CAN THERE BE LAWS WITHOUT SANCTIONS?

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WHAT IS LAW-?

I agree to the Austin’s definition of law which says that the law is a set of commands which is recognized by sovereign persons or body that has the power of inflicting punishment or penalties. It can be stated that it is a powerful method to control the society. Now the main question which arises is that who is a sovereign. A sovereign, is the highest authorities to give command or lay down rules which leads to a duty to the bulk of individuals and require obedience to those rules, falling to obey these duties, an evil called sanction can be inflicted on them. A sovereign therefore has no authority over and above it. The sanction or a threat which is laid down after every command or rule is a very broad term i.e. the meaning of sanction may differ in case to case basis. Under criminal law the sanction can be punishment whereas under civil law it can be paying monetary damages or paying fine. Therefore in the modern legal system it can said that both the types of sanctions exists. However, in my opinion there is something more to the Austin’s and Harts concept of sanction i.e. an indirect form of punishment can also be a form of sanction. This will discussed in the latter half of the paper.

Therefore it can be stated that no laws can exist without sanction in the modern legal system. Every law requires some kind of sanction, it need not be coercive (punishment) in all cases. Here it can be stated that if there is any rule or command which does not have sanctions attached to it the bulk of individual may or may not follow that rule. Therefore it will be in the hands of the society to obey the law or not. However the rules will not be considered as an absolute command and may further lead to chaos. Therefore to make every law followed in the society the law has to have sanctions or else it may or may not be considered as law by masses in the society. Therefore sanctions gives a reason to people to comply with its obligation and maintain law and order in the society. For e.g. if there is no sanction attached to the rule of wearing helmet while driving a two wheeler vehicle, people may choose not to do it as there will be no evil inflicted on them. Sanction are widely stated in command theory of law defined in positive jurisprudence. It was first started by Jeremy Bentham generally known as

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utilitarian philosopher. Bentham states that the law is made by the sovereign and should be fully codified and therefore the courts have no role to play. He further goes on to say that the law is not only backed by punishments but also by rewards. Here Bentham has not defined as to what exactly a punishment is and how should it be inflicted upon, however gives a very narrower description of law. Moreover it can be stated that Bentham’s idea of reward as a sanction does not work in the modern legal system as it tends to give a choice in the hands of people as to whether they want to perform their duty or not. For e.g. if a prof (if considered as sovereign) gives an assignment and says that on submitting that assignment on time the student will get two marks extra as a reward, the student might just choose to not do the assignment on time and let go of that two marks. Therefore it can be stated that by giving reward, the individual may or may not obey to the duty which is stated by the sovereign. Therefore Bentham’s theory of rewards as sanction does not work.

After Jeremy Bentham, John Austin being the disciple of Bentham modifies and criticizes the command theory of law given by Bentham. Therefore he is best known for his work in the theory of legal positivism. Austin was a realist and had a positive approach to jurisprudence. He regards law as empirical reality rather than a concept i.e. he considers what law is and not what it is ought to be. According to him law is a command which is given by the sovereign and is always backed by sanction. He also stated that all the three words namely command, sovereign and sanctions are crucial characteristics of the positive law theory. He defined command as the desire of the sovereign, to do or refrain from doing something. He further goes on to say that wherever the duties lies, a command is signified, and when a command is signified a duty is imposed, and if that duty in not obeyed an evil is inflicted which is known as sanctions. He talks about the sanction only as punishments and thereby gives it a very narrow definition of sanction, however he fails to recognize the monetary compensations or damages as the forms of sanction. He majorly takes into consideration the criminal laws and fails to talk about other laws such as civil laws which do not have provisions for punishments but for compensation which can be considered as a form of sanctions. For e.g. if a person breaks a traffic rule, he is fined for it and not given punishment for doing the same. Here the fine is the evil inflicted on that individual for not obeying the duty laid down by the sovereign.

Further Austin’s work was deeply criticized by H.L.A Hart. According to Austin, law is only related to command and habit. But according to Hart, the definition given by Austin is inadequate as it does not include the “idea of a rule.” He also states that the idea of rule explains the structure of authority and obligations. It is so to say that people participating in this structure not only to do certain things but also to justify what they do. Therefore, law can be best understood as a mixture of primary and secondary rules.

Hart also says that in modern legal system the law is not merely coercive i.e. backed by threats but can be treated as a wider term. He further distinguishes between the primary rules and secondary rules. According to Hart, the laws can be of two type’s i.e. primary rules which are the rules of human conduct, which states that what exactly
an individual is legally obligated to do or abstain from doing, also what the exact consequences are relating to obedience or dis-obedience. One example of primary rules can be the criminal law which prohibits theft, murder and also prohibits certain human conduct and provides for penalties for not abiding by rules.

However according to Hart there is something more to the primary rules which is known as secondary rules. The secondary rules includes all the rules which allows for the creation, extinction, and alteration. E.g. making of contracts, marriages and wills etc. Moreover the secondary rules can also be considered as power conferring rules. Therefore he calls these types of laws as “power conferring rule” and thereby states that they are less in terms of order which are backed by threats because in these cases an individual can define his own rights, liabilities and obligation. Examples of power conferring rules can be Contract Act which allows an individual to make contract according to them however a contract can also be a collection of various primary rules. Therefore it can be said that secondary rules govern or is the union of both primary and secondary rules. The secondary rule may impose a duty to legislate in a particular way or to prohibit on creating certain kind of rules. E.g. in case of a contract the agreement is made between the parties who decides as to what can be done and what cannot be done. Therefore while making a contract primary and secondary rules are both included. However the mere difference between primary and secondary rules is just that the primary rule can be considered as a duty imposing, whereas secondary rules can be more of power conferring rules.²

However, it can be said that Hart fails to recognize that even if contract and wills are made by individual’s choice, when it is not performed it may lead to sanction. For e.g. if someone enters into a contract and does not performs his duties he will be asked to pay damages thereby leading to infliction of sanction on him. Also in case of “will” if it is not made in a specified way as prescribed by the law it makes the will invalid.

**HART’S CRITICISM ON NULLITY OF TRANSACTION**

Moreover Hart fails to recognize as to what happens in case of the “nullity of transaction” as he states that nullity shall not be considered to inflict ‘evil’ on the person who failed to comply with the requirements of the power conferring rules. Moreover he goes on to say that failure of anything cannot be considered as sanction when it is not passed by the requisite majority. Therefore according to Hart nullity is only the consequence of not complying to the frame work determined by the power conferring rule as it is the part of the rule itself, however Austin considers private power conferring rules and talks about ‘nullity of transaction’ as a form of sanction.

² [Legal Theory Lexicon 039: Primary and Secondary Rules, available at](http://lsolum.typepad.com/legal_theory_lexicon/hart/ (last visited 4th may)
Therefore a ‘will’ which is executed in non-compliance to the law will not accomplish the legal effect for which it was intended. Whereby making the will invalid on the whole. Also in case of contract, where a contract fails to be in accordance with the Indian Contract Act, it will make the contract void which will in return make it unenforceable in the court of law. In this case the sanction shall be neither the punishment nor the compensation but the loss of expected advantages. Also in case of marriages, where a marriage is completed without performing the required customs, it shall render the marriage void whereby making the children born out of the wedlock illegitimate. Here the illegitimacy of the marriage and the children can be considered as a form of sanction. Further Austin goes on to say that the nullity of transaction is not only personnel but also official. E.g. the judges if exceed the power given to them regarding their jurisdiction, then the decision given by him shall be overturned by an appellate court.\(^3\) Thereby this can also be considered as a form of sanction because when the judge does not comply with his power his decision shall be overturned. Therefore to make his decision valid the judge has to obey the law.

HART ON INTERNAL POINT OF VIEW AND CUSTOMARY LAW

Further Hart talks about the ‘internal point of view’. He says that law it not only about sanction and threat but is also about obligation imposing. Also a sense of obligation to follow rules. For e.g. if an alien comes on earth from mars, he would simply stop at the red light following the traffic rules without having any sense of obligation to follow these rules. However people who follow the traffic rule in his country, is because of their safety and thus have an obligation to follow. Therefore according to Hart there is a want which arises from inherent sense of duty. Also according to Hart the law not only depends upon the external point of views but also based on inner point of view which convinces human beings to impose obligation. However in case of internal point of view it can be said that members of the society considers it to be obligatory to obey those rules as it pre-exists inherently and thereby consider it as a common standard of behavior amongst themselves. Therefore here it can be seen that if that common standard is failed to be satisfied it may lead to a kind of sanction. Moreover this sanction shall be considered as legitimate by the offender as well as the other members of the society. For e.g. marriage in Hindu Law is basically based on the customary such as saptapati and kanyadaan which is supposed to be performed to make a marriage valid. Moreover this customs are accepted by the society at larger. Therefore this is converted from internal to external and is considered as a law by the external viewers thereby making it law followed by a command which further states that if these customs are not followed, the marriage shall be rendered void.

\(^3\) Neil MacCormick, *H.L.A. Hart*, [https://books.google.co.in/books?id=nWeaAAAAIAAJ&pg=PA86&lpg=PA86&dq=hart+of+nullity+of+transaction&source=bl&ots=7Ci8uUcLk2&sig=FGwV60WQuiSHQafsFtxolbyeo&hl=en&sa=X&ei=VuRRVdTT9991ygPuIHYCQ&ved=0CDEQ6AEwAw#v=onepage&q=hart%20of%20nullity%20of%20transaction&f=false (last visited 4th may)]
Therefore with reference to this it can be said that the (customary) law can be made internal also, which may further lead to sanction. In this case the marriage becoming void can be considered as a form of sanction.

**HART AND AUSTIN ON INTERNATIONAL LAW**

Hart also talks about international law and considers it to be a law properly so called despite the absence of authoritative rule of recognition. He also asserts that international law rules resemble the primary rules of obligation in a primitive society. Hart considers the international law to be a law because sovereign states consider them as obligatory and use them to press their claim to criticize the conduct of the other states. Unlike Austin who states that a sovereign cannot command another sovereign, i.e. one state cannot command other states as to what to do and what not to do. He further goes on to say that there is no one particular sovereign which can govern the international law. Therefore he states that there is no hierarchy of sovereignty existing and fails to recognize the horizontal line of sovereignty. However Hart recognize that the horizontal line of sovereignty i.e. when two or more countries sign a treaty they bind themselves to follow some rules between them and also agrees that failing to which may lead to sanction to which they might have agreed between themselves. E.g. embargo, or economic boycott of the particular state who has failed to abide by the rules laid down by the parties to the treaty can be a form of sanction. As the sanction need not be always coercive but can also be in form of boycott by other states or facing other related consequences in case of disobedience by the particular state when entered into a specify treaty with other states. Therefore it can be said that even the international law has power conferring rule which leads to some form of sanction.

**INDIRECT SANCTION**

Moreover there can be some laws which may suggests that these laws do exists without sanctions but at the end in ends up with a sanction either directly or indirectly. For e.g. a juvenile, who is a chain smoker and a drug addict. The law does not have a direct sanction relating to this but the juvenile in this case is sent to the rehabilitation center or juvenile care center. In this case where the juvenile has been sent to a rehabilitation which can been seen as indirect punitive measure to make that juvenile refrain from doing drugs. In this case juvenile’s stay in the rehabilitation center can be considered as indirect sanction to make him refrain from doing the acts which was done by him.\(^4\)

Therefore at the end it can be concluded that the laws cannot exist without sanction, there has to be some form of sanction either direct or indirect as the case may be, and need not be coercive always. Therefore if the laws exists

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without sanction it will give choice in the hands of the society as to whether they want to perform the duty or not. Further this will also lead to trouble in the society and the legal system which is followed by the society will break. Therefore to conclude it can be said that there cannot be any laws which exists without sanction.