PROFESSOR HARTS CONCEPT OF LAW

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LEGAL THEORY

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1) INTRODUCTION

Herbert Lionel Adolphus Hart was born in 1907. He practised at the Chancery Bar and thereafter, worked as a Professor of Jurisprudence in Oxford during 1952-68. Then he joined as a Principal of Brasnose college, Oxford. He rejected Austin`s theory of analytical positivism and expounded his legal theory based on the relationship between law and society. He favoured analytical approach to law for better understanding of it. Thus Hart`s notion of law is altogether different from his predecessors because he believed that law, coercion and morality are related social phenomena having sociological implications. His classic work "the concept of law" was written in criticism of Austins`s theory.[1]

The Concept of Law (1961) is an analysis of the relation between law, coercion, and morality, and it is an attempt to clarify the question of whether all laws may be properly conceptualized as coercive orders or as moral commands. Hart says that there is no logically necessary connection between law and coercion or between law and morality. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality. He also explains that to conceptualize all laws as coercive orders or as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. He argues that to describe all laws as coercive orders is to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application.

1.The main works of H.L.A. Hart include the concept of law (1961); Law, Liberty & Morality (1963); Morality of criminal Law (1965); Punishment and Responsibility (1967). He also wrote causation in the law in 1959 in co-authorship of A.M. Honore.

Laws are rules that may forbid individuals to perform various kinds of actions or that may impose various obligations on individuals. Laws may require individuals to undergo punishment for injuring other

individuals. They may also specify how contracts are to be arranged and how official documents are to be created. They may also specify how legislatures are to be assembled and how courts are to function. They may specify how new laws are to be enacted and how old laws are to be changed. They may exert coercive power over individuals by imposing penalties on those individuals who do not comply with various kinds of duties or obligations. However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them.

2) HART`S CONCEPT OF LAW

According to Hart, law is a system of two types of rules the union of which provides key to the science of jurisprudence. These rules, he called as `primary` and `secondary` rules. Rejecting Austin`s view that law is a command, H.L.A. Hart emphasised that primary rules are duty-imposing, while secondary rules confer power and the union of the two is the essence of law. The primary rules which impose duty upon individual are binding because of the popular acceptance such as rules of kinship, family, sentiments etc. These being unofficial rules, they suffer from three major defects, namely, (1) uncertainity, (2) static character; and (3) inefficiency. Besides, there is no agency for deciding about these rules.

The secondary rules which are power conferring, enable the legistors to modify their policies according to the needs of the society. In fact they seek to remedy the defects of the primary rules and it is out of the union of these two types of rules that law takes its birth.[2] Bringing out the distinction between primary and secondary rules, Eric Colvin, observed that under the primary rules, individuals are required to do or abstain from doing certain acts, whether they wish to do so or not. The secondary rules are in a sense dependent on primary rules themselves, for they provide that human beings may by doing or say certain things, introduce new rules of primary type, extinguish or determine their incidence or control their operations. Thus the primary rules which impose duties are concerned with actions involving physical movement or changes whereas the secondary rules which confer public or private powers provide for operations which lead to creation or variation of duties or obligation.[3]

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2. Hart H.L.A : The concept of Law (1961) p.61.

3. Colvin Eric : Sociology of Secondary Rules, Law journal (1978), p.3.

3) RULE OF RECOGNITION

Professor Hart`s positivism explains the existence of law with reference to the rule of recognition binding force of which depends upon its acceptance. The validity of law is to be tested on the basis of rule of recognition which is similar to Austin`s conception of sovereign. Hart, however, insists that the rule of recognition is not an extra-judicial hypothesis like Kelson`s 'basic Grundnorm'. According to him, rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance. For example, whatever is enacted by British Queen in Parliament is rule of recognition. Again, the various constitutional laws which constitute rule of recognition are rules of positive law which are binding on citizens, officials, legislatures, courts and various other governmental agencies.

Thus, it can be seen that H.L.A. Hart`s conception of positivism centered round the following considerations :-

(1) He accepted law as a command as advocated by Bentham and his disciple Austin ;

(2) He believed that analysis of legal conceptions are worth pursuing as distinguished from more sociological and historical inquiries ;

(3) The judicial decisions were to be deduced from pre-determined rules without recourse to social aims, objectives, policy or morality ;

(4) Moral judgement cannot be defended any rational argument, evidence or proof ; and

(5) The law as it is actually laid town (positum) has to be kept separate from law as it ought to be.

4) HART`S VIEWS ON LAW AND MORALITY

H.L.A. Hart does not denounce the role of natural law in his positivism. Unlike Austin and Kelson, Hart contends that it is necessary for law and morality to have certain element of natural law as a logical necessity. Thus morality is implicit in Hart`s positive law which he describes as union of primary and secondary rules. As a member of society, individual feels morally bound to abide by these rules both as a matter of duty and obligation. Hart, therefor, asserts that law and morality are complementary and supplementary to each other. In his view, there are four attributes of morality, namely:-

- ✓ Importance
- ✓ Immunity from deliberate change
- ✓ Voluntary character of moral offences
- ✓ Forms of moral pressure which separate it from etiquette, custom and other social rules

Criticising Devlin`s view that law demands certain standards of behaviour or moral principles which society should observe and the breach of which should be made punishable as an offence, Hart observed that a balance has to be drawn between the freedom of individuals to have intellectual and artistic freedom and the duty of the law to protect society from depravity and corruption. He accepted that morality is a necessary condition of society and the law has a function to ensure that morality of society does not disintegrate. But he further added that "law`s function is only the last line of defence; other attempts to preserve the accepted morality should come from within the society itself e.g., through education, the mass media, etc."

5) CRITICISM

H.L.A. Hart`s concept of law has been vehemently criticised by some jurist notably, Ronald Dworkin and Lon. L. Fuller. Dworkin denounces Hart`s view of law as a union of primary and secondary rules and exclusion of morality from law. He drew a distinction between rules and principles and pointed out that a legal system cannot be conceived merely has an aggregate of rules but it has to be based on certain solid principles and policies. These principles are broad formulations of generalisation whereas rules are detailed percepts having a distinct and definite effect; they are more specific than principles. Dworkin further observed, "a principle is standard that is to be observed because it is a requirement of justice or fairness or some other dimension of morality." For example, no one can take advantage of his own wrong[4] is a well established principle of law.

Lon Fuller has also criticised Hart`s theory which holds that there is no law other than rules of recognition. He believes that legal system being an instrument to regulate human conduct, must concern itself with both law as "it is" and "as it ought to be". This, in other words means that law cannot be completely divorced from the concept of morality. He says laws may be of little service and may cause both injustice and misery if they do not confirm to the "internal morality". According to Fuller, eight conditions which constitute the internal morality of law are-

4. Riggs v. Palmer, wherein defendant`s right to inherit under the will of a man whom he murdered was challenged.

1. There must be rules,
2. The rules must be published,
3. retractive legislation must not be used abusively,
4. the rules must be understandable,
5. the rules must not be contradictory,
6. the rules must not require the conduct beyond the power of affected parties,
7. the rules must not be changed so frequently that the subjects cannot guide their actions by them,
8. there should be congruence between the rules as announced and their actual enforcement.

As a modern naturalist, Lon Fuller believed that "law represents order simplicitier. Thus "good order is law that corresponds to demand of justice or morality or men`s notion of what ought to be".[5] Therefore, both is and ought seem to be inseparable or indissoluby fused.[6]

5. Fuller : "positivism & Fidelity of Law A Reply to Professor Hart 71, Har L.R. 630 (1957-58)

6. Fuller : Law in Quest of itself (1940) p. 12.

CONCLUSION

In conclusion, I submit that Hart's concept of law is more open than either his typology of rules or his minimum content of natural law suggest. First, the minimum two conditions for the existence of the legal system cannot be deemed necessary and sufficient in their current form. Hart's understatement of the role of standards and principles and the deep inconsistencies in his definition of primary and secondary rule necessitate substantial revision in his typological analysis. Second, Hart's attempt to ground normative standards in the minimum content of natural law (a) fails to guarantee any minimum moral content of rules and (b) fails to ensure that the legal system will eschew coercive obligation

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