# DOWNLOAD PDF HARTS THEORY OF LAW

## Chapter 1 : Harts Theory of Law primary and secondary rules | Antonio Holder - blog.quintoapp.com

*Chester v Afshar in context of Harts theory There is a general consensus on the pre-eminence of Harts positivist theories; built on the works of Bentham it maintains that morality and the law are distinct concepts.[1]Hart in developing these theories introduced "the pedigree thesis[2] which is considered central to positivist theory.*

His father was a Jewish tailor of German and Polish origin; his mother, of Polish origin, daughter of successful retailers in the clothing trade, handled customer relations and the finances of their firm. Hart had an elder brother, Albert, and a younger sister, Sybil. He took a First in Classical Greats in  Hart worked at Bletchley Park and was a colleague of the mathematician and codebreaker Alan Turing. Another incident of life at Blenheim which Hart enjoyed recounting was that he shared an office with one of the famous Cambridge spies, Anthony Blunt , a fellow member of MI5. Hart wondered which of the papers on his desk Blunt had managed to read and to pass on to his Soviet controllers. Hart did not return to his legal practice after the War, preferring instead to accept the offer of a teaching fellowship in philosophy, not Law at New College, Oxford. Austin as particularly influential during this time. He was president of the Aristotelian Society from to  In fact her work as civil servant was in fields such as family policy and so would have been of no interest to the Soviets. Nor was her husband in a position to convey to her information of use, despite vague newspaper suggestions, given the sharp separation of his work from that of foreign affairs and its focus on German spies and British turncoats rather than on matters related to the Soviet ally. In fact, Hart was anticommunist. The marriage contained "incompatible personalities", though it lasted right to the end of their lives and gave joy to both at times. Jenifer published her memoirs under the title Ask Me No More in  The Harts had four children, including, late in life, a son who was disabled, the umbilical cord wrapped around his neck having deprived his brain of oxygen. The boy was, despite his handicap, capable of remarkable observations on occasion. As a philosopher, Hart had long been interested in the mind-body problem , and he was thus in some sense professionally interested in his son, as well as emotionally invested, if only because his child was first-hand proof of the complex and unpredictable nature of the relationship between mind and body. The description appears in her book The Spiral Staircase. He subsequently became Principal of Brasenose College, Oxford. Hart died in Oxford in , aged  He is buried there in Wolvercote Cemetery. Hart also had a strong influence on the young John Rawls in the s, when Rawls was a visiting scholar at Oxford shortly after finishing his PhD. Also, conspicuously, Peter Hacker , who took his D. Philosophical method[ edit ] Hart strongly influenced the application of methods in his version of Anglo-American positive law to jurisprudence and the philosophy of law in the English-speaking world. Influenced by John Austin , Ludwig Wittgenstein and Hans Kelsen , Hart brought the tools of analytic, and especially linguistic, philosophy to bear on the central problems of legal theory. Significant in the differences between Hart and Kelsen was the emphasis on the British version of positive law theory which Hart was defending as opposed to the Continental version of positive law theory which Kelsen was defending. This was studied in the University of Toronto Law Journal in an article titled "Leaving the Hart-Dworkin Debate" which maintained that Hart insisted in his book The Concept of Law on the expansive reading of positive law theory to include philosophical and sociological domains of assessment rather than the more focused attention of Kelsen who considered Continental positive law theory as more limited to the domain of jurisprudence itself. In the paper on international law, he sharply attacked the many jurists and international lawyers who had debated whether international law was "really" law. This approach was to be refined and developed by Hart in the last chapter of The Concept of Law , which showed how the use in respect of different social phenomena of an abstract word like law reflected the fact that these phenomena each shared, without necessarily all possessing in common, some distinctive features. Glanville had himself said as much when editing a student text on jurisprudence and he had adopted essentially the same approach to "The Definition of Crime". The book emerged from a set of lectures that Hart began to deliver in , and it is presaged by his Holmes lecture, Positivism and the Separation of Law and Morals, delivered at Harvard Law School. The Concept of Law developed a sophisticated view of legal positivism. Among the many ideas developed in this book are: A distinction between primary and secondary legal rules, such that a

primary rule governs conduct, such as criminal law, and secondary rules govern the procedural methods by which primary rules are enforced, prosecuted and so on. Hart specifically enumerates three secondary rules; they are: The Rule of Recognition , the rule by which any member of society may check to discover what the primary rules of the society are. In a simple society, Hart states, the recognition rule might only be what is written in a sacred book or what is said by a ruler. The Rule of Change, the rule by which existing primary rules might be created, altered or deleted. The Rule of Adjudication, the rule by which the society might determine when a rule has been violated and prescribe a remedy. A concept of "open-textured" terms in law, along the lines of Wittgenstein and Waisman, and "defeasible" terms later famously disavowed: As a result of his famous debate with Patrick Devlin, Baron Devlin , on the role of the criminal law in enforcing moral norms, Hart wrote Law, Liberty and Morality , which consisted of three lectures he gave at Stanford University. He also wrote The Morality of the Criminal Law  Despite this, Hart reported later that he got on well personally with Devlin. Hart considered himself to be "on the Left, the non-communist Left", and expressed animosity towards Margaret Thatcher.

## Chapter 2 : The Concept of Law - Wikipedia

*Harts theory prevented him from building upon his *sociological claim+. _39 From this brief selection of criticisms of Harts sociological claim it can be seen that he had much to elaborate on if he was to meet the expectations created by his statement in the preface.*

A blog to discuss jurisprudence, legal theory, the philosophy of law and moral philosophy. Austin believed that law is a species of command. Modern legal systems have laws governing the formation and implementation of contracts, of wills, marriages and other executory instruments. Hart also considers another variety of laws, laws which define the scope and limitations of judicial and legislative power, laws which confer jurisdiction upon courts and govern the functioning of governmental institutions. He argues that it is impossible to view these laws as mere orders backed by threats either. Attempts, however, have been made to assimilate power-conferring rules within the broad ambit of orders backed by threats. According to the first of these theories, the nullity that is a consequence of not complying with the framework established by power-conferring rules is the Austininan sanction. However, Hart argues that the two are fundamentally different in nature: For instance, it would be impossible to conceive of the provisions that govern how to make a valid will without conceiving that the will cannot exist without these provisions. Hart has a number of subsidiary objections as well, such as nullity not always being a source of evil for instance, to the judge who rules without jurisdiction. A second theory argues that power-conferring rules are not genuine laws. This theory views as all laws as directions to officials to apply sanctions in case of non-compliance. A power-conferring rule, therefore, would be viewed as a direction to the requisite official not to confer validity upon a particular transaction if the rules of procedure are not adhered to. Hart argues, however, that such a theory achieves uniformity at the high price of distorting the true nature of laws. For instance, the point of criminal law is to establish certain standards of behaviour, which the citizens are expected to conform to. Sanctions are there only as ancillary measures in case the system breaks down. It is therefore misleading to consider criminal law as directions to officials to apply sanctions. The same logic applies to power-conferring rules as well. The second basic objection Hart has to Austin is regarding the range of application of laws. However, this is not true in modern legal systems, as legislations often have a self-binding force. In an attempt to respond to this, it has been argued that a legislator has two personalities: However, Hart argues that such a complicated device is unnecessary to explain the self-binding nature of legislation. A legislation can be viewed as a promise, which creates obligations upon the promisor. And in any event, much of legislation is done under the ambit of pre-existing rules of procedure, which bind the legislators. To this, it has been argued that the validity of customs depends upon tacit acceptance by the sovereign; that is, if Courts are implementing customary law, and the legislature does not repeal such laws, then this might be said to be an implied command that customary law is to be followed. However, Hart argues that absence of objection does not mean implied consent. It could equally well mean a lack of knowledge, or a lack of awareness, or numerous other reasons. On the three grounds of content of laws, range of application, and mode of origin, Hart rejects the idea that law is merely an amalgamation of coercive orders backed up by threats. Hart argues that habitual obedience, which is merely convergence of behaviour, is inadequate to explain the continuity of laws. Mere habits of obedience to orders given by one legislator cannot confer on the next legislator any right to succeed the old, or to give orders in his place. Why is the law made by the successor to legislative office already law before even he has received habitual obedience? To answer this question, it becomes essential to distinguish between a habit and a rule. Rules require not only convergence of behaviour, but also convergence of attitude. That is to say, rules are viewed as standards of behaviour, where deviance is considered as meriting criticism. Habits of obedience also fail to explain the persistence of laws. That is to say, how can a law made by an earlier legislator, long dead, still be law for a society that cannot be said to habitually obey him? Once again, this requires us to replace the notion of habits of obedience with a concept of rules that delineate rights of succession. Recognizing such a problem, Austin had argued that in democracies, it was the electorate that formed the sovereign. It may be argued that legislators make rules in their official capacity, rules which then

apply to them in their personal capacity. However, the very notion of official capacity presupposes the existence of rules that confer such official capacity. This, therefore, is again incompatible with the Austinian idea of sovereignty.

## Chapter 3 : OLATUNDE'S LAW NOTES: ESSAY ON HARTâ€™S CONCEPT OF LAW

*HART'S CONCEPT OF LAW Herbert Lionel Adolphus Hart (blog.quintoapp.com: ) conceives law as a social phenomenon: it can only be understood and explained by reference to the actual social practices of a community.*

His theory or rule of recognition is discussed in chapter 6. Chapter 9 is where Hart defended his thesis. He also indicated that he will pay attention to examining language and meaning of words and pay attention to the concept of law we are all familiar. He calls his thesis a mere description of law that is already known. He described his use of legal-related language by an analogy of the captain of a ship who concentrates of focusing his telescope with the main object of finding land. The use of legal-relate language is only a means to an end. He emphasized the distinction between internal and external point of views in understand his theory or concept. In the analysis of rule following, Hart distinguished between merely habitual behavior that doing things as a rule following i. In definition of law, the Model union of modern and secondary rules of law is constituted by a central set of elements that describe a modern municipal legal system. We can now say international law is law to the extent that its shares similarities with this central case it involves legal argument employing rules and not law to the extent that it does not e. The main criticism of OBT is that it ignore concept of rule of rule following and concentrate on law a sets of punishment from someone who gives orders. The key issues discussed in the various chapters are as follows: Harts considers linguistics differences between orders and laws and talk about linguistic method or method of linguistic philosophy. Being obliged and under obligation to do something. A bank cashier being obliged to by an armed robber to hand him cash or when a tax inspector orders someone to pay a particular amount of money. Hart considers what law would look like if we consider law as orders to us by legal sovereign and make three criticisms as follows: Harts continue the criticism of OBT theory by criticizing the idea of legal sovereignty as brute force. Reference to a group of persons or person that relied on the continued habit of obedience to it would meet severe difficulties where there was change in sovereignty. According to him sovereign is constituted by rules so that the appropriate persons are seen as occupying offices of the sovereign rather than being the sovereign themselves. In UK we have crown-in-parliament is the sovereign. Harts discussed his own model of law includes the idea of obligation that implies the existence of strongly support social rules that confers power and permit peoples to do things. Duty-imposing rules without power-imposing rules would not be a truly legal system, but a pre-legal system. This is because the existing of both sets of rule is necessary to create a legal society. To cure the defects of duty-imposing rules, Hart construct three power-conferring rules which he called secondary rules as follows: Harts examined in detailed the rule of recognition and its role in constitutional law. This rule was identified as matter of empirical fact and law was seen as something different from morality. Hart also say legal system is in existence where 1 the rules issuing from it are by and large effective 2 even if people in general needs not accept this rules, the officials do accept certain standard as setting up the criteria of legal validity of the system. The less important chapters g In chapter 7: Hart discussed his view of legal reasoning and stresses the open-ended, unclear and ambiguous character of many legal rules including his famous distinction between the core and penumbra of settled rules of legal systems. He attacks the view that law can be reduced to a set of propositions about what judges will do. The American Legal Realism criticized this view and stated that statement of laws were no more than prediction of what judges and juries would do in particular case. This led to a call for the examination of law beyond the stated rules into the sociological conditions that surrounded law. Hart considers why law and morality has so much to do with each other but nevertheless can be distinguished in the way his theory of legal positivism requires. His brilliantly clear introduction to the idea and history of the development of doctrines of natural law is one of the best introductions to this subject. Hart distinguishes between the sort of justice to law procedural justice or justice according to law and the justice that attaches to substantive law or justice of the law. He says the latter concept is more important from the moral point of view. According to Hart this means nothing more than when a person has an internal point of view towards a set a rules i. Why would anyone accept these rules? If judges are only to commit themselves to their judicial oath of legal validity that has some moral decency â€” a

commitment to allegiance to the Nazi party would not be proper? If we think we would not identify any rule as valid law unless it complied with a rule of recognition that embodied some moral decency e. If the aim of description is accuracy, then it should report inconsistencies and different views about what obligations people are under or whether people are actually under obligations. Perry concludes that internal account is required to understand normativity. Hart also provide a classic criticism of orders backed by threats OBT Theory of law which is similar to Austin command theory, because it ignores rule following and concentrates on punishment and orders. In Chapter 2 Hart considers linguistics differences between orders and laws and talk about linguistic method or method of linguistic philosophy. In Chapter 3, Hart considers what law the structure of law is it is consider law as orders to us by legal sovereign. In Chapter 4 Harts continue the criticism of OBT theory by criticizing the idea of legal sovereignty as brute force. Chapter 5 discussed Harts model of law includes the idea of obligation that implies the existence of strongly support social rules that confers power and permit peoples to do things. In Chapter 6, Harts examined in detailed the rule of recognition and its role in constitutional law. In Chapter 7 Hart discussed his view of legal reasoning and stresses the open-ended, unclear and ambiguous character of many legal rules including his famous distinction between the core and penumbra of settled rules of legal systems. In chapter 8 Hart considers why law and morality has so much to do with each other but nevertheless can be distinguished in the way his theory of legal positivism requires.

## Chapter 4 : The Pure Theory of Law (Stanford Encyclopedia of Philosophy)

*Law, Morality and the Human Predicament â€¢ Social morality addresses these same problems of the human predicament. â€¢ Therefore, there is a necessary content to law and it is the same content that moral institutions address.*

Development and Influence Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought see Finnis  The modern doctrine, however, owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law. The most important architects of this revised positivism are the Austrian jurist Hans Kelsen and the two dominating figures in the analytic philosophy of law, H. Hart and Joseph Raz among whom there are clear lines of influence, but also important contrasts. Although they disagree on many other points, these writers all acknowledge that law is essentially a matter of social fact. Their discomfort is sometimes the product of confusion. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists. Among the philosophically literate another, more intelligible, misunderstanding may interfere. Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism the meaning of a sentence is its mode of verification or sociological positivism social phenomena can be studied only through the methods of natural science. While there are historical connections, and also commonalities of temper, among these ideas, they are essentially different. The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts. To say that the existence of law depends on facts and not on its merits is a thesis about the relation among laws, facts, and merits, and not otherwise a thesis about the individual relata. The only influential positivist moral theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions. Such theists and relativists apply to morality the constraints that legal positivists think hold for law. The Existence and Sources of Law Every human society has some form of social order, some way of marking and encouraging approved behavior, deterring disapproved behavior, and resolving disputes. What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist answers, it bears emphasizing that these are not the only questions worth asking. While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has in common with other forms of social control. Some Marxists are positivists about the nature of law while insisting that its distinguishing characteristics matter less than its role in replicating and facilitating other forms of domination. Though other Marxists disagree: They think that the specific nature of law casts little light on their primary concerns. But one can hardly know that in advance; it depends on what the nature of law actually is. According to Bentham and Austin, law is a phenomenon of large societies with a sovereign: It has two other distinctive features. The theory is monistic: The imperativalist acknowledges that ultimate legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives for example, permissions, definitions, and so on. But they regard these as part of the non-legal material that is necessary for, and part of, every legal system. Austin is a bit more liberal on this point. The theory is also reductivist, for it maintains that the normative language used in describing and stating the law -- talk of authority, rights, obligations, and so on -- can all be analyzed without remainder in non-normative terms,

ultimately as concatenations of statements about power and obedience. Imperatival theories are now without influence in legal philosophy but see Ladenson and Morison. What survives of their outlook is the idea that legal theory must ultimately be rooted in some account of the political system, an insight that came to be shared by all major positivists save Kelsen. It is clear that in complex societies there may be no one who has all the attributes of sovereignty, for ultimate authority may be divided among organs and may itself be limited by law. Obedience is a normative concept. To distinguish it from coincidental compliance we need something like the idea of subjects being oriented to, or guided by, the commands. Explicating this will carry us far from the power-based notions with which classical positivism hoped to work. Treating all laws as commands conceals important differences in their social functions, in the ways they operate in practical reasoning, and in the sort of justifications to which they are liable. For instance, laws conferring the power to marry command nothing; they do not obligate people to marry, or even to marry according to the prescribed formalities. Nor is reductivism any more plausible here: Moreover, we take the existence of legal obligations to be a reason for imposing sanctions, not merely a consequence of it. On his view, law is characterized by a basic form and basic norm. On this view, law is an indirect system of guidance: Thus, what we ordinarily regard as the legal duty not to steal is for Kelsen merely a logical correlate of the primary norm which stipulates a sanction for stealing , p. The objections to imperatival monism apply also to this more sophisticated version: The courts are not indifferent between, on the one hand, people not stealing and, on the other, stealing and suffering the sanctions. But in one respect the conditional sanction theory is in worse shape than is imperativalism, for it has no principled way to fix on the delict as the duty-defining condition of the sanction -- that is but one of a large number of relevant antecedent conditions, including the legal capacity of the offender, the jurisdiction of the judge, the constitutionality of the offense, and so forth. Which among all these is the content of a legal duty? Might does not make right -- not even legal right -- so the philosophy of law must explain the fact that law is taken to impose obligations on its subjects. Moreover, law is a normative system: For the imperativalists, the unity of a legal system consists in the fact that all its laws are commanded by one sovereign. For Kelsen, it consists in the fact that they are all links in one chain of authority. For example, a by-law is legally valid because it is created by a corporation lawfully exercising the powers conferred on it by the legislature, which confers those powers in a manner provided by the constitution, which was itself created in a way provided by an earlier constitution. But what about the very first constitution, historically speaking? Nor can it be a social fact, for Kelsen maintains that the reason for the validity of a norm must always be another norm -- no ought from is. It follows, then, that a legal system must consist of norms all the way down. It bottoms in a hypothetical, transcendental norm that is the condition of the intelligibility of any and all other norms as binding. There are many difficulties with this, not least of which is the fact that if we are willing to tolerate the basic norm as a solution it is not clear why we thought there was a problem in the first place. One cannot say both that the basic norm is the norm presupposing which validates all inferior norms and also that an inferior norm is part of the legal system only if it is connected by a chain of validity to the basic norm. We need a way into the circle. Moreover, it draws the boundaries of legal systems incorrectly. The Canadian Constitution of was lawfully created by an Act of the U. Parliament, and on that basis Canadian law and English law should be parts of a single legal system, rooted in one basic norm: If law cannot ultimately be grounded in force, or in law, or in a presupposed norm, on what does its authority rest? The most influential solution is now H. For Hart, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced. Law ultimately rests on custom: It exists only because it is practiced by officials, and it is not only the recognition rule or rules that best explains their practice, it is rule to which they actually appeal in arguments about what standards they are bound to apply. Thus for Hart too the legal system is norms all the way down, but at its root is a social norm that has the kind of normative force that customs have. Law is normally a technical enterprise, characterized by a division of labour. And this division of labour is not a normatively neutral fact about law; it is politically charged, for it sets up the possibility of law becoming remote from the life of a society, a hazard to which Hart is acutely alert , p. Although Hart introduces the rule of recognition through a speculative anthropology of how it might emerge in response to certain deficiencies in a customary social order, he is not committed to the

view that law is a cultural achievement. The objection embraces the error it seeks to avoid. It imperialistically assumes that it is always a bad thing to lack law, and then makes a dazzling inference from ought to is: If one thinks that law is a many splendored thing, one will be tempted by a very wide concept of law, for it would seem improper to charge others with missing out. Positivism simply releases the harness. Law is a distinctive form of political order, not a moral achievement, and whether it is necessary or even useful depends entirely on its content and context. Societies without law may be perfectly adapted to their environments, missing nothing. A positivist account of the existence and content of law, along any of the above lines, offers a theory of the validity of law in one of the two main senses of that term see Harris, pp. Kelsen says that validity is the specific mode of existence of a norm. An invalid marriage is not a special kind of marriage having the property of invalidity; it is not a marriage at all. In this sense a valid law is one that is systemically valid in the jurisdiction -- it is part of the legal system. This is the question that positivists answer by reference to social sources. It is distinct from the idea of validity as moral propriety, i. For the positivist, this depends on its merits. One indication that these senses differ is that one may know that a society has a legal system, and know what its laws are, without having any idea whether they are morally justified. For example, one may know that the law of ancient Athens included the punishment of ostracism without knowing whether it was justified, because one does not know enough about its effects, about the social context, and so forth. No legal positivist argues that the systemic validity of law establishes its moral validity, i. Even Hobbes, to whom this view is sometimes ascribed, required that law actually be able to keep the peace, failing which we owe it nothing. Bentham and Austin, as utilitarians, hold that such questions always turn on the consequences and both acknowledge that disobedience is therefore sometimes fully justified. Hart thinks that there is only a prima facie duty to obey, grounded in and thus limited by fairness -- so there is no obligation to unfair or pointless laws Hart  The peculiar accusation that positivists believe the law is always to be obeyed is without foundation. Moral Principles and the Boundaries of Law The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due. A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. It is a curious fact about anti-positivist theories that, while they all insist on the moral nature of law, without exception they take its moral nature to be something good.

## Chapter 5 : Dworkinâ€™s Criticism of Hartâ€™s Theory of Law: A Response â€“ The World's Corner

*By David Harvey. Dworkin () argues that Hart's theory of law is insufficient in that it doesn't explain all aspects of law. In his criticism of Hart's account, Dworkin stipulates that Hart fails to incorporate principles into his description of what law is.*

Chester v Afshar in context of Harts theory There is a general consensus on the pre-eminence of Harts positivist theories; built on the works of Bentham it maintains that morality and the law are distinct concepts. It claims that rules valid with in a modern legal system must meet the criteria set out in the rule of recognition[3]. Therefore, according to Harts scheme, only those rules which satisfy the criteria of legal validity set out in a legal systemXCHARXs rule of recognition may be classified as law. Anything else, including rules of morality and other social standards, cannot be law and will therefore not be directly relevant in the process of adjudication carried out by the courts. As Lord Bingham stated in Chetser v Afshar: Here in my opinion, it is not satisfied. Miss Chester has not established that but for the failure to warn she would not have undergone surgery. His subsequent statement perhaps reflects Harts view of separating identification of the law from its moral evaluation. Hart might perhaps refer to the case of the Speluncean explorers[7] where we saw that the positivist judges applied the law the idea was that you should leave it to parliament to make changes to the law, and even if there are moral issues the judges should just follow the law. At a first glance, one might conclude that Hart would regard the outcome is Chester v Afshar[8] as unacceptable, as despite there being a rule the judges decide to go a bit further. In exercising this discretion, the judge or official will look to the purposes or the social consequences of adopting a certain interpretation of the rule e. The majority went on to allow the policy extension, telling us that, just as in Fairchild,[12] there was in this case, too, a special case for making an exception. Lord Steyn, one of the majority judges justifies the outcome in Chester in the following words: But he was also right to say that policy and corrective justice pull powerfully in favour of vindicating the patientXCHARXs right to know. And that there is no rule of recognition which distinguishes between legal and moral principles. If we are to respect individual rights, he argues, they must not be capable of being squashed by some competing community goal. By using cases such as Riggs v Palmer[23] Dworkin demonstrates that certain situations necessitate the application of principles in order to avoid absurd results. Dworkin argues that this decision demonstrates that, in addition to rules, the law incorporates principles. Dworkin would perhaps argue that in Chester the majority judges are applying principles, the relevant principle or right that judges are protecting in Chester is the right of autonomy and dignity. Within this theory Dworkin developed Hercules J, as an archetypal judge capable of ascertaining this correct answer. It can be argued that in Chester Dworkin would perhaps say that the majority judges are weighing principles, as two principles are seen to be conflicting. First one being the traditional principle of English law that a tortfeasor would not be liable unless he had, by his conduct, increased the risk to which a Claimant was exposed. According to Dworkin in such a situation the conflicting principles have to be weighed and balanced against each other before the decision is made to apply one or the other. Dworkin would say that in cases where principles conflict, as in Chester, Hercules would be able to talk about policy, only because both the principles fit, it would be relevant to consider the political considerations of these principles as both of them fit. This may require him to consider related branches of the law to see whether the community has committed itself to some background right from which the concrete right would follow. And have weighed the two principles at hand and applied the one that best fits. In this case in conflict with the traditional principle of causation, as mentioned above, the principle of a right to autonomy informed consent overrules in terms of political morality. Moreover, in Taking Rights Seriously, Dworkin specifically addresses the Spartan Steel[31]case, which he regards as proving his theory of adjudication[32],as he quotes: Although compelling, Dworkins critique is not without flaw. Perhaps too cynically, this leads Raz to suggests that one can only expect a low degree of consistency from judicial pronouncements[39] due to the fact that strong discretion allows them to decide cases based on their own opinions and conceptions of what is right[40]. Within his post-scripts[41] Hart concedes that tests whether the law conforms to morals or principles may be applied,

provided law and morals remain distinct. Fact scepticism v Rule scepticism Those who declare allegiance to the banner of legal realism might just as easily be called sceptics, and they sometimes are, or even cynics. Rule sceptics, include those like Llewellyn,[46] concentrate on the notion that rules do not necessarily, automatically lead to a particular conclusion or judgement so they argue that judges do not reach their decisions in a formalist way by applying rules, principles and concepts to the facts. Realists however, argue that the legal process is really a rationalisation of a result, judges decide on the results usually by reference to politics and then retrospectively rationalise it, so that it seems as legally right and inevitable. However, some of the later legal realists like Jerome Frank[50] took a more radical position. Thus the various prejudices[53] of judges and jurors often crucially affect the outcome of the case. This, in his view was absurd. Moreover, the law being whatever the courts said it was would greatly appeal to his Lordship as he was always trying to rid himself of the constraints of the law to do what he, sincerely, thought was best. So when describing the events Lord Denning is presenting the facts in a way that suggests the merit of the outcome which he has already reached. They tend it wellâ€¦â€¦â€¦. And all this because of a newcomer who has just bought a house there next to the cricket ground. It is also worth pointing out that one does not really find any disagreement that supports a genuine scepticism about facts. His scepticism lay in a judgeXCHARXs or juryXCHARXs ability to respond to that reality in any sort of realistic way; his position eventually amounts to the assertion that judges and juries are unable to decide like cases alike and unlike cases differently, the most basic requirement of justice. Again, whether in fact judges and juries often fail to be rational in just this way is open to question; a claim that they are constitutively unable to do so seems exorbitant. Judges, old or new, would automatically have absolute discretion, but we might as well make this plain by giving it to the new ones expressly- for rules to guide them would not guide them. Theory and Context, Thompson: Hutchinson and John N. Afshar [] at page [14] Routledge. See Raymond Wacks, Understanding Jurisprudence: Raz quoted in S. Ltd at page 60 [30] J. Ltd at page [33] Ibid [34] K. An Introduction to Legal Theory, Oxford University Press at page [47] Holmes meant to refer to quite general legal concepts or principles. Holmes believed that specific legal rules would determine results in most legal cases. An Introduction to Legal Theory, Oxford University Press at page [53] For example,plus or minus reactions to women,or unmarried women, or red-haired women,or brunettes, or men with deep voices or those who have pronounced gestures or nervous tics. It reveals that a quest for personal advantage could flourish in a traditional setting.

## Chapter 6 : - Harts theory | Professional Custom Writing Service - Professional Custom Writing Service

*much in natural law theory which any philosophically de- fensible theory of law must include; and (d) is a critical, moral philosopher as well as an analytical legal philosopher.*

The law, Kelsen maintained, is basically a scheme of interpretation. Its reality, or objectivity, resides in the sphere of meaning; we attach a legal-normative meaning to certain actions and events in the world PT1, Suppose, for example, that a new law is enacted by the California legislature. How is it done? Now, of course, the actions and events described here are not the law. To say that the description is of the enactment of a new law is to interpret these actions and events in a certain way. But what makes this the law? The California Constitution confers this power on the state legislature to enact laws within certain prescribed boundaries of content and jurisdiction. But then what makes the California Constitution legally valid? The answer is that the legal validity of the Constitution of California derives from an authorization granted by the US Constitution. What makes the US Constitution legally valid? Any document can say that, but only the particular document of the US Constitution is actually the supreme law in the United States. The problem is that here the chain of authorization comes to an end: At this point, Kelsen famously argued, one must presuppose the legal validity of the Constitution. At some stage, in every legal system, we get to an authorizing norm that has not been authorized by any other legal norm, and thus it has to be presupposed to be legally valid. The normative content of this presupposition is what Kelsen has called the basic norm. The basic norm is the content of the presupposition of the legal validity of the first, historical constitution of the relevant legal system GT, â€" As Kelsen saw it, there is simply no alternative. Hume famously argued that any practical argument that concludes with some prescriptive statement, a statement of the kind that one ought to do this or that, would have to contain at least one prescriptive statement in its premises. If all the premises of an argument are descriptive, telling us what this or that is the case, then there is no prescriptive conclusion that can logically follow. Kelsen took this argument very seriously. The first is to ground a non-reductive explanation of legal validity. The second function is to ground a non-reductive explanation of the normativity of law. The third function is to explain the systematic nature of legal norms. These three issues are not un-related. Kelsen rightly noticed that legal norms necessarily come in systems. There are no free-floating legal norms. Furthermore, legal systems are themselves organized in a hierarchical structure, manifesting a great deal of complexity but also a certain systematic unity. We talk about Canadian law, or German law, etc. They are also separate legal systems, manifesting a certain cohesion and unity. This systematic unity Kelsen meant to capture by the following two postulates: Every two norms that ultimately derive their validity from one basic norm belong to the same legal system. All legal norms of a given legal system ultimately derive their validity from one basic norm. Whether these two postulates are actually true is a contentious issue. Joseph Raz argued that they are both inaccurate, at best. Two norms can derive their validity from the same basic norm, but fail to belong to the same system as, for example, in case of an orderly secession whereby a new legal system is created by the legal authorization of another. Nor is it necessarily true that all the legally valid norms of a given system derive their validity from the same basic norm Raz , â€" Be this as it may, even if Kelsen erred about the details of the unity of legal systems, his main insight remains true, and quite important. Norms are legally valid within a given system, they have to form part of a system of norms that is in force in a given place and time. A norm is efficacious if it is actually generally followed by the relevant population. So the relationship here is this: Any given norm can be legally valid even if nobody follows it. However, a norm can only be legally valid if it belongs to a system, a legal order, that is by and large actually practiced by a certain population. And thus the idea of legal validity, as Kelsen admits, is closely tied to this reality of a social practice; a legal system exists, as it were, only as a social reality, a reality that consists in the fact that people actually follow certain norms. What about the basic norm, is efficacy a condition of its validity? One might have thought that Kelsen would have opted for a negative answer here. After all, the basic norm is a presupposition that is logically required to render the validity of law intelligible. This would seem to be the whole point of an anti-reductionist explanation of legal validity: Kelsen, however, quite explicitly admits that

efficacy is a condition of the validity of the basic norm: A basic norm is legally valid if and only if it is actually followed in a given population. In fact, as we shall see below, Kelsen had no choice here. And this is precisely why at least one crucial aspect of his anti-reductionism becomes questionable. The structure is as follows: In other words, the necessary presupposition of the basic norm is derived from the possibility conditions for ascribing legal significance to actions and events. At some point, as we have noted, we necessarily run out of legal norms that confer the relevant validity on law creating acts, and at that point the legal validity has to be presupposed. The content of this presupposition is the basic norm. Kelsen himself seems to have changed his views about this over the years; he may have started with a kind of neo-Kantian perspective one can discern in PT1, and gradually shifted to a Humean version of his main argument, which is quite evident in GT. However, this is a very controversial issue; for a different view, see Paulson and Green Kant employed a transcendental argument to establish the necessary presuppositions of some categories and modes of perception that are essential for rational cognition, or so he thought. They form deep, universal, and necessary features of human cognition. More on this, below. Second, and not unrelated, as we shall see, Kelsen has explicitly rejected the idea that the basic norm in law, or of any other normative domain is something like a necessary feature or category of human cognition. The presupposition of a basic norm is optional. But one is not rationally compelled to have this attitude: The Pure Theory describes the positive law as an objectively valid order and states that this interpretation is possible only under the condition that a basic norm is presupposedâ€¦. The Pure Theory, thereby characterizes this interpretation as possible, not necessary, and presents the objective validity of positive law only as conditionalâ€”namely conditioned by the presupposed basic norm. PT2, â€” A comparison to religion, that Kelsen himself offered, might be helpful here. The normative structure of religion is very similar to that of law. It has the same logic: Thus the normativity of religion, like that of the law, rests on the presupposition of its basic norm. But in both cases, as, in fact, with any other normative system, the presupposition of the basic norm is logically required only of those who regard the relevant norms as reasons for their actions. Thus, whether you actually presuppose the relevant basic norm is a matter of choice, it is an ideological option, as it were, not something that is dictated by Reason. Similarly, the normativity of law, presupposed by its basic norm, is optional: Relativism, however, comes with a price. What is the content of the basic norm that one needs to presuppose in order to render positive law intelligible as a normative legal order? The simple answer is that what one presupposes here is precisely the normative validity of positive law, namely, the law that is actually practiced by a certain population. The content of the basic norm of any given legal system is determined by the actual practices that prevail in the relevant community. As Kelsen himself repeatedly argued, a successful revolution brings about a radical change in the content of the basic norm. Suppose, for example, that in a given legal system the basic norm is that the constitution enacted by Rex One is binding. One gets the clear impression that Kelsen was aware of a serious difficulty in his position. In both editions of the Pure Theory of Law, Kelsen toys with the idea that perhaps changes in the basic norms of municipal legal systems legally derive from the basic norm of public international law. But this led Kelsen to the rather uncomfortable conclusion that there is only one basic norm in the entire world, namely, the basic norm of public international law. Be this as it may, the main worry lies elsewhere. The worry stems from the fact that it is very difficult, if not impossible, to maintain both a profound relativist and an anti-reductionist position with respect to a given normative domain. This is basically what was meant earlier by the comment that Kelsen had no option but to admit that the validity of the basic norm is conditional on its efficacy. And this makes it very questionable that reductionism can be avoided. In fact, what Kelsen really offered us here is an invitation to provide a reductive explanation of the concept of legal validity in terms of some set of social facts, the facts that constitute the content of any given basic norm. Which is precisely the kind of reduction H. Hart later offered in his account of the Rules of Recognition as social rules [see Hart , at p. The problem stems from the fact that Kelsen was quite right about the law. Legal validity is essentially relative to the social facts that constitute the content of the basic norm in each and every legal order. Notice that legal validity is always relative to a time and place. A law enacted by the California legislature only applies within the boundaries of the state of California, and it applies during a certain period of time, after its enactment and until a time when it is modified or repealed. And we can see

why: Once Kelsen admits, as he does, that the content of a basic norm is fully determined by practice, it becomes very difficult to understand how the explication of legal validity he offers is non-reductive. The Normativity of Law Let us now see how Kelsen thought that the basic norm helps to explain the sense in which law is a normative domain and what this normativity consists in. A certain content is regarded as normative by an agent if and only if the agent regards that content as a valid reason for action. As Joseph Raz noticed, Kelsen agrees with the Natural Law tradition in this particular respect; both assume that the normativity of law can only be explained as one would explain the normativity of morality, or religion for that matter, namely, in terms of valid reasons for action Raz , â€"; but cf. The anarchist does not endorse the legal point of view as one that reflects her own views about what is right and wrong.

## Chapter 7 : Hart Concept Of Law | Oxbridge Notes the United Kingdom

*A complete legal theory must consider not only the relation between law and coercion (i.e. the "force" of law), but the relation between law and rightfulness or justifiability (i.e. the "grounds" of law).*

For it appears that Hart can to some degree accept that principles become a part of law following their involvement in legal precedents. In this, then, Dworkin wants to argue that principles can and do legally bind judges before precedent has been set. Hart argues that law is comprised of a combination of primary and secondary rules  Primary rules consist of statutes or conventions which explain both the penalties we may face for certain actions and the rights we are entitled to, either absolutely, or under certain circumstances. These rules of conduct help to guide our behaviour as we know to act in certain ways and not others to avoid undesirable repercussions. Secondary rules, on the other hand, detail the method by which laws come to be valid. The most famous of these are called the rules of recognition. Rules of recognition explain the characteristic possessed by primary rules which qualifies them as law. To take a trivial example, in the United Kingdom, bills become validated into law by passing through the elected legislature in the House of Commons and the House of Lords, before being signed by the monarch. However, this is not the only characteristic a valid rule could possess. It is important to note that Hart suggests three kinds of pedigrees for a valid rule: Hart thereby argues that law consists of the application of valid rules. Take, for instance, the case of Daniels and Daniels v. Daniels purchased a drink labelled as lemonade from Mrs. Tarbard and, later, they became ill. It was discovered that their illness was caused by their consumption of Mrs. Daniels went on to sue Tarbard for damages in compensation for their medical treatment. In court, Judge Lewis J. Tarbard may not have known of the contamination, unfortunately the Sales of Goods Act, , required that goods sold be of merchantable quality. The judge thus followed the rule specified and hence applied the law. However, some cases do not always seem to fall so clearly under the law. In light of this, Hart establishes the problem of the penumbra. Penumbral cases, he argues, are those which require judges to use their discretion to adjudicate appropriately in circumstances where the way in which a law should be applied to a particular case is unclear. Hart therefore holds the view that the law contains gaps. Furthermore, the fact that there are gaps in the law entails that the filling of these gaps via the exercise of judicial discretion does not have any legal nature. That is to say that, in these cases, judicial discretion involves applying values which are outside of the law to a case in order to reach a judgment. These values may invoke a moral or social duty but their application is not legally right or wrong. This is a conclusion which Dworkin rejects. And it is on this particular distinction between Hart and Dworkin that this essay focuses. Dworkin argues contrastingly that the law is, in fact, largely complete; it has no, or very few, gaps. This is because the law is not merely comprised of laws which are either applicable or not; it is also made up of principles. To exemplify this Dworkin discusses a case whereby the judge cites an apparent legal principle as the reason for his decision. Having already been convicted of murder, the case of Riggs v Palmer contested the notion of allowing the murderer his inheritance. The court ruled in favour of the plaintiffs, arguing that to allow the grandson to profit from his crime by obtaining his inheritance was to violate the universal maxim that no person should be able to profit from her crime. This principle clearly held substantial weight in the case and significantly affected the judgment. Secondly, Dworkin argues that principles do not enter the legal system via a kind of validating process. Instead, principles become a part of law over time through a collective sense of appropriateness; they reflect, then, our conception of what law is and should be. Indeed, Dworkin does not think principles bear any kind of relation to validity, though it is not clear what Dworkin offers as an alternative for distinguishing between appropriately legal principles and other principles with a pure moral sense. For Hart, these principles must, at least initially, have no legal sense in that they do not legally bind the decisions of judges. The Riggs v Palmer case is particularly interesting as it appeared that if merely the rules of law were followed, the decision should have gone the other way. Of course, since Riggs v Palmer, precedent became set for future similar cases. Here, Hart can account for this principle as having a kind of legal sense. For future lawyers can argue on the basis of precedent that contemporary cases be ruled in the same way. Moreover, since precedent was set, Hart can

identify the origins of the principle, allowing his rule of recognition to come into play. Hence, Riggs v Palmer introduced the following idea into law: And in this, the principle came to relate to a judicial decision. This is highly significant. However, this brings me to the crux of the debate. Dworkin, on the other hand, wants to say that it did. His claim is that in Riggs v Palmer, the judges were not using their discretion, in the Hartian sense. I shall from here on simply refer to principles as binding under the Dworkinian view, but it should be understood that this is in the weaker sense. It is not very obvious that the judges were legally bound to consider the principle in question. As we have already seen, not all the judges on the case were sympathetic to this Dworkinian idea. Furthermore, let us return to the case of Daniels and Daniels v R. In this case, the judge ruled that Mrs. Tabard was liable for the injuries sustained by Mr. Daniels, though the judge admitted that unfortunately Mrs. Tarbard was actually entirely innocent in the matter. Surely if there is one legal principle that the legal profession and public would collectively endorse, it is that one should not be held accountable for an offence in which one is an innocent party. Suppose then, that there is some legal principle similar to the one I propose. Should he have ruled differently? Or, more strongly, as Dworkin would propose, was he in fact legally bound to rule differently? The resulting conclusion seems to be that if such a principle existed and legally bound the judge, the decision reached was wrong and unlawful. This at least seems doubtful. Indeed, the judge cited legal constraints as the very reason he was unable to rule in the way our supposedly legal principle suggests. It would require a difficult empirical enquiry to verify whether such principles are in fact legally binding due to their unwritten nature and lack of historical enactment in these cases. Dworkin argues that principles become part of the legal system over time through a sense of appropriateness by both lawyers and laymen. But, as a result, we are left uncertain about when a principle truly becomes legally binding. If the relevant legal principle did in fact exist at the time of Riggs v Palmer, certainly Judge Gray was doubtful of such. Indeed, what degree of appropriateness is needed? And who is to decide and when? These issues become prevalent as we begin to evaluate the desirability of a Dworkinian conception of law. For having discussed the difficulties in verifying whether in fact principles have a sense of legality apart from their institutionalisation, perhaps it is worth considering a different approach to the topic. I am unsure as to whether Dworkin would accept that his theory is intended to be normative rather than descriptive. But allow me to consider in relation to the aspect we have discussed which conception of law we might prefer. In the case of Riggs v Palmer, might we not prefer that the judges were legally bound to deny the murderer his inheritance? That is to say that their majority decision was lawfully the right one. Comparatively, for Hart, the law is incomplete, and so when a judge exercises her discretion to fill in the law, her judgment is not legally right or wrong. For one, lawyers are able to submit their case with conviction that there actually is a right answer. Secondly, the fact that the law can give a correct answer to any case suggests that the law becomes more predictable, as the outcome of a case does not so heavily depend on the morally and personally fuelled discretionary powers of the judge. Let us now consider these in detail. But Dworkin fails to give us a way by which we might know all that law consists of. Indeed, it is central to his characterisation of principles that they do not possess a recognisable quality which can determine whether or not they are law. But let us analyse the impact this has on the practice of law. Under a Dworkinian conception of law, judges, in cases like Riggs v Palmer, would be supposedly legally bound by certain legal principles. Yet each judge has no way of knowing whether a particular principle has become legally binding or not. The judges, then, were left only to speculate whether the principle had become appropriately legally binding, as Dworkin states that principles should become a part of law through a collective sense of appropriateness. Yet how can we expect judges to know whether or not unprecedented principles have become legally appropriate? The reality is that the judges could not have known whether their understanding was the right one. Remember that once a principle has been written into law through its relation to a judicial decision or other kinds of precedents, the Hartian depiction of law equally requires that judges take these into account in making judgments. Before the enactment of a principle, however, there is no written reference to the principle; not even a convention towards it. If there were, the Hartian theory would be able to capture its legal sense just as easily. The only cases which truly show the difference between Dworkin and Hart are those where nonconventional and unprecedented principles are used in law for the very first time. A further problem arises from the Dworkinian understanding of principles. Not

only are judges unable to know whether their understanding of legal principles is correct, but this same uncertainty renders advocates and laymen equally cautious of the law. It would be difficult if lawyers, who have explored every inch of written law, were to argue a case only for it to be rejected on grounds of principles which bear no precedent. Can we really argue that the judgment in Riggs v Palmer was predictable? I would argue not. Tarbard should not have been held liable for her innocent actions, yet the judge ruled that she legally was.

## Chapter 8 : Legal Positivism (Stanford Encyclopedia of Philosophy)

*Hart's theory seemed for a while to have solved the "concept" of law. He worked in the style of British "ordinary language analysis" and examined and clarified a host of other legal concepts-many of which we will address in the latter portions of the course.*

Background[ edit ] The Concept of Law emerged from a set of lectures Hart delivered in  The book developed a sophisticated view of legal positivism. Among the ideas developed in the book are: A distinction between primary and secondary legal rules, where a primary rule governs conduct and a secondary rule allows the creation, alteration, or extinction of primary rules. The idea of the rule of recognition , a social rule that differentiated between those norms that have the authority of law and those that do not. For instance, the gunman forces us to obey but we may not feel inclined to obey him. Presumably, obedience to the law comes with a different feeling. Hart identifies three such important differences: In terms of content, not all laws are imperative or coercive. Some are facilitative, allowing us to create contracts and other legal relations. Hart argues that this is an inaccurate description of law, noting that laws may have several sources and legislators are very often subject to the laws they create. Hart lets us know that laws are much broader in scope than coercive orders, contrary to the "command theory" of Austin. Frequently laws are enabling and so allow citizens to carry out authoritative acts such as the making of wills or contracts which have legal effect. We feel in some sense bound by social rules and laws frequently appear to be types of social rule. There are two perspectives to this: It is from this internal sense that the law acquires its normative quality. The obedience by the populace of a rule is called efficacy. No law can be said to be efficacious unless followed by the majority of the populace. Yet, the officials must use the internal aspect and accept the standards as guiding their behaviour in addition to also guiding the behaviour of other officials. Thus, primary rules construct legal obligations and consequences when they are disobeyed. A good example of a primary rule is the law against murder; it prohibits a person from killing and attaches consequences for committing, attempting to commit, and conspiring to commit the crime. Each kind of secondary rule addresses a separate one of those three issues, yet all are interdependent. For a rule to be valid is to recognize it as passing all the tests provided by the rule of recognition. The next best thing is to make sure that the system does not remain at a static quality but instead is dynamic and progressive. The remedy for the static quality of the regime of primary rules are rules of change. Rules of change range in complexity: Rules of adjudication empower individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. However, intermingled with who adjudicates is what laws they adjudicate.

## Chapter 9 : H L A Hart Notes; Concept of Law; Chapters 2, 3, 4, 5, 6 | Jia Sajjal - blog.quintoapp.com

*Significant in the differences between Hart and Kelsen was the emphasis on the British version of positive law theory which Hart was defending as opposed to the Continental version of positive law theory which Kelsen was defending.*

They identify inadequacies both with the account of sovereignty and with the notion of laws as orders backed by threats. In summary, a legal obligation or a duty is different from being obliged or forced to do something. Jia Sajjal Next Hart draws a distinction between commands and orders backed by threats. A distinction he feels has been largely ignored by Austin. It requires compliance not implication that there is a relatively stable because of respect but solely due to the fear of hierarchal society of men in which the threat of punishment or sanctions. A command means to exercise authority over men, NOT power to inflict harm, and though it may be combines with threats of harm in case of non-compliance, a command is primarily an appeal not to fear but to respect authority. Hart feels that no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act he was required to do. Hence, law possesses GENERALITY and the standard form even of a criminal statute which has the closest resemblance with an order backed by threat is general in two ways; i It indicates a general type of conduct. Official individuated face-to-face directions here have a secondary place: Therefore, generality is the first feature we should add to the model of the gunman if it is to reproduce for us characteristics of law. This he feels is misleading in suggesting a parallel to the face-to face situation which really does not exist and is not intended by those who use this expression. Laws are complete when they are made, it is desirable that they are brought to the notice of the general public, but they are in a finished form whether or not they are conveyed to the public. The order of the gunman would have no force if the clerk was unafraid of Jia Sajjal him or if it were said in an empty room. Besides the introduction of the feature of generality to the gunman model, a more fundamental change must be made. It is true there is a sense in which the gunman has an ascendancy or superiority over the bank clerk; it lies in his temporary ability to make a threat, which might well be sufficient to make the bank clerk do the particular thing he is told to do. There is no other form of relationship of superiority and inferiority between the two men except this short-lived coercive one. The question how many people must obey how many such general orders, and for how long, if there is to be law, no more admits a definitive answer than the question how few hairs must a man have to be bald. Mere temporary ascendancy of one person over another is naturally thought of as the polar opposite of law, with its relatively enduring and settled character. It remains to be seen whether this simple, though admittedly vague, notion of general habitual obedience to general orders backed by threats is really enough to reproduce the settled character and continuity that legal systems posses. How are they to fit into the OBT model? Moreover, Hart says that the law has features of supremacy and independence within its territory that cannot be reproduced in this simple model. Within a country like Pakistan, for example, there are various bodies such as local authorities or officials that give out orders in return of which they receive habitual obedience, for example; WAPDA. However, it is noteworthy here that this body is subordinate to the Head of the State and thus, may be described as an agent of the Government of Pakistan. The Government is also independent as it is arguably not in the habit of obedience to the government of any other state. In this chapter, Hart considers what law would be like if we assumed that law really consisted of orders directed to us by the legal sovereign. He makes three main criticisms: The model of orders is much closer to the idea that all laws impose duties as though all laws were really of the sort that we find most common in criminal law; as containing orders not to perform certain acts crimes , the failure of which imposes a sanction and tort. That said it is pertinent to note here that criminal law and the law of torts are not the only category of laws. Hart states, and rightly so, that law extends to the laws of contracts, and wills etc, which do not have mandatory application to everyone and do not impose duties or obligations. Instead they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create certain conditions within the coercive framework of law. What needs to be borne in mind is the fact that Austin does deal with the issue of public and private power conferring rules and sees nullity of transactions as a sanction because it leads to the loss of an expected benefit. Hart however states

that this would be missing the point, since the whole point of power conferring rules, as their very name suggests is to confer power or to provide the individual with facilities to make contracts and not impose a sanction. To further elaborate this claim he gives the example of Section 9 of the Wills Act. If there is non-compliance with the number of witnesses, the will shall not be a valid document. Rules conferring powers fall into distinguishable kinds themselves. For example; Rules regarding capacity, manner and form, maximum and minimum duration for contracts etc. Moreover, there are rules which confer powers of an official nature. If a judge listens to a case with an issue that exceeds the scope his jurisdiction, the decision may be voidable. He feels that talking about nullity of a contract as a sanction takes the focus away from the contract itself. Nullity merely withholds legal recognition; it does not finish the contract itself. Moreover, Hart says that the legal system makes provisions for power conferring rules. It would be ludicrous to reduce the variety of laws into a single simple type as civil law is the recipe for creating duties, whereas, criminal law imposes these duties. In other words, this means that law is a mere direction to officials to apply certain sanctions IF a breach has occurred. Therefore, the general form of this extreme theory of law appears to be that instead of law being a series of orders backed by threats of sanctions, it is now directions to officials to apply sanctions when a breach occurs. But then what about the perspective of the private individual when he is conferred with a power; i. Kelsen would reply that if the individual breaches the term s of the contract, the order will be administered under law to the official to apply the sanction- Under Section 73 of the Contract Act. There could also be directions to private individuals themselves to for example A to not enter into a contract with B, if B is under aged or has not given consideration. The sanction would then be the non-performance or the extinguishing of the contract itself. If it can be shown that law without sanctions is perfectly conceivable, both theories will fail. The idea that criminal law applies to officials and not citizens clouds the distinction and obscures the character of law. Why should the law not set a standard of conduct for the behavior of ordinary people instead of waiting for the sanction to be applied? He feels that it would be limiting and depressing if the principle function of law was restricted to private litigations or prosecutions as a means of social control and ignore the diverse ways in which law is used to control, guide and to plan life out of court. Jia Sajjal Hart sums up his argument by giving an example with reference to the rules of cricket. Moreover, Hart points out that it is better to treat the situation of power conferring rules as promises rather than coercive orders because a promise creates an obligation for the promisor. This view may be applicable to the making of contracts, wills, etc buts its application to criminal law and the law of tort is questionable. It appears that under this the promisor, will covenant with the state that he shall not commit a crime against his fellow men, but this entails a utopian scenario where the use of sanctions are probably not needed. Its applicability in real life is unlikely. Hart however, points out that with law it is not necessary in every case to be able to locate the time and place of the coming into force of the order. He points out to the legal status of a local custom. Hart says that it is not true that custom is not law unless it is recognized by courts because in fact IT IS law because people obey it; they have internalized it. A distinguishing characteristic of law lies in its fusion of different types of rules. Jia Sajjal Chapter 4; Sovereign and Subject: Austin has stressed that whenever there is law, there is the concept of an illimitable sovereign who is as essential to society as the backbone of a man. The sovereign is characterized by the habit of obedience that is owed to him by the masses. Moreover, it is important to examine whether the legally illimitable status of the supreme law giver is necessary for the existence of law, and whether either the presence or the absence on limits on the sovereign can be understood in terms of the habit of obedience. In order to explain this concept Hart once again uses the aid of a hypothetical situation where he identifies an absolute Monarch- Rex, who rules a community for a very long period, and the people of which, obey him. Moreover, if all that was required to make Rex the sovereign was habitual obedience, what happens when Rex dies and Rex II succeeds his father to the throne? The mere fact that there was a general habit of obedience to Rex I in his lifetime is no guarantee that Rex II will be habitually obeyed as well. Therefore, there is nothing to make Rex II the king until people of the community develop a habit to obey him. Hence, until people start obeying Rex II the society will remain in a state of chaos. Hart states, that the way out of this problem is to secure the obedience of people through the system of rules which bridge the transaction from one law giver to another. In other words Rex will regulate in

advance that the people must obey Rex II after his death. It is obvious however; that with these expressions we have introduced a new set of elements [rules] which cannot be explained in terms of habit of obedience. In fact, the idea of habitual obedience fails in two different though related ways where one legislator succeeds another. Firstly, mere habits of obedience to orders given by one legislator cannot confer on the new legislator any right to succeed the old and give orders in his place. If both the aforementioned right and presumption are present there must have been acceptance of the rule which allows the new legislator to succeed the old. The complex social practice he then talks about is rule following. And in order to understand what rule following is he differentiates between a habit and a rule. However, deviance will not lead to criticism from society. Whereas when talking about a rule, deviations are met with criticism and there will be pressure from society to conform. This relates to the internal aspect of rule following. Under habitual obedience this internal aspect is lost as people confer to laws only for the external element of law. Hart feels that for a social rule to exist people must look at it internally and internalize its acceptance. To explain this point further he gives the example of the game of chess. Moving the queen two spaces ahead would mean to someone who does not understand the rules of the game as a mere habit- because this is the external point of view. When these rules will not be followed, it will be met with criticism from those holding an internal point of view. What Hart is trying to say is that people can accept rules without compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behavior and this should display itself in criticism including self criticism , demands for conformity and an acknowledgment that the demands are legitimate. This is primarily due to human nature. Humans do not like restrictions and seldom adhere to prohibitions if they go against their personal interests. Sanctions are crucial to compliance with laws. Moreover, Hart states here that criticism can me a motivating force, why then does he in chapter three rule out the possibility of criticism as a sanction as purported by Austin? There may be a revolution and the society may seize to accept the rule. His theory accounts for this fact]. Jia Sajjal ii The Persistence of Laws: In R V Duncan a woman was prosecuted in England and convicted for telling fortunes in violation of the Witchcraft Act,  This is an illustration of how a statute enacted three centuries ago can still be good law? The question that arises is how can law made by an earlier legislator long dead still be law for a society that cannot be said to have habitually obeyed him? The answer to this lies in the idea of substituting the simple habit of obedience to currently accepted fundamental rules which govern the right to legislate and describe the persons who have this right.