

HART’S THEORY OF LAW

- I. Overview: Hart’s theory of law is often characterized as a hybrid theory, combining elements of legal positivism, natural law legal theory and legal realism. It is more accurate, I think, to conceive of it as a modern version of legal positivism that makes small concessions to legal realism and natural law theory at the margin of the theory. For Hart, law is a hierarchically structured system of social rules. At the bottom are rules that directly guide behavior—requiring or forbidding specific actions. Above these are rules concerning the making, changing, enforcing and adjudicating of the rules in the system.
- II. Fundamental Concepts
 - A. Social Rule: Hart doesn’t give an analysis of a social rule. Instead, he distinguishes between two locutions: “As a rule . . .” and “It is a rule that . . .”. This constitutes at most a rough guide to the notion of a social rule.

| “As a rule . . .” | “It is a rule that . . .” |
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| factual | normative |
| contrary behavior is a mere <i>exception</i> unless it becomes prevalent | contrary behavior is a <i>violation</i> |
| widespread contrary behavior renders it false that “as a rule . . .” | widespread contrary behavior does not necessarily render it false that “it is a rule that . . .” |

- B. Varieties of Social Rules:
 - 1. Primary Social Rules: Primary social rules directly regulate behavior—prohibiting, permitting or requiring actions. For example, such social rules as “Send ‘thank you’ notes for gifts” and “Do not exceed 65 mph on state hiways” are primary social rules.
 - a. Obligation imposing rules: Primary rules impose social obligations when the pressure to conform to them is great, when they are believed necessary to maintain social life or a highly valued aspect of it, and compliance with them may conflict with the desires of those subject to them. Rules of correct grammar are not obligation imposing. Rules of law are.
 - 2. Secondary Social Rules: Secondary social rules are “meta rules”—that is, they are rules about rules. They regulate the making, changing, enforcing, adjudicating, interpreting *etc.* of other rules (both of primary rules and of other secondary rules). Secondary rules would include the following: “Speed limits on state hiways may be set in excess of 65 mph only by the state legislature upon a recommendation by the state Department of

Traffic and Safety” and “Domestic Relations Court does not have the power to order child support for children over 18 years of age”.

III. The Concept of Law: Law is, Hart says, a “union of primary and secondary social rules”. In addition, at least some of these rules must be obligation imposing rules. In order for a system of social rules to constitute a legal system, at least some people subject to they system of rules must “internalize” the rules, seeing them as justification for the imposition of sanctions. Hart’s concession to natural law theory is that the content of a system of legal rules is not completely unrestricted; such a system must aim at the amelioration of the human predicament. That is, in order for a system of social rules to be a legal system, it must at least address itself to problems arising out of mundane facts about human vulnerability, approximate equality of ability, limited scarcity of goods, limited altruism, limited knowledge, *etc.*.

A. The Need for Secondary Rules:

1. Hart considers a system of social rules that contains only primary social rules to be a “primitive legal system” The defects of such a system are:
 - a. Uncertainty
 - b. Static Nature
 - c. Inefficiency

B. Types of secondary rules

1. Rules of Recognition: address the uncertain nature of primitive legal systems by showing how to recognize rules of the system.
2. Rules of Change: address the static nature of primitive legal systems by specifying how to change rules of the system.
3. Rules of Adjudication: address the problem of inefficiency by specifying how, and by whom, disputes concerning the rules are to be resolved.

C. The Ultimate Rule of Recognition (URR): The ultimate rule of recognition of a legal system defines validity for all of the rules of the system. There is no more fundamental rule that defines it as valid. Rather, it exists as a complex social fact about people’s behavior and attitudes. Hart doesn’t suggest a serious candidate for the URR of any real legal system. As a aid to understanding, he suggests that one might suggest that the URR of the British system is “What the Queen in Parliament declares is law”, but this is a ridiculously simplistic URR. It is only slightly better to say that in our system the Constitution itself is the URR. This leaves out many legal rules that are part of our legal system. Still, *for our purposes in this course*, we can think of the Constitution as being the URR.