India)
HPNLU Law Journal

Volume IV *ISSN: 2582-8533* *April 2023-March 2024*

Volume IV (2023)

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Volume IV | *ISSN: 2582-8533* | *April 2023-March 2024*

LAW AS SOCIAL RULES:
A Descriptive Evaluation of *Hart's Concept of Law* for Contemporary Teaching

***Chanchal Kumar Singh**[*] & **Mritunjay Kumar**[**]*

[Abstract: *The contemporary law and administration in common with other branches of knowledge have strong impacts of 'positivism' that spearheaded the rise and fall of modernism. Methodologically, there is little distinctions and divergence between modernity and its 21st century successor, namely, post-modernism manifested in legal pluralism. The concept, 'Law as social Rules' has clear pedigree in British empiricism and uninterrupted lineage in the American and Continental European jurisprudential imaginations. Thus, H.L.A. Hart remains one of the central point of reference and teaching for scholars today. The theory constructed, on the professed denouncements of previous theories and their central suppositions has resurrected the similar archetypes and social moorings. However, in this process, concept of rules described by H.L.A. Hart revolutionises the idea of "advanced and organized modernity". The subsequent and contemporary writers have tried and struggled hard to answer the questions raised by H.L.A. Hart the subjects of law, morality, judicial process, coercion, or authority, etc. In the process, the theory has lively and lasting effects on the development and understanding of law. This paper provides the descriptive insights of the theory of law expounded by H.L.A. Hart along with raising a few unsolved questions, especially what motivates one to obey the system of rules and to what extent an internal perspective of law has succeeded in allaying the psychology of fear, which has been central motivation to construct the foundations of legal positivism in the philosophies and legal theories constructed by Thomas Hobbes, Jeremy Bentham, and John Austin, etc. H.L.A. Hart introduced a soft version of legal positivism, but somehow, he could not escape from the hardest truth about the fear psychosis, central to the civilizing process penetrated in the minds and hearts in the epoch-making age of disciplinary form of governance.*]

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I

Introduction

The school of Analytical Positivism dominated in the common law legal systems for about more than 100 years. By the end of the 20th Century, however, the analytical tradition of jurisprudence almost exhausted its potential with respect to explaining the meaning, significance, and application of law. It served its purpose of bringing law from the shackles of mediaeval political outlook and infusing in it anthropocentric goals, such as clarity, consistency, and certainty in law, these principles are meant to control the development of law so as to make it useful for the controlled organization of social, economic, and political orders.[1] The 19th and 20th Centuries witnessed significant developments in almost all social sciences. New methods emerged in the context of exploring the concept of law and legal philosophy beginning with the jurisprudential activism of Jeremy Bentham. The social conditions of modern beings transformed due to innovations and discoveries of new explanations to various aspects and challenges of human lives, especially after the emergence of individualism in the context of industrial revolution.[2] The scope of jurisprudence was similarly limited to study the concept and functioning of law as human artefact, without exploring the politics and metaphysics behind its origin, characteristics, or evolution.[3]

In the emergence of new social and political milieus, the traditional legal positivism lost its ability to explain the newly emergent life-world in the age of advanced Modernity. On the other hand, the development of sociological jurisprudence and legal realism, particularly in America in the 1920-1930s, challenged the methods and limitations of legal positivism, in particular, their pre-occupation to bind the concept of law around the narrow confines of power and obedience.[4] Moreover, the realisation of the dislocation of legal positivism from the social realities fostered some sort of intellectual dormancy to revive the spirit of inquiry in a holistic sense. One of the chief reasons for this state of affairs in the jurisprudential traditions may be attributed to John Austin who did not give enough importance to the censorial functions of jurisprudence; he limited the moral question in law around utilitarianism.[5] As a result, the scope of jurisprudence was confined as a one dimensional field of studying the identity, characteristics, and validity of law.[6] One of the main theses of John Austin's theory that he separated the positive law from the morality which carried the study of jurisprudence away from the

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1 *See generally* Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1780, 2012); See also Lon L. Fuller, THE MORALITY OF LAW 33-37 (1969).

2 Karl Polanyi, THE GREAT TRANSFORMATION 35-80 (1944, 2001).

3 John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 1-5 (1832).

4 Oliver Wendell Holmes, *The Path of Law* 110 (5) HARVARD LAW REVIEW 991-1009 (1997).

5 John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 97-125 (1832).

6 Hans Kelsen, PURE THEORY OF LAW 195-2014 (Max Knight *trans.*, 2005).

societal needs and functions. The methodology of analytical positivism proved to be insufficient in explaining the origin, development, and functions of law. The analytic method was premised on the deductive logic to build a system on the basis of defining and clarifying various concepts. Its limited method ushered in is nothing less than 'linguistic pedanticism', therefore, its study is nowadays hardly taken seriously in the University system.

The emphasis of the curriculum is to study law as a subject to harness the skills of practicing law without excavating the principles on which the foundation of law is premised. Another example is establishing the Centres or appointing the Chairs in the field of legal study on narrow themes advanced by the agendas of a few elites without paying necessary attention to the requirements of Indian cultures and history. Such practices are making the subject of studying jurisprudence as parroting the concepts advanced in Eurocentric traditions or American traditions. Nobody is taking pain to seriously examine the cultural requirement of India and what idea of law is rooted in its immensely rich history and cultures. Therefore, such scholarship requires thinking not necessarily about developing careerism as a culture of law and in law but as a splendour of inquiring the fundamental principles on which our law is premised on and its functioning. The inquiry must not be limited only to identify the contours or characteristics of law but to go beyond all too 'opinionated questions and responses',[7] carried forward by the caretakers of the great bygones.[8] Such inquiry requires the self-discipline and passion to live with the questions and not too hastily opine on each and every question floating around the cultures of no culture.

What was the central question and what is that basic question which requires an eternal return? This question is the question behind all the jurisprudential questions. The central question which inspired the legal positivism to inquire was; why should one obey the law? What makes a law legitimate or valid? There are many conclusions but the central question does not evaporate and remains still a relevant question. John Austin's answer to this question revolved around the 'Trinity of Sovereign, Command, and Obligation', whereas 'Sanction' remains a key solution to maintain and sustain social, political, and legal orders just like the problem of evil is a central question in the Providence of God and its governmentality in Christian theology.[9] What makes sanction a remarkable concept is that it reduces human agency merely as a malleable stuff which is either inspired by the sensitivity of pleasure or fear of pain. Therefore, the human species is nothing more than an instinctual animal, whose life is not governed by the inherent virtues or vices endowed by nature or God. Human beings, therefore, are moulded by the contingent demands of history and cultures. They are created and conditioned machines whose genes are rewritten by fear psychosis as understood by John Austin. Such efforts were crucial to demystify the mysterious ideals of natural law school. In the

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[7] Martin Heidegger, WHAT IS CALLED THINKING? 95 (J. Glenn Gray *trans*., 1976).

[8] Roberto Unger, LAW IN MODERN SOCIETY 1-2 (1976).

[9] John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 13-18 (1832).

progression of advanced modernity, the hypothesis of John Austin proved fatalistic and nihilistic in character. The emergence of Fascism in Italy and Nazism in Germany posed serious challenges to the imperative theory of law. Especially, its inability to answer the moral questions which are the beginning and end of the law. The Nuremberg trial or Eichmann trial[10], in particular, exposed the limitations of Austin's Trinity.[11] Therefore, Hart took the initiative to modify Austin's theory of law as per the changing circumstances. In these changed circumstances, though, once praised and worshipped for his clarity of thought, John Austin came to be severely criticised, despised, and legal positivism was regarded as a curse on the jurisprudential traditions prevalent in the common law legal systems.

It was squarely to the credit of Hart (Herbert Lionel Adolphus Hart 1907-1992) that the salvation of the theory came to fall during 1950s and 1960s. Hart, an Oxford educated, born in 1907, initially practised as a Chancery barrister for eight years. He briefly also served as a civilian member of the military during the Second World War. After the War, he joined Oxford University as a teacher in philosophy. However, the turning point in his intellectual career came in 1952, when he was elected to the chair of jurisprudence at Oxford, a post he held till 1968. Though, Hart wrote numerous essays of immense repute, the monograph titled *The Concept of Law* is regarded the most influential work published in 1961. It has resurrected and salvaged the discredited imperative theory of law and reinstated it to its original prestige as it once occupied. In this essay, we explore in the second section about the influences, structure, and method adopted by Hart in his jurisprudential inquiry. The third section investigates the failures of hitherto philosophies of law explored by Hart and alternative explanations were expounded by him. The fourth section explores Hart's critique of Austin's Imperative theory of law. The fifth section explains the concept of Social Rule described in the Hart's Concept of Law. The sixth section of this essay examines the principle of utility and the concept of Social Rule. The seventh section critically evaluates the contribution of Hart in defending and refining the legal positivism and we conclude the essay with some critical insights.

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[10] Hannah Arendt, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL XIII-XIV (1963).

[11] *See generally* Judith N. Shklar, LEGALISM (1964).

II

Influences, Structure, and Method adopted by Hart

Hart was influenced by a new paradigm of knowledge developed by linguistic philosophers of Vienna school, in particular, Ludwig Wittgenstein,[12] known as philosophy of language. He in his earlier period of life believed that words picture reality. In other words, the limitations of our language are the limitations of our world. But in the latter period of his life, he himself discredited his earlier theory of language and believed that language does not picture reality in an objective sense; it has a social function whose meaning is contextually dependent on the situation in which a person is using a language.

Hart too believes that a word does not always have a core meaning, but only an inner core of generally agreed usage and is surrounded by a periphery of unsettled usages.[13] This theory has played a crucial role in his 'concept of law' in demarcating the distinction of core and penumbra. Further, his idea of internalisation of rules in daily behaviour of social life was inspired by Wittgenstein linguistics premised on the 'internalisation of language' in the life of social beings.[14]

Particularly, the distinction made by Hart between the idea of 'being obliged' and 'having an obligation' is based on the internalisation of rules in a social or political life.[15] Hart's conclusion was that primary rules are not necessarily imposed by the power of the sovereign's authority. They are internalized in the social behaviours in such a way that people while obeying the social rules are not conscious about their behaviours. The obedience of rules is therefore not premised on the motive of acquiring good virtues or eliminating the fear of being punished by the evil of sanction. Rules are internalised as self-regulating behaviours, an unconscious conformity to the social rules, without rationally calculating the means and ends relationship. Therefore, being a positivist, he defended the position of positivist with 'mitigated scepticism'[16] and advocated for the minimal discretion for judges to interpret the meaning of words in case of penumbral reading of the open texture of meaning of a word. But avoided committing himself too far to align with the camp of committed moralists like Lon L. Fuller or soft moralists

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[12] Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS 203 (1953).

[13] Hart was furthering the positivist method and project of Bentham who believed that 'legal words demanded a special method of elucidation, and he enunciated a principle that is the beginning of wisdom in this matter, though it is not the end'. *See* H.L.A. Hart, *The Definition and Theory in Jurisprudence* (1954), in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1983).

[14] Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS 203 (1953).

[15] H.L.A. Hart, THE CONCEPT OF LAW 50-99 (1961).

[16] M. Jamie Ferreira, *Hume's 'Mitigated Scepticism': Some Implications for Religious Belief* in D.Z. Phillips & Timothy Tessin (*eds.*), RELIGION AND HUME'S LEGACY 47-67 (1999).

such as Ronald Dworkin. He did not subscribe to the realists' claim that every word of law has no fixed or objective meaning; its interpretation is always already provisional as Roland Barthes reminds us that the birth of a reader means the death of an author. The originalists' claim of the foundational intention hidden in every word or for every word is chimerical and fictitious as per the belief of the realist school. However, Hart adopted a golden mean, a *madhyam marg*, and took inspiration from his predecessors in believing that judges do not have unlimited discretion or no discretion at all in interpreting the rules. He, in fact, adopted a dualist approach in explaining the situation of core and penumbra of a legal concept in interpreting the social rules. Further, in criticising the traditional formalism of British positivism and the rule scepticism of American realism, 'the theory of language games'[17] was substantially utilised by Hart.[18] Moreover, his theory of the penumbra in legal language in context of the debate with Lon L. Fuller in the late 1950s primarily devoted to his defence of the traditional positivist position on the separation of law and morality, and his belief about the minimum content of morality in law are primarily based on this theory.[19]

An analysis of the concept of 'social rules' expounded by him results in an inescapable conclusion that the 'survival principle' forms the bedrock of his theory, though he claims that the *Concept of Law* is a work primarily falling under 'descriptive sociology'. In this respect, the theory is heavily indebted to the social contractarian political philosophy. In line with the conception of social rule, Hart conceded that there are tremendous varieties in the primary norms prevalent in different societies, however, there must be a minimum core of rules absolutely required for social life. This survival principle is the basic norm irreducible for an individual and social life. Moreover, Hart seems to suggest that there is an indisputable truth in the Natural Law school which supports the necessity of survival instincts in species, in particular human species, whose desire to escape the nature led them to organize a society through social rules as obligation conferring rules. On the basis of which, he formulates his theory of minimum content of morality. Therefore, he appears to be adopting a milder version of philosophy founded by Thomas Hobbes about human nature.[20] In this context, it may be noted that Hart's concept of law belongs to the post World War era, which has exhibited a reinvigorated interest in social contractarian political philosophy of Natural Law theories.[21]

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[17] As Wittgenstein calls it, *see* note 12 at 5 & 128.

[18] *See generally* Chap. VII of THE CONCEPT OF LAW.

[19] *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals* 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart* 71 HARV. L. REV. 593 630 (1958).

[20] H.L.A. Hart, THE CONCEPT OF LAW, Chap VI (1961).

[21] *See generally*, John Rawls, A THEORY OF JUSTICE (1971, 1999); John Rawls, JUSTICE AS FAIRNESS: POLITICAL NOT METAPHYSICAL (1985).

This is the time when the consequentialist political philosophy such as utilitarianism lost its appeal in political and legal reasoning. Consequently, we find that Hart gave little place to the principle of utility in his theory even though the utility principle forms the bedrock for the theories of Bentham and Austin, whose legacy Hart was supposed to be carrying on. So much so in his own account of Austin's theory of law which is circumscribed by Austin himself with the principle of utility as an intelligible direction to the legal system, Hart ignores the importance of the principle of utility as a guiding arch in the theory of Austin. Neither does he refer to any other such intelligible principles in his own conception of law. Though, the reasons for it are not clear in his writings and his unfair treatment of Austin, it seems to have happened due to the fact that Hart did not want to carry forward an analytical form of legal positivism, rather he intended to adopt a new positivism akin to descriptive sociology. Thus, Hart hopes that his work would be useful not only to those who are interested in analytical jurisprudence but also for those whose main interest lies in the moral and political philosophies or sociology.[22]

H.L.A. Hart's avowed claim was to further the understanding of law, coercion, and morality as different but related social phenomena. This exercise has obviously been an integral part of the analytical tradition of jurisprudence, for him, it was a project to bring out a constructive destruction of Bentham's and Austin's theories in particular. The constructive criticisms of Austin's theory provided him several insights for the further developments of the concept of law. According to Hart, though, Austin started with the sound idea that where there is law, human conduct in some sense becomes non-optional or obligatory. Still, Austin's notion of law as command backed by threat of sanctions cannot furnish the idea of obligation. Hart invented his own answer to the problem in the form of social rules of primary kind and secondary rules which can ensure the fulfilment of obligations. In other words, as opposed to Austin's command theory of law, for Hart, the legal system is a union of primary and secondary rules. Rules are social in as much as they regulate conduct of the members of society and are derived from human social practices. Moreover, the secondary rules are concerned with the composition, powers, and the functioning of the legislatures, courts, and other officials. The secondary rules provide the powers to the officials to recognize, change, and adjudicate the primary rules, this is the way the system of law was established, as per Hart, which was missing in the pre-modern societies. Lack of secondary rules had the effect that the pre-modern societies were suffering from uncertainty in terms of recognizing the rules, rigidity with respect to changing in the primary rules, and inefficiency vis-à-vis their administration and adjudication.

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[22] H.L.A. Hart, THE CONCEPT OF LAW V (1961)

III

Failures of Hitherto Philosophies of Law

As indicated above, the theoretical approach of Hart was different from his predecessors. Instead of beginning the conceptualization of law with the preliminary definitions,[23] He adopted a sociological approach to describe why people obey the law. According to Hart, we cannot rush to any definition of law as an answer to the question what is law, until we have found out the 'puzzling facts' about the law which tormented and persisted all the investigations of law for centuries, i.e., what is law?[24] Hart identified three principal issues recurrent in the history of philosophy of law: *firstly*, the idea of obligation and its relation to law. This is the most prominent general feature of law at all times and places that where there law exists human conducts are no *longer optional* but in some sense it becomes *obligatory*. *Secondly*, the same idea is often associated with morals. Moral rules also impose obligations and restrict certain spheres of conduct from the freedom of the will on the part of individuals. There are many similarities between obligations provided by law or moral rules. Both share a common vocabulary and therefore, there are legal and moral obligations. All legal systems, therefore, contain certain fundamental moral postulates. Homicide, theft, or use of physical aggression against the other members of the social group are some of the examples where the sphere of law and morality coincide.[25] Moreover, the quest of justice unites both the fields.

If this is true, two consequent issues emerge which have not been satisfactorily answered by the traditional analytical jurisprudence. One, how can we conceptualise the idea of *obligation* as a necessary incidence of law or legal rules and distinguish it from the mere fact of being *obliged.* Obligation of law cannot be synonymous with the compulsion emanating from a gunman.

The idea of non-optional conduct by virtue of existence of law was the beginning point of Austin's analysis, yet it is difficult to describe how law and legal obligations differ from or are related to the commands backed by coercions or threats.[26] Two, though moral rules as well as law impose obligations and take away actions from the individual's options of exercising free choices. It is difficult to identify precisely and define their relationship. It is important to note that Hart not only criticised the natural

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[23] Hart expressly claims that the purpose of his book is not to achieve any true definition of the expression. 'Law' but to advance legal theory. This he seeks to accomplish by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality as types of social phenomena. See The Concept of Law, p- 17.

[24] H.L.A. Hart, THE CONCEPT OF LAW 5 (1961).

[25] H.L.A. Hart, THE CONCEPT OF LAW 7 (1961).

[26] H.L.A. Hart, *Id.*

law school for their ambiguous assertions about the concept of law but also the American and Scandinavian realism.[27] These schools were critical of the legal positivism, especially its obsession with the search of certainty and the question of validity of the positive law or rules.[28]

The *third* issue which Hart identified was that of the concept of rules. According to Hart, law is a union of primary and secondary rules. However, there was confusion and uncertainty about the aspects of rules. There are several types of rules in society, such as, rules of etiquette, language, games, clubs, morality, and law. Some rules are obligatory whereas others are simply optional for their acceptance and conformity. About the social rules, it may be stated that people generally behave in a similar manner in certain circumstances which may be said to be 'convergent habitual behaviour' in a particular social group. Obviously, the concept of rule is a problematic one. In other words, for Hart, the idea of a rule does not merely connote a social habitual behaviour. As opposed to other social rules, legal rules are characterised by the fact that deviations and violations are met with hostile social reactions and punished by the officials. Which is not the case with non-legal rules. Thus, legal rules require certain kinds of action or non-actions which are expressed in the terminology of 'must', 'ought', or 'should'. Generally, legal positivism school accepts legal rules as a reliable guide for predictable consequences or the punishments inflicted by the officials. Thus, this language is useful in identifying the nature and character of law. Hart, however, demonstrated that characterisation of law consisting of rules in this manner obscures reality and is a source of confusion. According to him, there is something more involved when we think and talk of legal rules. For example, a judge does not only take legal rules into account as a guide for him to punish the deviations, but rules are also the reason and justification for awarding the punishment.[29]

The identification of the three issues plays a vital role in *the concept of law*. It also shows that the theory is set in a very broad background and was intended to be comprehensive and as an answer to all dominant theories and schools of thought existing in addition to providing a strong defence for the tradition of legal positivism. A careful reading of the book indicates that it was not solely aimed at criticising the deficiencies of John Austin's theory of law, but contains powerful refutations of the central beliefs of realists and natural law theories. Yet, Hart signals out the theory of Austin, in particular, as an experimental tadpole for establishing and linguistically tasting his own fundamental propositions about law.[30] The chief reasons for doing so was; firstly, Austin's theory was

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[27] See H.L.A. Hart, *Id.*, Chapter VI.

[28] H.L.A. Hart, *Id.* at 8.

[29] H.L.A. Hart, THE CONCEPT OF LAW 10 (1961).

[30] However, Hart asserts that, 'we will not hesitate to take a clear and consistent position (about Austin) where Austin's meaning is doubtful and ignore where his views seem inconsistent'. See The Concept of Law, p-18; Moreover, Hart has not analysed, while

Contd…

the dominant and has had perennial attraction for the lawyers, and secondly, the shortcomings of the imperative theory was pointing towards the understanding of the true nature of law. Whatever treatment Hart gave to Austin and made use of his theory, it is beyond doubt that Hart brought back Jeremy Bentham and John Austin in the mainstream jurisprudence in the Age of advanced modernity.

It was the identification of these persistent issues in the history of legal philosophy around which Hart woven his theory of law that established him as one of the most influential jurists of the 20th Century. This along with his unique capacity to accommodate the social needs of the legal system of the time on the lines of natural law theory secured his work as one of the masterpieces ever written in the field of modern jurisprudence similar to one that John Austin occupied nearly a century earlier.

IV

Hart's Critique of Austin's Imperative Theory of Law

H.L.A. Hart's first point of criticism of the concept of law was that law as command fails to explain two essential characteristics of law: i.e., presence of it implies 'authority and it has a quality of generality'. Commands are said to be an expression of wish or desire of the politically superior person issuing the same.[31] It is an expression of wish or desire of the sovereign addressed to the subject to do or refrain from doing something.[32] According to Hart, there are varieties of commands, expressions of wishes or desires addressed in imperative form. For example, Go home! Come here! Do not kill me! An order of the gunman to the bank clerk, Hand over the money or I will shoot you, and the order of a tax inspector to pay the money, etc.[33] These imperatives signify request, warning, permission, prohibition, and authorization, etc. These varieties of social situations expressed in a special linguistic form in an imperative mood are not distinct from each-other and they tend to overlap and infuse with each-other. Sometimes, they

criticising Austin, the place of the principle of "utility" to which Austin theory was embedded. Though, Hart asserts that one of the concerns of his book is to analyse the element of 'coercion' as an essential aspect of law, he disregards Austin's view on coercion that even the 'civil law' circumscribed by the 'criminal law' symbolises coercion. See Wayne Morrison, JURISPRUDENCE: FROM THE GREEK TO POST-MODERNISM 359 (1997); The truth of the last point itself is acknowledged and strongly argued by Hart himself in the form of his theory of 'Protective comprising mostly of criminal duties (coercion) for the protection of 'liberty' (civil law). See HLA Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE: FIRST SERIES (A. G. Guest *ed.* 1961); *See also* H. L. A. Hart, ESSAYS ON BENTHAM JURISPRUDENCE AND POLITICAL PHILOSOPHY (1982).

[31] John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 1-30 (1832).

[32] *Id*.

[33] H.L.A. Hart, THE CONCEPT OF LAW (1961).

may be backed by threat of evil and therefore, coercive in nature, for example, the order of a tax inspector and a gunman. According to Austin's theory, the general command of the sovereign for the politically inferior subject creates an obligation in them. In failure of obeying the command, the sanction of evil nature is inflicted to make the law imperative and obligatory. Therefore, the trinity of command, obligation, and sanctions are complementary in nature. In the absence of one, the other's nature and character do not remain the same.

As per Hart, Austin failed to make a distinction between a command of the sovereign and a gunman. Therefore, he believed that law creates obligations for the people instead they are being obliged by the fear or coercion of the sovereign like a gunman. Further, the law is not necessarily obeyed by the people due to fear of punishment. People internalise the rules in their routine conducts and develop respect for their conformity without rationally thinking about the sanctions each time when they follow or violate the social rules.

Though, the power to inflict harm or coercion is an existent element in law, much of it is not directed to arouse fear to comply with the command, rather it is related to respect or self-discipline. Thus, Hart claims that the idea of command is not a befitting description about the social reality of law. Hart suggests that the element of authority is included in the notion of power but they are not synonymous. As per his considered opinion, the internalised perspective of law does not necessarily take into consideration the evil nature of sanction as the compelling cause to conform the command.

The command of the sovereign signifies a face-to-face or personal generalized relationship between sovereign and subject which is presupposed in a statement that command is signified. It signifies a simple situation, for example, a traffic police officer ordering the commuters either verbally or by gesture. In this simple situation, the making of the law and its signification are closely connected, and are interdependent. Thus, this view only concentrates on a specificity of instances of law which are minuscule in numbers. But this is not the usual way of the functioning of law. Even a criminal law statute, which mostly resembles the conception of law as "command backed sanction", does not refer to a specific person and a specific act to be done or to be refrained from doing. They possess the following two characteristics: that they refer to a general type of conduct and apply to a class of persons generally and its conformity or violation is context dependent. Thus, law has the character of generality which was conceded by John Austin. Making laws differs from simply commanding people to do certain things or to refrain from doing something. In fact, it is a character of law that as soon as it is made by the lawmaker, it is valid and binding, irrespective of the fact that whether the subjects of law are informed or not and whether they are aware of it.[34] Though, it is desirable that as soon as laws are made, it must be made known to those

[34] *H. M. George* v. *State of Bombay*, 1965 SCR (1) 123.

whose conducts are sought to be regulated by it, but its validity or existence is not conditioned by this fact.

Thus, laws have the character of being persistent or standing in quality. It requires a generally shared belief on the part of those whose conducts are intended to be regulated by it, an attitude of obeying voluntarily or unconsciously. This shared belief towards law and its preeminent standing character cannot be explained on the basis of threat of harm or a general habit of obedience. An external perspective, however, generalises the motive of obedience without actually experiencing the actual situations in which laws are conformed or violated. An observer often derives cause and effect relationship through limited observation within the historical and cultural framework. That observation also mirrors the agent perspective culturally stimulated and historically conditioned. It is a member of society who is born and nurtured in a particular set of social rules are able to understand and practice a set of obligations conferred by the social rules.

The most fundamental critique of the theory of Austin by Hart is contained in chapters three and four of his book. Chapter three is related to criticism of law in various aspects while chapter four targets the deficiencies of the notion of lawgiver and the peculiar notion of society in which both exist. As to the former, Hart categorises his critique in the three categories: content of laws, mode of origin, and a range of application. On all these accounts, the predictive theory is bound to be insufficient and Hart invents or starts constructing his own conception of 'social rules', a necessary prerequisite for law, and as an answer to the deficiencies of the Imperative theory of John Austin.

As per his analysis, firstly, the concept of law essentially found in any modern legal system greatly varies in respect to its contents which cannot be explained on the basis of law as command backed by threat of evil consequences. The insight of such a conception of law is that commands supported by power and the latent possibility of its exercise induces compliance to it. Such commands are said to be imposing duty and thereby discourage or encourage doing something. If the contents of laws found in any legal system are examined, then the current proposition are nothing less than an excessive generalisation at the cost of not understanding the social facts about the law. There are rules or kinds of law which seem to mostly resemble the idea of law as commands, such as criminal Law. Then there are laws which deal with private business, contracts, will, and marriage, etc., which are known as private law. There are also certain laws which regulate and control the conducts of public officials, including lawmakers. The latter two varieties of law share a different nature distinct from the first category of law.

The criminal laws are the most obvious examples of the Imperative theory that law is a command of Sovereign. These laws are seen to be consisting of commands obligating certain duties. The violation of which is designated as either offence or wrong. These laws strongly resemble the theory propounded by John Austin; its unique feature is that

they set up a mechanism in which certain kinds of conduct are permitted or enjoined upon those to whom it is addressed irrespective of their wishes. Then, it appears that they exist in the form of commands forbidding certain actions and which form of sanction shall be imposed upon all those who do not comply with the same. The obedience to the laws related to crime and punishment or the laws of torts is achieved by providing punishment/sanction or damages as a motive for abstaining from the prohibited activities. The element of sanction is present in case of the laws of torts in the form of compensation or similar legal remedies which follows certain 'breach of a duty'. According to Hart, at least, these types of laws conceived as a form of command do not satisfy the criteria of 'authority' and quality of 'generality' discussed above. Whatever the merits of the truth of this analogy, which Austin must have in his mind, there are a set of laws where the analogy of orders backed by threat completely fails.

An important segment of laws in any legal system comprises such rules as concerning contract, marriage, wills, and rules regulating other private actions or interrelationship of citizens, do not qualify, in any sense of the term, to be called creating obligations or imposing duties. Therefore, the analogy of law as command backed by threat of sanction altogether fails. From the point of view of the contents of these laws, they are intended to perform a different social role or function. As per Hart, they provide conditions and define ways in which a valid contract,[35] marriage,[36] or will[37] may be concluded. They do not require persons to act only in certain ways irrespective of their wishes. Instead, 'they provide individuals with facilities for realising their wishes by conferring legal powers upon them to create by certain procedures, subject to certain conditions, structures of rights and duties within the coercive framework of the law'.[38] Thus, it is significant to note that the element of compulsion or negation of choice is absent in his opinion. In other words, power conferring laws does not eliminate and even disturb the choice of options or existence of freedom available to the individuals. Rather these powers are conferred by law on individuals to adjust and readjust their legal relations with other individuals, which Hart looks upon as a great contribution of law to the social life. Within this sphere, rules can be differentiated on the ground that some of them conferred power such as capacity to contract, on the other hand, there are rules which prescribe procedures, which must be followed for a valid legal transaction.

There is a further class of laws which confers power but they differ from the rules concerning private power. These sets of rules can be called as laws conferring public power or authority. For example, the power conferred upon judicial officers, legislative authorities, or administrative bodies. The set of rules together belong to the broader division of law called public law. If rules are the commands backed by sanction, the disobedience of them invites exercise of power of the sovereign in form of imposition of

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[35] *See* provisions of Indian Contract Act, 1860, The Partnership Act 1932, etc.

[36] *E.g.,* under the Hindu Marriage Act, 1956, the requirement of *sptpadi.*

[37] *See* provisions of the Hindu Succession Act, 1956, The Transfer of Property Act, 1882.

[38] H.L.A. Hart, THE CONCEPT OF LAW (1961).

the evil, then it must of necessity be accepted that these power conferring rules are not laws as per Austin's theory. In the case of powers of a court, there are some rules which confer jurisdiction on the judge, that is the power to try certain types of cases, rules subject to which the former power is to be exercised, and rules which concerns the composition of the court, other rules prescribing the qualifications of the officials. It is obvious that some of the rules are prescribed to be observed by the judge himself. Now can we say that the rules are commands backed by sanction binding upon or imposing a duty upon the judges in Austin's sense. It is clear as we all are aware that if the jurors violate rules concerning trial or award a judgment or sentence[39] exceeding the jurisdiction that the violation of rule of law has occurred. If these rules are to be regarded as commands even for a judge to do something or to abstain from doing something, he has broken a duty and therefore is liable for the stipulated harm. It is curious to note that even in cases where the judge has violated binding rules upon him, the rules do not stipulate sanction upon the judge himself. At most, what happens in such a situation is that the decision is invalid. This can hardly be seen to be a sanction upon the judge. Here Hart seems to be implying that Austin's notion of sanction as an essential element of the law itself is problematic in his predictive theory. 'For the concern of the rules conferring such powers is not to deter just from improprieties but to define the conditions and limits under which the court's decision shall be valid'.**11** The analysis of private and public law conferring powers, prescribing procedures and conditions as opposed to criminal laws, furnishes several insights about the nature of law. In the case of private law, if the conditions stipulated and the extent of powers or competencies conferred are not complied with, in that case, the transactions results in nullity. This nullity affects his or her own life plans, legal status, and intended changes in his legal relations with others. It happens in the manner that these goals of individual plans are frustrated by way of legal consequences in the form of nullity. However, where a judge has failed to obey the binding procedures or exceeds limits of his powers, he himself is not affected when his decisions are nullified or reversed at a higher stage. Even if, by a psychological analysis of the human mind, it could be asserted that in respect of private laws concerning powers, the prospect of their actions resulting in nullity act as a sanction, would be a far-fetched analogy. It is altogether absent in the working of laws relating to public powers.

Similar analysis can be done of the laws relating to legislative powers summed in eight legislative authorities. According to Hart, there is a fundamental difference between rules concerning and defining the manner of exercise of legislative powers and the rules of criminal law which at most resemble orders backed by threats. Therefore, it is not appropriate to look upon all the varieties of laws through the lens of command or order backed by threat. Every legal system, therefore, consists in major parts of rules which

[39] There is no provisions for providing liability of the judge for such decisions or judgements in Code of Civil Procedure 1908, Code of Criminal Procedure 1973, or the Indian Evidence Act, 1872.

cannot be described in terms of orders. If these kinds of rules are lacking in the legal system, several peculiar features and concepts of social life would also be absent, such as buying, selling, gift wills, and solemnizing marriage, etc.

Hart also criticises the notion of law given by Hans Kelsen so long as power conferring rules are concerned. The pure theory of law holds that 'law is a primary norm which stipulates sanction'. Thus, according to this view, law does not prohibit commission of any offence. Rather laws are directed towards officials to apply such kind of sanctions conditional upon the happening of certain human conduct. Therefore, laws are in the form: 'if X happens then Y ought to happen'. Law is a norm stipulating sanction requiring officials to carry out conditional upon the happening of X. In this view laws are directed primarily upon officials. Hart regards this theory as a 'recasting' of the same theory which believes that laws are commands backed by a threat of sanctions. Hence, the theory involves a shift from the original conception of law as consisting of comms backed by a threat of sanctions which are to be executed when the orders are disobeyed. Instead, the central conception now is that of orders to officials to apply sanctions. It is not necessary that a sanction be prescribed for the breach of every law, it is only necessary that every genuine law shall direct the application of some sanction…. thus, it is possible that the official who disregards such directions will not be punishable...'[40] According to Hart, at least, this recasting is needed, in the pure theory, with respect to the laws which consist of power conferring rules.

The above views obscure the real character and features of law. Even the criminal laws are designed to specify certain types of behaviour as a standard for guidance either of the members of society as a whole or of a special class within it. The members of the society are expected without the intervention of the officials to understand the rules and see that the rules apply to them and to conform to them. The role of the officials becomes relevant to law only when a deviation from the standard conduct occurs. Thus, laws in general, and the two major types of law, private and public, are designed to provide a general standard of social behaviour and act as instruments for social control. 'The principal functions of the law as a means of social control are not to be seen in the private litigation or persecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide and to plan life out of court'.[41]

The second point of criticism of the theory of Austin concerns the various ways or range in which law applies in the modern legal system. It is not only binding on subjects for whom it is intended but, in a roundabout manner, laws are also applicable to the person or persons making it. Austin's image of law making is a vertical or top-down image which misses the essential feature of law. According to Hart, the predictive theory cannot explain, in modern times, the self-binding character or feature of law making.

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[40] H.L.A. Hart, THE CONCEPT OF LAW 36 (1961).

[41] H.L.A. Hart, *Id.*, at 39.

Austin invented the device of dual capacity of lawmakers: official capacity and private capacity. Thus, a key feature of law is that in the former capacity law is binding upon other persons while in the later capacity it is also applicable upon himself in his private capacity. In Hart's view, the complicated device is not necessary. Taking analogy from the incidence of promise making by a private person, Hart says that while a promise is binding upon himself, the person making the promise can only be explained by virtue of the existence of some rules. Similarly, it is unnecessary to utilise the dual capacity theory[42] to explain the essence or character of law as to the range of its application, including the lawmaker. 'For making of law like the making of promise presupposes the existence of certain rules which govern the process'.[43] Thus, a fresh conception of legislation as the introduction or modification of general standards of behaviour to be followed by the society is needed.

The third instance of the failures of Austin's theory relates to the modes of origins of law. The theory of law as command backed by threat of sanction regards law only as a product of conscious law making. In this view, only legislation is law, which resembles the model of coercive order of law, a product of deliberate law-making process. However, according to Hart, there are laws which do not fit into this account. Because law does not always presuppose a conscious human act. There is a long existing debate that the customs are not law. Here it is necessary to keep in mind that many aspects of social existence are governed by customary rules, of which the most parts do not qualify to be called as law, because they do not form a part of law as a product of definite human act. However, it does not mean that no custom can be and can form a part of binding law. However, the generally held view is that any custom is law, only if it is recognised by law itself.

Custom is usually a subordinate source of law in the modern legal system and in that sense, it is open for statutes or legislation to deprive it of its legal statutes. This fact has prompted Austin to proclaim that customs are not law unless and until they are incorporated or sanctioned by law which he says to be the command of the sovereign. The fact that customs may be recognised and taken into account applying it to practical cases, Austin explains, on the ground of *tacit command* theory. This was a logical necessity for Austin because if he did not deploy the theory of tacit command, his main hypotheses that the laws are commands backed by sanction would have proved inconsistent. According to this theory laws are commands or orders backed by threat. The sovereign can issue orders himself or he may delegate the authority to his subordinates to issue orders on his behalf. Austin takes this theory a little further and says that the sovereign may expressly delegate authority to his ministers and officials or he may tacitly let his subordinates do things to which he may acquiesce. This he can do

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[42] H.L.A. Hart, THE CONCEPT OF LAW 43 (1961).

[43] H.L.A. Hart, *Id.*

by not interfering with the orders which the subordinate has issued of which he had knowledge.

It is on this basis that the claim rests on, 'custom not being law until it is applied by court or officials in particular case situations'. 'Till the courts apply them in particular cases such rules are mere customs and in no sense law... When the courts use them, and make orders in accordance with them which are enforced, then for the first time these rules receive legal recognition. The sovereign who might have interfered has tacitly ordered his subjects to obey the judge's order fastened on pre-existing customs'.[44] Hart strongly disapproves such analysis of custom being law. He completely destroys the foundation of tacit command theory by offering the following two arguments. First, it is not necessarily the case that until they are in litigation customary rules have no status is law. Were this to be true than why statutes are law even prior to their application by courts in particular cases. In other words, if a statute is law well before they are used by courts in specific cases why should it not be true in the case of certain customs. Secondly, the extended theory of the tacit command presupposes the existence of orders on the part of the sovereign which in a modern legal system is not true. It simply means that the legislation would take away legal status of custom, but if it fails to do so, it may not be a sign of the legislators' acquiescence to it. Further, in the modern complexity of society it is rarely that the attention of legislature or that of the courts is turned to the great turning to the customary rules applied by the court. The non-interference, therefore, cannot be compared to the tacit acceptance of the same.

The concept of law is devoted to the criticism of two essential notions in the theory of law given by Austin-the idea of sovereignty and the element of habit of obedience. In the process, Hart identifies two essential characteristics of law. These are the 'continuity of the authority to make law' and the 'persistence of laws' once made validly. In other words, neither of these two respects modern legal system admits of 'gap or discontinuity'. On each of these points the command theory of law fails to explain the incidence of law in any modern sense. Taking insights from such failures, Hart formulates his own answers in the form of the existence of 'social rules', which constitute the starting point of 'the concept of law'.

The idea of habit of obedience has no reference to the difference of authority and merely refers to the 'socially convergent behaviour'. Habit, moreover, connotes a personal relationship between the sovereign and the individual subject. Suppose that a community of people is ruled by an absolute monarch Rex I. In this community the orders of the Rex constitute command and therefore law if he possesses the positive character of sovereignty. Inasmuch as this positive character signifies a rendering of habitual obedience by the bulk (majority) of subjects, it must be taken to be a personal relationship between the Rex and each of the subjects individually. 'Each regularly does what Rex orders him... If we speak of the population having such a habit, this is like the

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[44] H.L.A. Hart, *Id.*, at 45.

assertion that people habitually frequent (visit) the tavern on a particular night. This will simply mean that the habits of most of the people are convergent'.[45]

In such a conception none of the each of the population, whose actions form convergent social behaviour, are concerned as to whether his own or that of any other's obedience to the Rex is 'right, proper or legitimately demanded'. Such a society cannot give the idea of law and it is in a primitive stage ruled by absolute rulers.

Further the idea of habitual obedience has necessarily its reference point in the form of orders of the sovereign. Hart raises the question that from the notion of habit what one can infer the fact that in any particular situation, when man ordered otherwise, even in the absence of the order, would have acted in the very same way envisaged in the commands? This point is very intuitive because it contains the prognosis of the idea of social rules (of which legal rules are subdivision, see below). This observation of Hart and the genesis of his notion of 'rules' has elements of speculation, instances of it in law are numerous. For example, there is a rule under the Indian penal Code, Section-497, which prohibits bigamy (refer to the proposition, above, that it is the criminal law which comes closer to the notion of command as law). In India this command has to be read as qualified by respective personal laws of the different sections of subjects. The fact is that even in the absence of this command similar results could have been there. The command seems to be applying initially to Hindus and not to Muslims but the fact is that the number of bigamous marriages are more in Hindus than Muslims. This shows that the convergence of social behaviour is not dependent on rules of the legal system nor the existence or validity of legal rules are dependent on social acceptance.

However, a more fundamental question is that when and in what manner the fact of habitual obedience may be said to have been established. For in the absence of it there can be no sovereign, no command and therefore no law. Suppose that after the death of Rex in the instant situation, Rex II (son of Rex) becomes monarch and starts ruling over the subsets. The orders of Rex II are regarded law from the very first day of his crowning. Though habitual obedience to his orders cannot be discerned either on the first day or also for quite some time. This is so because whatever relationship of sovereign and subject having habitual rendering of obedience existed it happened between Rex I and his subjects. Since habitual obedience refers to 'personal relationship between Rex I and his subjects' cannot be attributed to continue between Rex II and the subjects. In other words, habit even as a character of an individual must have reference to a longer time period.

The essence of this analysis can be illustrated by another social situation. Suppose that we happen, on a fine morning spot 'A' reading the newspaper at a particular time. Mere single observation of a single day cannot justify us in saying that 'A' has such a habit. It is only when we observe it on the day, the next day and on subsequent days for quite some time, that it would be legitimate for us to make a generalisation that 'A' has (or

[45] H.L.A. Hart, THE CONCEPT OF LAW 51 (1961).

acquired) a habit of reading the newspaper while taking tea in the morning at a particular time. This is also true to the position of Rex II that before some time has passed, logically, we cannot say that he has established-positive character of sovereignty and people are in the habit of obeying him- a personal relationship is established.

Consequently, till this is achieved by Rex II, analytically, his orders must not be said to be commands and hence laws. There would, necessarily, be a gap in the law-making authority which cannot be tolerated in any modern legal system.

Thus, Austin fails to explain how or why, orders of Rex II are law till he succeeds in establishing the personal relationship of habitual obedience with his subjects. The same question applies to the modern law-making bodies, legislature, by nature whose life and existence is periodical, and keep being succeeded by another set of man. The gap does not happen.

Hart says that this vital character of law can only be explained on the basis of existence of a 'rule' in the society which authorises and confers a 'right or title to the succeeding lawmaker to make law without the need of having notion of habitual obedience. "It is characteristic of our legal system, even in absolute monarchy, to secure uninterrupted it continued law-making power by 'rules' which apply in the transition from one lawmaker to the another, these regulate the succession in advance.... and is natural to use the expression (for such rules) 'rule of succession, title, right to succeed and right to make law'.

It is important to note that, Hart, introduces the 'idea of rule' to explain essential features of law that Austin's notion of habit cannot render legible. The same analysis applies to the other quality of law that is 'persistence of law'. It simply means that law once made tends to persist. If it were to be a product of a mere expression of wish or desired forming command, its continued existence would presuppose the continuance of the will of the commander because its continuity is dependent on the continued existence of the commander's wish. In other words when Rex I dies, his wishes or desires come to an end, therefore, logically laws which he issued in the form of command must also come to an end.

The requirements of negative mark of sovereignty necessarily implies that the sovereign is posited outside or above the law. In other words, there can be no legal limits on his law creating power. Though Austin visualises limitations on the power of sovereign in the form of popular opinion, according to Hart, these are not legal limitations. It imposes no legal duties but merely legal desirability. 'Limits here implies not the presence of duty but the absence of legal power'. 68 Such limitations are called by Austin 'constitutional limitations'. However, in the modern legal system no sovereign is to be found in this sense. Sovereigns represented in its modern form by legislatures have their power limited. Since Hart has talked about social rules, the limitations on the power of lawmakers are prescribed by the rules which confer upon them the power to make law. These limitations are of two kinds: one it may relate to the procedure to be followed for

making law validly and two, restricting the substantive power to make certain laws. For example, rules requiring assent to the bills passed by the legislature, or the fact that legislature cannot make a law deprive a person of his life or liberty unless it prescribes a fair, just, and reasonable procedure. Art 21. 110.

This analysis establishes various points about the legitimacy of Austin's proposition of sovereign: First, in the form of limitations on the sovereign authority to make law, it does not refer to duties imposed upon the legislature by superior authority but signifies that the powers of the sovereign are qualified. Secondly, in order to examine whether a particular law is law, i.e., the reference is not required to be to the unlimited authority of the sovereign. What is important to look into whether the authority which issued this law has the power to do it? Thirdly, it is also not necessary to prove the existence of an unlimited power in order to prove that there exists a legal system forcefully that you need to distinguish between a legally unlimited legislative authority and the other which may have its power limit by virtue of existence of such rules. Fifthly, the negative marks of the sovereign simply signifies that the authority is not subordinate to any other authority but it does not necessarily imply absence of limitations of his power.

Another difficulty with the idea of sovereignty is that such a sovereign is simply not traceable in any modern legal system. Most legal systems have their supreme legislature as the highest law-making body but their power does not imply unlimited authority to make law. The power of the supreme legislature is subject to legal limitations on the exercise of its legislative powers. Yet their enactments, within the limited power are considered plainly law. General limitations are found on the part of the legislature in Federal Constitutions. For example, in our own country, the Parliament cannot make law which violates or restricts any of the fundamental rights Art. 13 all basic structure doctrine. Moreover, laws on certain subjects cannot be made by Parliament because they have been assigned to state legislatures. Hart looks upon the unending power of the Parliament as a limitation itself. According to Hart, the manner in which Austin went on to identify sovereigns is also problematic. He did not identify sovereignty with the elected representatives of the people in a democratic legal system. Rather Austin identified sovereignty with electors of England. A similar proposition he held for Federal constitutions such as the United States of America. Here it may be remarked that his last position raises a contradictory point for his theory itself. If we identify sovereignty with electors/people then two of the most important propositions of Austin come into direct conflict with this proposition. Firstly, the sovereign cannot be indeterminate or even change the body of people which is an inherent quality of the body of electors. Secondly since sovereign, is above the law and no law applies to them than the proposition that electors are sovereign represents negation.

V

Concept of Social Rule

We have seen in the previous pages whenever the theory of Austin was found to be lacking explaining the essential characters of law, Hart invents and introduces his own answer in the form of existence of 'social rules'. The first four chapters of 'the concept of law', in one way or the other, concern the refutation of the idea of law as command grounded in the fact of the general habit of obedience. It is essential to examine, before we take up Hart's concept of law as a system of rules, what lie beneath the two views: Austin's that the law is a command qualified by general habitual obedience, and Hart's claim that no idea of law can be rendered intelligible without having a telling image of 'social rules'. Let's have a brief look at the idea of a rule and how does it differ from habit?

According to Hart there is only one point of similarity between habit and a rule. That is in both cases the behaviour in question must be general though not necessarily invariable. Whenever the occasion arises the same behaviour must be repeated by most of the group. Yet the idea of rule differs in fundamental ways from the idea of habit. Firstly, in the case of rule not only the behaviour converges but the deviations from it are regarded as lapses or faults open to criticism. Moreover, threatened and eminent deviations are met with social pressure for compliance. In that respect, compliance with the rule is not only a matter between the individual and the rule but it becomes a concern for the other fellow individual whose own conduct is not in question. As opposed to it in cases of habit, it signifies a mutual relationship between the person, command and the commander (see below). The second and the third characteristics of 'rule 'are more subtle, in the way conceived by Hart.

The second feature concerns the rule in the way it is taken, according to Hart, by members of society in the form of 'standard', generally accepted by the members of that social group. It means that the criticism of variations or eminent deviations from the standard behaviour (rule) is generally accepted as a 'good reason' for making it. Thus, it signifies a social demand for conformity. The implicit assertion is that this feature is altogether absent in the case of habit. It may be recalled that, it is this character of rule which was designated at the beginning of this essay, as adoption of social contractarian 'survival principle'. The rationality of 'the concept of law' is qualified and conditioned by this survival principle, explained hereinafter.

The third distinguishing feature of rule is something which Hart calls 'internal prospect of a rule'. It depicts the relationship between the individual and the rule which exists in a particular way and the need for such a relationship is not present in the case of habit. 'A social rule has an *internal aspect* in addition to the external aspect, which it shares with social habits, and which consist in the regular behaviour which an observer could

record'.[46] It represents a *critical self-reflective attitude* of the individual towards the rule and his proposed behaviour. This can be illustrated with the simplest example of rules of traffic and a common man (driver of a car). In that case this 'critical reflective attitude' has two aspects. One thing he himself thinks of the rules as far as they are concerned is his own behaviour with respect to the rule i.e., stopping at red. Two, his critical attitude towards the behaviour of a co-driver (another car) and the rule. Thus, his act of criticism, expressed as Nonsense! Does not have a road sense about the behaviour of the other, of jumping off the red lights. In that sense the third characteristic of 'social rules' is intimately connected with the first two. In Hart's own terms:

> 'What is necessary is that there should be a critical reflective attitude to certain pattern of behaviour as a common standard, and that this should display itself in criticisms (including self-criticism), demands for conformity (to the rule), and in acknowledgements 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'.[47]

VI

Principle of Utility and Social Rule

The force of this analysis of Hart has been so great and in association with his unique linguistic style of writing it has blindfolded a complete generation of scholars and legal philosophy in the West. This has happened in two ways: the understanding of Austin and whatever insufficiencies of his theory might have been concerning a modern legal system, secondly, the true nature of law and its basis in the Liberal Democratic legal systems. Habit for Austin represented and was grounded in the element of a particular arrangement of 'power' in the society. As opposed to it the idea of social rules, of Hart, is rooted in the principle of social life or social survival. Both the propositions, here it is argued, firstly, create an illusion or myth of neutrality, in a modern dominant liberal legal system, of making, existence, acceptance, and legitimacy of law. Moreover, secondly, the application or practice of law by people and the officials, whatever the truth of the former, is not determined, in general, by any belief in or acceptance of rule or principle of utility but by the factors or elements which are decisive in the construction and manufacturing of the 'social and what is constitutive of society'. A brief analysis of the terms 'social or society', though not precise in its philosophical and anthropological correctness, has the potential of throwing up several insights as to the soundness of Hart's notion of social rule.

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[46] H.L.A. Hart, THE CONCEPT OF LAW 55 (1961).

[47] *Id.*

This can be done by investigating the question: what is social? Or what is society? Answers to this problem by historians, sociologists, and other social philosophers are bound to vary and diverge greatly. Deontological, political and metaphysical studies try to take recourse to one or the other version of the theory of humanity or human nature. Hart seems to be evading the need for such theories, yet the essence of them is implicit in his theory.

Prior answers to the question invariably tend to bolster the dogmatic reach of liberal legal or political philosophy. Therefore, the convenient, or an uncontaminated way to approach the question is to compare it with its opposite concepts that is 'nature or natural' and answer the question: what is nature? Or what is natural? Would produce the telling images of two worlds, one, of nature and the other of social, which human beings have, though seldom being conscious of it. Each individual can have and do have the two worlds in him, yet the two tend to infuse in each other and represent to him as one. This problem can be appropriately called the 'myth of perception' of the liberal legal philosophy, illustrated herein below.

Anything that is given or found on this earth or cosmos, unadulterated that is not having human contribution may be said to belong to nature or is natural. But something more needs to be stated of the proposition. The given may be taken to be referring to something divine, or extra-divine but not human that is the mechanism of cosmos itself. Everything that is not man-made or artificial may be seen to be natural. Thus, living creatures on this earth, natural resources, plants, animals and human beings as part of a larger family of animals, air, sunlight, the oxygen we breathe in, water etc. undoubtedly is within the term natural. As opposed to it, 'social' refers to human contribution or something which owes its existence to human creativity. In other words, everything that is not given or not found is social. A thing which cannot be determined, in the sense said above, to be natural, is social. And an aggregate of these constitute society, thus language, culture, sets of norms representing political and economic or private institutions are social and can certainly be included within the meaning of the term 'society'.

So far it is so good. The comparative analysis of nature and society do not represent much difficulty. The 'myth of perception' begins to confound the two worlds when we consider the interface of the two. Teleology and natural political philosophy tend to remove the distinction between natural and social. Questions of a speculative type are generally posed to the nature of investigation in the sphere of natural and social, producing different answers. The natural world, for example, is governed by causal factors that are the driving force. Whereas social and institutions of society are motivated by some definite 'purpose'. An ulterior question is asked of causes or reasons which capacitate human purpose which in turn is located in the field of nature, in the form of human reason, distinctive cognitive faculty with which human being is endowed, properties of labour, or instincts or virtues of man and woman.

However, it may appropriately be assumed that the definite human purpose, towards which the social is intended, is not determined by any norms or principles of philosophy of ethics or deontological. What is decisive is the element of 'social power' produced and constructed by non-neutral individual or group social 'interests'. Thus, it is the objective of individual or group interests represented through the instrumentality of 'power' that is decisive in the construction of the social, including norms, standards and principles of society and social institutions. The institutions and norms are primarily responsible for producing the three individually desirable social goods: wealth, honour, and leisure. Law, whatever part it takes of the social, is primarily concerned in producing socially and securing individually the benefits or advantages of communal human existence.

If this can be accepted as a sufficient explanation of the factors which cause the origin and sustenance of the social as opposed to the natural, including law, many social rules become intelligible. For example, society in India has been stratified in a hierarchical order, regulated by social and legal rules, *sudras and the woman* occupying the lowest rung. Their position, entitlement and dis-entitlement, liabilities and dis-abilities well provided in the law itself. In many respects their position continues to be the same, which 'feminists' writers on law' have sufficiently demonstrated in their writings. The institutions of 'property' and social institutionalisation of natural or social human capacity of creativity called 'labour' represent the most telling examples.

Law and other human norms belong to the social and go to constitute what we know by the name society. What has been identified as the factors for creation of the social, indicated above, can be illustrated with a few examples. It has been a historical fact in India that in its stratified society *sudras* and *women* occupied a very inferior social position. This inferior position was reflected in their states closer to titles and animals as positions and property of other sections of society, having no or minimal social entitlements against the society. It is important to note that though there are social positions that were similar yet *sudras* and women did not form one class in the society. However, that is advantageous and this title meant to be attached to them were not much different. The social and legal rules of society were such that secured almost all social goods, benefits arising out of communal existence: wealth, honour and leisure for the classes except *sudras* and women. The latter class itself was in no sense a homogenous class having application of the same set of social rules. Yet the two classes can be seen to be the broader division of society based on social rules. It is a historical fact that this social reality existed for several millennia.

In so far, the fact is accepted that these historical classes were largely and substantial based on law, the latter cannot be explained as rules something 'having acceptance' of the 'society'. For it goes against the logic of language and human nature that a substantial section of society be willing to accept and believe for such a long time in rules which are against their own vital human interests. The same analysis goes substantially true, in the West, for feudal society: having to substantial element in the form of surfs and Lords, and also for societies having slavery as a social institution. This argument can be better

appreciated if it can be remembered that human society differs qualitatively from what we can call the kingdom of animals. Apart from impulsive and instinctive needs which it shares with animals, human individuals have some higher needs and capacities originating in the realms of cognition which is a unique endowment to mankind. Thus art, labour, inventions, pursuit of knowledge of all kinds, honour, leisure, and a sense of being attached to their products: wealth of distinctive human capacities all owe their existence to the process of cognition. It is this aspect of human life that has been the subject matter of philosophy of autonomy problematize through the agencies of reason, will, and desire. It is an inherent quality of man to value and utilise its distinctive qualities through the process of cognition. If this account is true then something, factors or processes, more subtle than the simple idea of acceptance as a belief in 'rules' or power of an individual or a definite group of individuals; sovereign, must be involved in the answer to the question: what is law, its making and enforcement?

Here we want to propose the thesis that whatever positivist theories, be it Austin, Bentham, or the currently dominant positivism of Hart, they all successfully tried to control strategically the images of social reality and present a constructed truth about 'law' as found in the society. The controlled images of reality and the constructed truth about society are dogmatically made to live on the same factor of engendered social fear, for Austin the danger of lapsing into anarchy, and for Hart the imminent threat to social survival. A unique point to be noted from their writings is that the threats or the danger is not external to the society rather it is internal and comes from within the society itself. It seems, the idea is that the threats and dangers originate from the facts of conflicts presumed or apparently to be inherent in any form of human coexistence requiring social solution in the form of control of human behaviour by law conceived by way of 'duties' or 'obligation'. Hence both Austin and Hart explain the incidence of law as duty or absence of options and choices that is freedom of action. However, what they hide from our eyes in so conceiving law with the answer to the question or both, why incidence of duty or obligation falls upon, by law, on one individual or sections of individuals and not upon the other. On this count the explanations of society and social institutions by the social contact revivalists such as John Rawls or the neo-liberals, for example Hayek or Robert Nozick are not exceptions.

Speaking from the retrospective location of the Indian past, why a person cannot take up a study of higher Scriptures, why certain individuals do not qualify to occupy public office, why a certain section of society condemned to only certain kinds of what a job socially considered to be mean, only a person belonging to a certain section or caste is entitled to occupy offices of religious institutions, different norms other social norms applicable to different people as to social and appropriately entitlements, existence of social rules depriving of individual choices for certain man and woman, once different punishment at attached to persons of different sections of society for the same kind of actions conceived as wrong or offence, even why different the stature of purity attached to different person and their personality in the society all sanctified on the basis of law?

The existence of such laws and the corresponding social facts cannot be explained on the basis of either power of a person or definite group of persons or on the idea of acceptance or belief about rules of law. If the basis of modern philosophy is to be accepted in view of its foundation on individual autonomy, as discussed above, then the survival and relapse theory has to be abandoned. Persons deprived and dis-entitlement by law constituted, certainly, the majority of the society. Neither the philosophical nor empirical studies can boast to itself that the majority of the society accepted or conceded to such laws voluntarily and willingly merely in order that the society must survive and continue as argued by Hart nor it can be proved that they were bound to obey the power of an individual or a group of individuals as held Austin.

Our present thesis would not be supported well if we stick only to the instances from the past. It is also not that the existence of law in the form, explained above, is merely a matter of history. Law very much continues to exist in the similar fashion even in the twenty first century. But it would be more correct to say that law exists in that form and substance in all liberal legal systems of the present time. The two current examples of the existence of such law in our own time are presented by the institution of property and the notion of justice and access to Justice through the profession of lawyering. It's not that these are the only two examples which can explain the problem we have undertaken. In almost all fields of society the existence of law and its working is more or less similar.

From the point of view of history of philosophy, the theories of labour, property and the associated idea of individual choice which was manifested in its legal incarnation as freedom of contracts, arose simultaneously in the context of each-other. The principal function of these theories was to provide a justification for the social institutions developed in the post feudal age. Be it social contractarians, meta-physicists, or utilitarians, all classical writers and their modern descendants, are primarily involved in the exercise of rationalising what had has got produced as a necessary bi-product of the processes and factors which are primarily responsible for the creation of the 'social', discussed above. Thus, the European colonisers who went to the new lands devised social institutions including rules subjugating and dominating the natives and exploiting their natural resources in accordance with the demands of mercantilism, a new stage of development of human civilisation. Yet it is important to bear in mind that the brigades of settlers, in the new lands, continued to be governed by laws dualistic in nature found from the homeland, regulating the relations of serfs and lords and so forth. Mercantilism and its higher manifestations in the form of industrialism or capitalism presupposed a similar foundation in philosophy about the notion of 'labour', 'property', and individual liberty/autonomy'.[48] It was similarly dependent on a requisite theory of

[48] *See generally* Karl Polanyi, THE GREAT TRANSFORMATION (1944); Karl Renner, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1949, 1976); B. H. Baden Powell, THE LAND SYSTEMS OF BRITISH INDIA: BEING A MANUAL OF THE LAND-TENURES AND

Contd…

property, the classical manifestation of it is to be found in the writings of John Locke. Thus, the institution of property came to be seen as a product of and connected with the personality of the individual drawing the mask of latter in the form of contribution by way of labour.

Though the modern theories have not so far been successful in any true sense to explain the incidence of property being transferred from one person to another through the notion of inheritance, some of the writers have found justification in the form of contract, such as Kant, Hugo, etc., based on individual freedom of choice, has given the institution of property a character of permanency. Without this character modern capitalist legal system would not have been possible. The second important character of modern social or legal notion of property, a feature connected and dependent upon the first, is that by way of social rules it carries with it the idea that it can grow like an organism and what is produced by the utilisation of it, forms an integral part of it. It is paradoxical that the second feature belies the very first foundation of the institution of property in the form of labour. Yet the social rules and their legal siblings adopt this dualistic paradoxical position about the institution of property and rationalise them in the form of laws. The growth of the organism of property is no longer dependent on the original sermon of labour but is mediated, un-associated with labour, by rules of markets having legitimacy in the legal system. Thus, a person who has made some capital/money, may be initially, by use of his labour or skill may wish to put the same in the form of investment, in the capital market or for example, real estate. And the same will grow unassisted by his own skills or labour in any real sense. The proceeds of the growth can only belong to him and forms part of his property. The rules on the subjects are more often formulated in terms of rights and duties.

A critical look upon these sets of rules of laws, that are made to operate the institution of property, in the modern legal system, cannot be explained either by power theory of Austin or acceptance and belief notion of Hart. For example, in India, 80% people may live without adequate food or decent accommodation, yet the rules of law prescribed that the 20% of citizenry can own or control more than 80% of national wealth/resources. More than half of the population can go without inviolable shelter, the minority which controls the resources are entitled to invest capital in real estate for the growth of their own property organism. The majority of citizens are deprived of basic lifesaving medicine and health care facilities, yet the society can have a system of super speciality of hospitals only within the reach of a minuscule proportion of population. 'Access to justice' too is primarily dependent and conditioned by the capacity to pay for 'good' lawyers, the first and the last pedestal to reach at one's own truth and meet one's fate with the law. Therefore, 'justice' constitutes the greatest socially designed optical illusion to the consciousness of the common man.

OF THE SYSTEMS OF LAND-REVENUE ADMINISTRATION PREVALENT IN THE SEVERAL PROVINCES (1841-1901).

These all 'socially produced' deprivations and denials are made to sustain on the foundations provided by the legal institution of 'property' primarily formulated by law in the forms of rules defining and determining ownership and possession, their acquisition, retention, and loss. It would, therefore, be utterly self-negating to believe with Hart and Austin that the deprived and denied majority accepts such rules of law with a view to cooperate in the continuance of social survival or of the fear of relapsing into anarchy. The intuitive idea is that if the social institutions were to serve basic human needs, it must show deference to the natural human requirements or necessities of each member of the society.

VII

Conclusion

Legal positivism emerged as the only alternative school in jurisprudence in the 19th to 20th centuries with the emergence of industrial revolution. This school is believed to be transformative in cutting the knot of medieval scholasticism and speculative but naturalised justifications of law provided since Greek and Roman Ages. In the beginning of European Enlightenment, intellectual and scientific upheavals eclipsed the existential questions associated with human life. As Matthew Arnold depicted in his Magnum Opus *Dover Beach*, how scientific and technological developments overshadowed the 'sea of faith' and significance of love in humans' life.[49] With the breakdown of 'traditional authorities'[50] human beings remained alone as individuals to face the uncertainty of life. The instrumental nature of science was innovated as a tool to create a utilitarian value system for human beings and to justify the newly established secularized institutions and their practices. In words of Matthew Arnold:

'The Sea of Faith,
Was once, too, at the full, and round earth's shore,
Lay like the folds of a bright girdle furled'.
But now I only hear,
Its melancholy, long, withdrawing roar,
Retreating, to the breath,
Of the night wind, down the vast edges drear,
And naked shingles of the world.

Ah, love, let us be true,
To one another! For the world, which seems,
To lie before us like a land of dreams,
So various, so beautiful, so new,

[49] Matthew Arnold, DOVER BEACH AND OTHER POEMS 86-87 (1984, 1994).
[50] Max Weber, THE VOCATION LECTURES 34 (Rodney Livingstone *trans.*, 2004).

Hath really neither joy, nor love, nor light,
Nor certitude, nor peace, nor help for pain;
And we are here as on a darling plain,
Swept with confused alarms of struggle and flight,
Where ignorant armies clash by night.[51]

This phenomenon was described by Max Weber as 'disenchantment of the world'[52]. The scientific progress was able to explain the methodological questions but remained insignificant to answer the most fundamental questions, such as what is the meaning and purpose of life and death? What is the right thing to do? And what is the significance of love and freedom? Scientific progress ushered the establishment of a parallel human world that aspired to dominate over nature and natural process. The reliance over 'technological instrumentalism'[53] was based on mechanical thinking to produce and organise an efficient society. In this context, philosophers like Thomas Hobbes, Jeremy Bentham, John Austin, Hart, and others endeavoured to organize a society based on empiricism and utilitarianism. As Jeremy Bentham believed 'Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do'.[54] These thinkers conceptualized a worldview based on scientific and technological power of innovation and creation of a new society. They had faith in, what Francis Bacon expressed, knowledge as power.[55] Human power was considered as significant to mould the natural process into an anthropocentric system of institution by selective intervention through artificial or symbolic reason. In this sense, positive law was conceived to suit human conditions and to vertically erect human power over the law of nature. In this context, John Austin laboured hard to bring clarity in the conception of what he calls 'positive law' and how it is different from other forms of laws, which may not be strictly or properly called as law.[56] He envisioned to separate further the positive law from positive morality which is the defining feature of Legal Positivism since then.[57]

John Austin applied analytical methods in defining and categorizing the concept of positive law so as to eliminate the ethics and metaphysics from the system of positive

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[51] Matthew Arnold, DOVER BEACH AND OTHER POEMS 86-87 (1984, 1994).

[52] Max Weber, THE VOCATION LECTURES 34 (Rodney Livingstone *trans.*, 2004).

[53] *See generally* Gerrett Hardin, *The Tragedy of the Commons* in John Benson *(ed.)*, ENVIRONMENTAL ETHICS: AN INTRODUCTION WITH READINGS (2000).

[54] Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1876).

[55] Francis Bacon, NOVUM ORGANUM 11 (1620); ("Knowledge and human power are synonymous, since the ignorance of the cause frustrate the effect; for nature is only subdued by submission, and that which in contemplative philosophy corresponds with the cause in practical science becomes the rule").

[56] John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 1-7 (1832).

[57] John Austin, *Id.*

law. In this process, he narrowed down the scope and characteristics of law around sovereign powers, its general command and obligation ensued from it, and the failure to comply on the part of the politically inferior attracts sanction.[58] John Austin's conception of positive law had to pass a litmus test during the fascism in Italy and Nazism in Germany before the Second World War. The Nuremberg trial exposed the limitations of his system of positive law resulting in revision of his thesis by Hart. Especially, the argument that law is a command of the sovereign backed by sanction was not accepted as the valid criterion of defining the characteristics of law. Without a system of its evaluation on the scale of value, law becomes an end in itself. Such a narrow vision is defined by Judith Shklar as 'legalism'.[59] In this sense, it is deduced from the judgment of the Nuremberg trial that law cannot be an end in itself. It is a means to a certain other end. It is a tool to realise justice or social transformation.[60]

H.L.A. Hart endeavoured to refine and mould the imperative theory of law expounded by John Austin, in particular, the fear psychology in obedience to law. He tried to defend the tradition of legal positivism that emerged after the industrial revolution in Europe. Hart was aware of the development of Legal Realism, Historical School, Sociological School, and revival of Natural law school. His objective was to defend the thesis that law and morality are the two separate and different normative standards and they must not be intermixed. From the experience of various sociologists and anthropologists, he concluded that pre-modern societies had social rules as the primary normative standard which conferred obligations to the people.[61] Such social rules were internalized by the people in daily behaviours like a chess player begins with the game by accepting its rules and becomes self-reflective and critical about the conformity or deviance to the rules. A similar process is visible in the learning of languages and its practices. Language is not always rationally used; its structure, system of signs, as well as interpretation and meanings are internalized through cultural and educational conditioning. It is also well established by a world-renowned linguist Noam Chomsky that ability to acquire language is dependent on the internal 'universal structure of grammar' evolved genetically among the human beings.[62] But a particular language is internalised by human beings through conscious training. However, its practices remain by and large unconscious.

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[58] John Austin, *Id*.

[59] Judith N. Shklar, LEGALISM: AN ESSAY ON LAW, MORALS, AND POLITICS 1 (1964); ("What is legalism? It is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationship to consist of duties and rights determined by rules").

[60] Upendra Baxi, TOWARDS A SOCIOLOGY OF INDIAN LAW (1985). Roscoe Pound, JURISPRUDENCE Vol. III, 325 (2000).

[61] H.L.A. Hart, THE CONCEPT OF LAW 86-88 (3rd Edition, 1961, 2012).

[62] Noam Chomsky & Robert C. Berwick, WHY ONLY US: LANGUAGE AND EVOLUTION 6 (2016).

Ludwig Wittgenstein, after observing the practices of language throughout his life, observed that there is no objective or fixed meaning of any word.[63] Art of language is conventional and its meaning is differently understood in context of its social applications; this is conceptualised by him as 'language games'[64]. It is usually observed that use of language is not always conscious; the improvisation of language and expansion of knowledge systems are creative acts performed by human beings in each unique situation.[65] This suggests that the rules of grammar are not always consciously used by the people. The initial acquisition of language in childhood is premised on conscious training but each child acquires the language in its own idiosyncratic way.[66] However, it is internalised like inner-traits in the social practices so much so that one hardly remains attentive to the linguistic practices in social sense, unless there is a communication failure to achieve the desired social objectives of communication. Furthermore, a specialised group of linguists or the philosophers of language devotes the time to create and refine its rules for the benefits of its members.

This scenario applies to the internalization of rules as social practices as well. Such rules establish a standard of duty internalised by the people which are conformed unconsciously or subconsciously, unless there is a conflict between the various duties. Such conflicts attract the innovation of secondary rules, such as 'rule of recognition', 'rule of change', and 'rule of adjudication'.[67] As per Hart, pre-modern society had no proper legal system even if they had the duty conferring social rules.[68] Such societies, as per his exploration, lacked the secondary rules.[69] Therefore, in spite of having primary rules, such society remained uncertain about the social rules and suffered from the rigidity of rules and inefficacy of the administration and adjudication of social rules.[70] Hart, therefore, conceptualized two kinds of rules; firstly primary rules as obligation conferring rules applicable to citizens and officials, secondly secondary rules as power conferring rules applicable exclusively to the officials.[71] Secondary rules are instrumental in the conscious application of rules to recognise, change, or adjudicate the primary rules on the basis of 'rational legal authority'.[72] These rules are significant in

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[63] Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS 175 (1953, 2010); ("Our mistake is to look for an explanation where we ought to regard the fact as 'proto-phenomena'. That is, where we ought to say: *this is the language-game that is being played*").

[64] Ludwig Wittgenstein, *Id.*

[65] Noam Chomsky & Michel Foucault, THE CHOMSKY-FOUCAULT DEBATE ON HUMAN NATURE 2-3 (2006).

[66] Noam Chomsky & Michel Foucault, *Id.*

[67] H.L.A. Hart, THE CONCEPT OF LAW 97-98 (3rd Edition, 1961, 2012).

[68] H.L.A. Hart, Id., at 249-250.

[69] H.L.A. Hart, *Id.*

[70] H.L.A. Hart, *Id.*, at 98.

[71] H.L.A. Hart, *Id.*

[72] Max Weber, THE VOCATION LECTURES 34 (Rodney Livingstone *trans.*, 2004).

transforming a legal system and maintaining the certainty, adaptability, and efficiency of primary rules.[73]

Unsolved Questions in Hart's Conception of Primary and Secondary Rules

John Austin's conception, that law is a command of the sovereign, which is obeyed by the bulk of the population due to fear of sanction, was criticized and modified by Hart. He differentiated between a gunman's command and social rules which confer obligations to the people.[74] As per Hart, those rules are internalized by people in their mental and social disposition. Hart tried to humanize Austin's conception of law by introducing soft positivism so much so that the language of command and sanction was replaced by internalization of rules in social behaviours. What is so striking is that Hart did nothing new except changing Austin's language in a humanized way.

The process of internalizing the rules is akin to what Norbert Elias calls 'civilizing process'.[75] The process to stimulate reason, science, or the development of various forms of disciplines in schools, colleges, universities, prisons, or armies are nothing more than establishing a power relationship within higher and lower self. The disciplinary techniques are used to create a conflicting and conflicted ego torn apart between what is and what ought to be, therefore the civilizing process is cruel and violent. The modern culture does not usually exemplify an external force ready to crush an unfortunate person; it inculcates a superego within the self, a voice of society, an internalized sign, which condemns the free urge of a being, limits it blooming by the dark mystery of fear and insecurity. Obedience is replaced by docility as ably demonstrated by Michel Foucault in 'The Discipline and Punish'.[76] In Hart's paradigm of rules, the 'authoritarian power'[77] is replaced by 'technological power'.[78] The essence of this power is not

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[73] H.L.A. Hart, THE CONCEPT OF LAW 94 (3rd Edition, 1961, 2012).

[74] H.L.A. Hart, THE CONCEPT OF LAW 23 (3rd Edition, 1961, 2012).

[75] Norbert Elias, THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS 1-15 (2000).

[76] *See generally* Michel Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (2012).

[77] Lewis Mumford, ART AND TECHNICS XXV-XXVII (1952, 2000). See also, Lewis Mumford, Authoritarian and Democratic Technics, Biophily2 (1972), *available at*: https://www.youtube.com/watch?v=VqRuEhHKVXY (last visited June 10, 2024); (Authoritarian power, produced by the authoritarian techniques by the widespread machinations of socio-political and economic life of the human beings. The birth of the planned economy, the culture of mass production and consumption, industrialization and market economy were developed by the machinations of human thoughts and limbs, mechanization of human labour and erecting a relationship of domination over nature and society, and the symbolization of value in form of money).

[78] 'Technological power' symbolizes the inner conflicts within the self, whereas the technology of the higher self has the functions to restrict the functioning of the lower self. The prior is the reflection of the 'father principle' and the latter is the naïve minor self, whose instinctual inclinations are required to be constantly observed, tamed, and civilized.

technological in the classical sense. This power is provisionally deployed, temporally managed, and subtly penetrated in the veins and bloods of the rationalized Homo sapiens.[79] The disciplinary power is initially deployed by the various social, political, religious, and educational institutions, which are instrumental to erect a technological relationship between ego and superego within the self. Human beings are no longer considered as rational agents but 'enframed genes'[80] by the technological prowess of the modernized society. The humanized and modernized technologies in form of primary and secondary rules warp the imaginations of human beings and thrive on the base of psychological insecurity and fear transmitted by history since time immemorial.[81] The social rules ask for conformity to certain patterned duties fixed by the normative standard of society. The inner discipline or a sense of civic duty does not emanate from freedom of the will. The normative standard of a society fixes the role of each member of the group and non-conformity to those rules attracts severe criticisms and socially organized sanctions. Henceforth, violence has been and remains to the core of positive law, even a soft version of legal positivism expounded by Hart fails to provide a cogent solution to this challenge.

It is difficult to believe that ancient society did not have any organized legal system and the pre-modern people could not develop an organized system of law based on secondary rules for the purpose of ascertaining, changing, and adjudicating between the conflicting rules. However, his observation is nothing sort of over-generalization. His observation is not authentic and suffers from the fictitious progressivism. The historical exploration of pre-modern society has established the fact that, for instance in India, ancient people had the rules authorizing certain people to ascertain and adjudicate between the conflicting rules.[82] *Dharmasastras* in India prescribed well-organized systems of rules and procedures to ascertain the rules and adjudicate the social disputes.[83] The sources of Hindu law, for instance, had relative weightage against each-other, and which one is valid in a particular case was decided by the King assisted by judges.[84] The priestly class had the social legitimacy to innovate with the legal principles and a large domain of law was customary in practices.[85] There was an organized set of rules of procedure to administer law and systematic-logical structure of the rules of

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[79] Michel Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 135-194 (Alan Sheridan *trans.*, 1975, 1995).

[80] Martin Heidegger, THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 19 (William Lovitt *trans.*, 1977).

[81] *See* Jiddu Krishnamurti, FREEDOM FROM THE KNOWN (1969).

[82] *See* J. Duncan M. Derrett, RELIGION, LAW AND THE STATE IN INDIA 400-436 (1968, 1999). Robert Lingat, THE CLASSICAL LAW OF INDIA (1973). *See also* P.V. Kane, HISTORY OF DHARMAŚĀSTRA VOL. I-V (1930). *See also* Max Muller, THE SACRED BOOKS OF THE EAST Vol. XXV 254-260 (1886).

[83] P.V. Kane, *Id.*

[84] Max Muller, THE SACRED BOOKS OF THE EAST Vol. XXV 254-260 (1886).

[85] See J. Duncan M. Derrett, RELIGION, LAW AND THE STATE IN INDIA (1968, 1999).

evidence, which suggest that ante-modern versus modern categorization of society based on traditional or scientific rationality is as true as fictitious tales imagined and crafted by a novelist.[86]

H.L.A. Hart, like any other positivist, envisioned the concept of law as a self-contained system with slight modification. Judith Shklar, however, exposed the limitation of what she calls 'legalism' as a self-contained system of rules devoid of other values, such as morality or politics. The legal rationality is only a manifestation of the dark matter hidden in the cultural pattern and ethical postulates. The legal realists, such as Oliver Wendell Holmes and Jerome Frank, contemplated and demonstrated the extra-legal influences in the development and functions of law.[87] Therefore, one is required to be very cautious in excluding the values of politics, morality, religion, or the functionality of the economic system from the conception and functioning of law. The core element of law is always non-legal; therefore, it is unrealistic to accept that what is law and what ought to be law can ever be separated in the context of a society governed by a normative system of primary and secondary rules internalized by citizens and officials. The moral elements, religious convictions, and political considerations are the key factors to understand the conception, characteristics, and functions of law. The school of Legal Pluralism expounded and discovered the idea of 'multiple normative systems in a social field'[88] to expose a parochial characterization of the rules within the circumference of 'rational-legal authority'[89] deployed by the State. However, the legal positivism has failed to exclude the plural dimensions of law co-existing in relative framework of time and space, text and context, symbolic structure and psychic functions, in a sphere of social practices or natural manifestation, or on the scale of local, global, and 'glocal', etc.

His attempt, like other positivists, to eliminate the speculative or metaphysical aspects from jurisprudence failed, since all the positivists endeavoured to create anthropocentric law, like a spider creates a world of its own and wanders around it with complete certainty. However, metaphysics is the basis of human ingenuity and mysteries, making the world of human beings interesting and alive. As Erwin Schrodinger puts:

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[86] For such a progressive categorisation *see* Henry Sumner Maine, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 170 (1861). Social Contract Theories also radicalized the division between nature and culture, barbarism and civilization, savagery and rational, etc., resulting into the colonization of space, time, geography, culture, history, sciences and social sciences, and the humans' abilities of free thinking.

[87] Oliver Wendell Holmes, *The Path of Law* 110 (5) HARVARD LAW REVIEW 991-1009 (1997). Jerome Frank, LAW AND THE MODERN MIND (1930).

[88] Sally Falk Moore, *Law and social change: The Semi-Autonomous Social Field as an Appropriate Subject of Study* 7 (4) LAW & SOCIETY REVIEW 719-746 (1973).

[89] Max Weber, THE VOCATION LECTURES 34 (Rodney Livingstone *trans.*, 2004).

> 'It is relatively easy to sweep away the whole of metaphysics, as Kant did. The slightest puff in its direction blows it away, and what was needed was not so much a powerful pair of lungs to provide the blast, as a powerful dose of courage to turn it against such a timelessly venerable house of cards. But you must not think that what has then been achieved is the actual elimination of metaphysics from the empirical content of human knowledge. In fact, if we cut out all metaphysics it will be found to be vastly more difficult, indeed probably quite impossible, to give any intelligible account of even the most circumscribed area of specialization within any specialized science you please'.[90]

The exploration under legal pluralism by sociologists and anthropologists suggest a short and limited history of a state-centric law in various societies; the multiple structures and functions of law were found in society in various forms, like a 'living law'[91] or 'social law'[92], natural law, human rights and international law.[93] It is realistic to say that ethics is condemned to plurality. Therefore, the content and context of law cannot be separated from social, political, ethical, or historical aspects. This is the reason Julius Stone once described the law as 'lawyers' extra version'.[94] To substantiate his perspective, one is to investigate the source of religious convictions in a person. As per Carl Jung, the human psyche is profoundly embedded in the religious symbols, values, and meanings.[95] Therefore, every endeavour to eliminate metaphysics from the concept and functions of law is bound to fail.

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[90] Erwin Schrödinger, MY VIEW OF THE WORLD 3 (1964).

[91] *See* Eugen Ehrlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (2002).

[92] Alan Hunt, *On Georges Gurvitch, Sociology of Law* in A. Javier Trevino *(ed.)*, CLASSIC WRITINGS IN LAW AND SOCIETY 174-176 (2011).

[93] Werner Menski, *Sanskrit law: Excavating Vedic Legal Pluralism*, SOAS SCHOOL OF LAW RESEARCH PAPER 05-2010 6-7 (2010).

[94] Don Harding, *Reflections on Working with Julius Stone on Sociological Jurisprudence* 10 Bull. Austl. Soc. Leg. Phil. 137 (1986). Julius Stone, LEGAL SYSTEM AND LAWYERS' REASONINGS 16 (1964).

[95] Carl G. Jung, MAN AND HIS SYMBOLS (1964, 2023).