

## **H.L.A Hart's Theory of Law: - Primary & Secondary Rules**

Jurisprudence is a name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems. The word 'jurisprudence' has been derived from a Latin word jurisprudentia which means 'knowledge of law'. 'Juris' means law and 'prudentia' means skill or knowledge. Thus, jurisprudence signifies knowledge of law and its application. Jurisprudence is the study of fundamental legal principles. Different jurists have given different definitions of the term jurisprudence as per follows:-

- According to Salmond jurisprudence is the 'Science of the first principles of the civil law'.
- **According to Austin jurisprudence is the 'Philosophy of positive law' etc.**

**Professor Herbert Lionel Adolphus Hart (H.L.A.Hart)** is an influential legal professor. Hart revolutionized the methods of jurisprudence and the philosophy of law. He authored 'The Concept of Law' and made major contributions to political philosophy.

He is regarded as the leading contemporary representative of British positivism. From his book it shows that he is a linguistic, philosopher, barrister and a jurist. To Hart, law is system of rules.

**According to him: "Where there is law, the human conduct non-optional or obligatory."**

Thus idea of obligation is at the core of a Rule. Rules of obligation are supported by great social pressures because they are felt necessary to maintain the society. To Hart, concept of law is equivalent to the legal system. Hart mentioned that rules of law fall into different logical categories that have distinct legal and social functions.

He distinguished primary rules from secondary rules or duty imposing rules from power conferring rule.

Primary rules are rules meant to guide the conduct of the individuals and other legal persons and secondary rules are rules about how primary rules are to be created and recognized.

The example of duty imposing rules are rules of Income Tax Act, Wealth tax Act, etc. which requires that taxes must be paid. The examples of power conferring rules are power to enter into a contract, make will etc. These may be used or ignored.

### **Concept of “Rule”**

Law can be analyzed in terms of rules which is largely based on Hart's theory of law. **According to him, rules are concerned not with what happens but with what is to be done.**

Rules are imperative or prescriptive rather than indicative or descriptive.

Rules have a certain independence or self-legitimizing character. Rules are different from commands. Commands normally call for one unique performance whereas rules have a general application and demands repeated activity.

In some cases rules are constitutive and define the activity in a question like rules of a game while in others they regulate activities which would take place in any case whether the rules existed or not like rules of grammar, of morals and of law.

Rules of game, club, and societies share the feature of rule of law in so far as these are of formal nature, are open to amendment by bodies authorized for this purpose, and some sort of adjudicating process is also found when there is any difficulty as to meaning or the application of these rules. As against these rules of morality or law are not amenable to legislative alteration and are not resolvable by adjudication.

Legal and moral rules both are invitum. Obedience to them is non-optional. Rules of game and club apply only within limited context, to players during the game. Law and morals are concerned with much broader aspects of life. Rules of games are not compulsory; withdrawal and resignation are permanent possibilities. In case of morals, there is no such choice and this is largely true of law also.

Thus according to Hart, **‘Law consists of rules which are of broad application and non-optional character, but which are at the same time amenable to formalization, legislation and adjudication.’**

### **Kinds of Rules**

Rules are of two kinds:-

- Primary Rules
- Secondary Rules

Primary rules regulate the behavior of man in the society. These rules either grant rights or impose obligations on the members of the society.

Example:- Rules of criminal law forbidding murder, robbery, rash driving are primary rules, tort rules, the individual right to freedom of speech, the provisions of contracts that define the primary obligations of the parties, the environmental law rule that forbids discharge of toxic substances in rivers and streams etc.

Secondary rules are those that stipulate how and by whom the primary rules may be formed, recognized modified or extinguished.

**Example:** - Contract law rules that enable parties to form contracts, the rules that allow testators to create a will, the constitutional rules that confer legislative powers on Congress, the statute that authorizes the Supreme Court to promulgate rules of practice and procedure for the federal courts.

Hart's basic idea is quite simple. Primary rules are rules of conduct; they tell you what you are legally obligated to do (or refrain from) and what consequences attach to obedience or disobedience. Thus, the criminal law rules that prohibit theft forbid certain conduct and provide for penalties for violating the prohibition. Technically, the class of secondary rules includes everything except primary rules. For example, secondary rules are legal rules that allow for the creation, extinction, and alteration of secondary rules;

Secondary rules are power-conferring rules. Thus, contract law empowers individuals and firms to make contracts; contracts themselves are usually collections of primary rules.

More precisely, primary rules are rules that govern conduct, and secondary rules are rules that do not. Thus, the distinction between primary and secondary rules is just a bit different than the difference between duty-imposing and power-conferring rules: duty-imposing rules impose duties, whereas power-conferring rules confer power.

This leaves open the possibility that some rules can regulate other rules, but do so by imposing duties. For example, a secondary rule might impose a duty to legislate in a certain way or a prohibition on certain kinds of rule creation. One of the really nifty things about Hart's introduction of the distinction between primary and secondary rules was his account as to why secondary rules are important. We can certainly imagine a system in which there were primary rules, but no secondary rules. This would be a system of customary law. Certain actions would be required; others would be taboo. But there would be no mechanism by which the set of obligations could be changed. Of course, customary law need not be completely static. It is possible that customs might gradually change over time, but this process would require a change in social norms. It could not be legislated. Secondary rules enable relatively more rapid legal change at a lower cost. Moreover secondary rules enable individuals to create customized primary rules that govern their private relationships or privately owned resources.

## **Difference In Gist**

- Under primary rules, human beings are required to do or abstain from certain actions; secondary rules are in a sense parasitic upon or secondary to the first.
- The primary rules bind people whether they like or not, wish or not; secondary rules bestow facilities upon them for realizing their wishes.
- Primary rules are essential for social life whereas secondary rules are necessary for the development of a legal system.[13]

### **Conclusion & Criticism Made On the Rule Theory**

The view of Lord Lloyd is that Hart's description of a developed legal system in terms of a union of primary and secondary rules is undoubtedly of value as a tool of analysis of much that has puzzled both the jurists and the political theorists. Professor Hart himself seems to recognize that his legal system is not necessarily as comprehensive as he appears to indicate since he suggests that there are other elements in a legal system, and in particular the "open texture" of legal rules as well as the relationship of law to morality and justice. Lord Lloyd asks the question whether it is possible to reduce all the rules of the legal system to rules which impose duties and to rules which confer powers. This is an over-simplification of a point. It can be said that many of the so called rules of recognition do not so much confer power but specify criteria which are to be applied in particular cases, such as the rules of procedure and evidence. It is doubtful

whether all the so-called secondary rules can properly be treated as a unified class. Professor Hart concedes that a full detailed taxonomy of the varieties of law still remains to be accomplished.

According to Hart, the rule of recognition is a secondary rule, but the view of Prof. Dias is that it looks more like the acceptance of a special kind of rule than a power. Hart's concept is based on the distinction between rules creating duties and rules creating powers on a legal system is constituted by their union, but the view of Dias is that it is questionable whether such a sharp distinction can be drawn. The same rule can create a power plus a duty to exercise it, or a power plus a duty not to exercise it.

According to Dias, Hart's avowed positivism in relation to his concept of law is open to criticism. Hart says that the acceptance of a rule of recognition rests on social facts, but he does not concern himself with the reasons why, or the circumstances in which, it comes to be accepted. Social and moral considerations may set limits on a rule of recognition at the time of acceptance.

Thus from the conclusion and from the detailed study, the hypothesis of the researcher has proved to be partly correct and partly wrong. The researcher assumed that primary and secondary rules are totally different which proved to be absolutely right and the researcher also assumed that the theory of Hart was accepted by the other jurists, but

many jurists have criticized it and given totally different opinions which can be read in the conclusion.