



## **Applicability of Hart's Concept of Law in India**

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### **Abstract**

*The aim of the article is to analyse H.L.A Hart's concept of law and to determine its applicability in India. According to Hart law is a combination of primary rule of obligation and secondary rules which are power conferring rules to correct primary conduct all defects of primary rules will be remedied by secondary rules. Hart's concept is applicable in present scenario of India when by passing of any legislation or abrogating any redundant law a change in society takes place and primary defects of law are remedied, also the article will discuss about how rules are followed out of obligation and not coercion.*

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### **Introduction**

H.L.A.Hart is the pen name of prominent law scholar Herbert Lionel Adolphus Hart. Hart significantly shifted the focus of jurisprudence and legal theory. In his book "The Idea of Law," he made significant advances in political theory. He is the most prominent exponent of British positivism in the modern era. His work demonstrates his expertise as a philosopher, lawyer, and scholar of language and philosophy. Hart defines law as a set of guidelines. His claim that "where there is law, the human activity is non-optional or obligatory" gets to the heart of the Rule's foundational concept of duty. Strong societal pressures exist in favour of mandatory rules since they are seen as essential to society's survival. Hart equates the notion of law with the judicial system. Hart argued that principles of law may be broken down into many logical categories, each serving a particular legal and social purpose. He made a distinction between fundamental norms and secondary rules, or those that impose duties and those that provide authority. Primary rules are those that are intended to govern the actions of people and other legal entities, whereas secondary rules are those that govern the establishment and recognition of primary rules. Rules such as those included in the Income Tax Act, the Wealth Tax Act, and similar legislation are examples of duty imposing regulations. Rules that grant authority include the ability to form a will or engage into a contract. You may choose to utilize them or not.

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### **Kinds of Rules**

Rules are of two kinds:-

· Primary Rules

· Secondary Rules

- i. Primary norms govern how people should act in a community. The members of society are either granted privileges or made subject to duties by these norms.

Example:- Primary rules include the prohibitions against murder, robbery, and reckless driving; the right to freedom of expression; the terms of contracts that establish the basic responsibilities of the parties; the prohibition against discharging harmful chemicals into rivers and streams; and so on.

- ii. Secondary rules specify the conditions under which primary rules may be established, acknowledged, altered, or repealed, and by whom.

Some examples of such rules include the statute that authorizes the Supreme Court to promulgate rules of practice and procedure for the federal courts, the rules of contract law that enable parties to form contracts, the rules that allow testators to create a will, and the rules of the Constitution that confer legislative powers on Congress.

The notion at Hart's core is straightforward. Primary rules are norms of behavior; they outline the things you must do (or avoid from doing) and the repercussions for breaking them. The provisions of criminal law that make theft illegal thereby make particular actions illegal and set out punishments for those who commit theft. In technical terms, any rules that are not main rules fall under the umbrella of secondary rules. Power-conferring rules, such as secondary rules, are legal rules that permit the enactment, repeal, and amendment of secondary rules. Hence, contract law enables people and businesses to enter into contracts, which are really just collections of fundamental laws. To be more specific, main rules are those that directly affect behavior, whereas secondary rules do not. This means that the gap between main and secondary rules is somewhat less clear cut than the difference between rules that impose responsibilities and regulations that bestow authority. This leaves up the potential of one set of rules putting responsibilities on another set of rules in order to govern them. A secondary rule might mandate a certain legislative approach or forbid the introduction of new types of regulation. Hart's

explanation of the value of secondary rules is one of the many neat things about his introduction of the difference between main and secondary rules. We can conceptualize a system with core rules but no subsidiary ones. This is an example of a customary legal system. There will be things you had to do and things you couldn't. Yet, there would be no way to modify the commitments. Customary law, of course, need not be totally static. Changing traditions takes effort and a shift in societal standards, but it's not impossible. There was no way to make it a law. Changes to the law may be implemented more quickly and at lesser cost with the help of secondary regulations. In addition, secondary rules allow people to make unique main rules that apply just to their own connections and property.

## Applicability in India

Primary rules of obligation suffer from three defects; the remedy for each of three main defects in the simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules.

1. Uncertainty- the simplest form of, or cure for, the uncertainty of the regime of fundamental rules is the insertion of a "rule of recognition," which may take any of a vast number of forms, simple or sophisticated. It may be nothing more than a list or text of the regulations written down or engraved on a public monument. Putting previously unwritten laws into paper is one way to go from the pre-legal to the legal realm. In cases when this is recognized, there is a straightforward secondary rule for determining which norms of duty take precedence.

Hart argues that rule of recognition, which is acknowledged by both private individuals and authoritative criteria, is the bedrock upon which a legal system is built in order to define the main norms of responsibilities. Examples include citing a constitution or statute as authoritative, following common practice or the proclamation of a prominent figure, or citing a prior court decision as precedent. <sup>1</sup>Due to the proliferation of legal authorities in the contemporary judicial system, the norm of recognition has expanded to include constitutional statutes and judicial precedents. So, the rule of recognition encompasses the sources of law, as it has the authority to validate a specific rule derived from that source. Most legal systems rely on judicial or administrative identification of applicable rules as the basis for recognizing them as law; "when a court reaches to that conclusion on the footing that a particular rule has correctly pointed out and termed as law it has obtain a special authoritative status and validity," as one author put it.

Officials have adopted a "internal point of view" of the rule of recognition in order to utilize it as a yardstick by which to judge and uphold the regularity of the populace's conduct, since the rule stipulates the final criterion of validity inside the legal system. Hart has streamlined the meaning of the term "internal point of view" by explaining that when people in a society identify a particular rule of the system, they are really identifying the law. one who uses it implicitly recognizes some rule of the system as legitimate without explicitly announcing their endorsement of the rule of recognition. When there is no legally limiting legislation, a rule of recognition gives a set of criteria of validity to the other rules where one of the rules is supreme, making it an ultimate rule that assures the existence of the main rules.

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Rule of Recognition- A rule of recognition is the ultimate rule that ensures the main rules continue to exist, and it is the ultimate rule because it offers a set of criteria of validity to the other rules in cases when one of the rules is supreme and there is no legally restricted legislature.

- i. The India Contract Act of 1872 codified the minimum age at which a party to a contract must be of legal age in India, eliminating a previous gray area. If a party to the contract is a minor, the agreement is null and invalid from the start under the Indian Contract Act. In addition, if a minor signs a contract before reaching legal adulthood, such contract is null and invalid from the start and cannot be ratified under any circumstances. It is also impossible to ratify an invalid contract. A minor cannot be a party to a contract, but he may be the recipient of the benefits of one.
  - ii. Saptpati- there was an uncertainty about the validity of hindu marriage which was remedied by saptpati defined under the Hindu Marriage Act<sup>2</sup> which says that a marriage to be valid and have a legal sanction by taking seven steps around the holy fire by the bride and groom is mandatory.
2. Static- the remedy for the static quality of the regime of primary rules consists in the introduction of 'rule of change'. Rules of change give citizens and officials the power of modifying the prior state of the law by introducing new rules, new laws. They ascribe, therefore, legislative powers.<sup>3</sup>

Rule of Change- When a competent legislative body has the authority to establish laws, that body should also have the authority to amend those laws. Article 368 of the Constitution grants Parliament the authority to alter the Constitution and the mechanism for doing so, therefore notice of any type need

<sup>1</sup> <https://www.lawteacher.net/free-law-essays/public-law/rule-of-recognition-law-essays.php> accessed on 9.04.2023.

<sup>2</sup> Section 7 Hindu Marriage Act, 1955

<sup>3</sup> [https://journals.openedition.org/revus/2746#:~:text=\(ii\)%20Rules%20of%20change%20give,of%20the%20rule%20of%20recognition](https://journals.openedition.org/revus/2746#:~:text=(ii)%20Rules%20of%20change%20give,of%20the%20rule%20of%20recognition) accessed on 9.04.2023

this authority. As a result, it grants the authority to alter the Constitution. The ability to revoke or do away with obstacles falls within this sphere of influence. It also applies to laws that have been passed down from above.

The simplest form of such rule empowers an individual or body of persons to introduce new primary rule of conduct of the life of the group, or of some class within it and to eliminate old rules. It is in terms of such a rule that the ideas of legislative enactment and repeal are to be understood.

In *S.P. Gupta v. President of India*,<sup>4</sup> the court stated that: every statutory provision must keep pace with changing concepts and values, and it must, to the extent that its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirements of the fast-changing society which is undergoing rapid economic and social transformation.

Also in *M.C Mehta v. Union of India* the court said that with the development and fast changing society the law cannot remain static and that the law has to develop its own new principles; interpret the statutes and the constitution with the changing times.

- i. Sati pratha- was abolished which meant that the wife had to burn on the funeral pyre of the husband this law was against the right to life and liberty of a person so it was abolished.
- ii. Adultery- section 497 of the Indian Penal code was a section dealing with adultery. Only a man who had consensual sexual intercourse with the wife of another man without his consent could have been punished under this offence in India. The law became defunct on 27 September 2018 by a judgement of the Supreme Court of India.

The Supreme Court called the Law unconstitutional because it "treats a husband as the master." However it is still a sufficient ground for divorce as ruled by the Supreme Court.

Because of this problematic interpretation, the Supreme Court in December 2017 decided to accept the public interest litigation in which it has been prayed that the Court strikes down or completely does away with Section 497 of the Indian Penal Code. It has been argued that the section violates two articles of the Constitution of India.

On accepting this petition, the Court in its initial observations noted that this was not the first petition challenging the section - debates and cases on this have been in motion since 1954, making it important for the Court to decide on this question without much ado. It felt that laws are supposed to be gender neutral. However, in this case, it merely makes the woman a victim and thus "creates a dent on the individual independent identity of the woman."

- iii. Article 370 of the Indian constitution gave special status to Jammu and Kashmir—a state in India, located in the northern part of Indian subcontinent, and a part of the larger region of Kashmir, which has been the subject of dispute between India, Pakistan, and China since 1947—conferring it with the power to have a separate constitution, a state flag and autonomy over the internal administration of the state.<sup>5</sup> The government of India revoked this special status in August 2019 through a Presidential Order and the passage of a resolution in Parliament.

The Constitution's Part XXI, Temporary, Transitional, and Special Provisions, is where this item resides. Once Jammu and Kashmir's Constituent Assembly was formed, it was given the authority to make recommendations about whether provisions of the Indian Constitution should be applied to the state, or to propose the outright repeal of Article 370. The 1954 Presidential Order, issued after deliberation with the state's Constituent Assembly, laid forth which provisions of the Indian constitution were applicable to the state. Article 370 was considered to have been a permanent part of the Indian Constitution when the Constituent Assembly disbanded without advocating its abrogation.

Along with Article 35A, this provision establishes that citizens, property owners, and individuals in the Indian state of Jammu and Kashmir are subject to a different legal system than those in the other Indian states. This rule prevented non-Jammu and Kashmiri Indians from buying property in the state of Jammu and Kashmir.

On 5 August 2019, President Ram Nath Kovind issued a constitutional order superseding the 1954 order, and making all the provisions of the Indian constitution applicable to Jammu and Kashmir based on the resolution passed in both houses of India's parliament with 2/3 majority.<sup>6</sup> Following the resolutions passed in both houses of the parliament, he issued a further order on 6 August declaring all the clauses of Article 370 except clause 1 to be inoperative.

In addition, the Jammu and Kashmir Reorganisation Act was passed by the parliament, enacting the division the state of Jammu and Kashmir into two union territories to be called Union Territory of Jammu and Kashmir and Union Territory of Ladakh.<sup>7</sup> The reorganisation took place on 31 October 2019

3. Inefficiency – the defect of inefficiency will be remedied by secondary rules empowering individuals to make authoritative determination of the question whether, on a particular occasion, a primary rule has been broken or not. Those are called "rules of adjudication". Besides identifying the individuals who are to adjudicate, those rules will also define the procedure to be followed. These rules define a group of important legal concepts of judge or court, jurisdiction and judgement.<sup>8</sup>

<sup>4</sup> SP Gupta vs. Union of India, AIR 1982 SC 149.

<sup>5</sup> Article 370: India strips disputed Kashmir of special status, BBC News, 5 August 2019 accessed on 9.04.2023.

<sup>6</sup> Parliament approves Resolution to repeal Article 370; paves way to truly integrate J&K with Indian Union

<sup>7</sup> "Kashmir debate LIVE: LS passes Bill reorganising Jammu and Kashmir". 6 August 2019.

<sup>8</sup> The concept of law, pp.89-95

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Rule of Adjudication- It primarily reflects those rules that provide the Supreme Court the original and Appellate jurisdiction, such as Article 131, 132, 134, and 133, and Article 32, which gives the Supreme Court the right to issue a prerogative writ. Articles 323A and 323B provide courts the authority to rule on legal disputes. The authority granted by the Constitution is detailed in several articles. They allow a judge to make an informed decision on a case.

The Supreme Court of India serves as the apex court of the Indian legal system, which has a highly integrated judicial structure. The Constitution may also be interpreted by the Supreme Court of India and the High Courts of the States. Although making decisions based on the Constitution's overarching ideas, structure, and goals, the Supreme Court has gone beyond the "open texture of law" in its use of this authority. Article 21's "procedure established by law" being replaced with "due process of law" is a prime illustration of this trend.

i. LGBT RIGHTS-

Lesbian, gay, bisexual and transgender (LGBT) people in India may face legal and social difficulties not experienced by non-LGBT persons. Over the past decade, LGBT people in India have increasingly gained tolerance and acceptance, especially in large cities. Nonetheless, most LGBT people in India remain closeted, fearing discrimination from their families, who might see homosexuality as shameful. Discrimination remains a strong presence in rural areas, where LGBT people often face rejection from their families and are forced into opposite-sex marriages. Sexual activity between people of the same gender is legal. Same-sex couples are not legally recognized currently in any form, yet performing a symbolic same-sex marriage is not prohibited under Indian law either.<sup>9</sup> In 2018, the Supreme Court of India decriminalised homosexuality by declaring Section 377 of the Indian Penal Code unconstitutional. Homosexuality was never illegal or a criminal offence in ancient Indian and traditional codes but was criminalised by the British during their rule in India.

Thus this inefficiency was recognised by intervention of judiciary.

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## Conclusion

The primary and secondary rule of conduct is very aptly applied in Indian society as it fulfils all the ingredients of Hart's concept in day to day changing pattern. Also, Hart's view that people follow rules because of Internalization ie, habit is true because not all laws which we follow are because of fear of coercion ex. Wearing helmet while driving two- wheeler is followed because safety of an individual during accident.

To sum up, we may get a very helpful framework for understanding the origins of law and how to discern legitimate laws from invalid ones via Hart's examination of fundamental and secondary rules. In addition to embracing some of the more normative aspects of the law without making any moral judgments, Hart's method also provides a mechanism to reconcile some of the inconsistencies in Austin's theory. Hart notes that individuals will do the right thing even if they know they won't be caught or penalized for breaking a fundamental rule. The theory of John L. Austin cannot account for this finding, as laws are defined by Austin as requests made by a sovereign under the prospect of punishment. Hart says that we need secondary laws to evaluate the legitimacy of the basic laws since this responsibility does not originate from the moral content of the law but from its legality. Those who adopt an internal viewpoint to the law do so on the assumption that the rule of recognition exists, and as such, they agree to be bound by laws that are legitimate according to the criteria set out in the rule of recognition and in the secondary laws derived from this rule. However, I believe that Hart's thesis on judicial judgments ignores the fact that most judges see their function in the legal system as that of interpreters or arbitrators of the law rather than that of legislators. Thus finally I would conclude that as the society is changing dynamically Hart's concept of Law will always be applicable in India.

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<sup>9</sup> "In a first, Gurgaon court recognizes lesbian marriage - Times of India". The Times of India.Retrieved 31 January 2017.