Herbert Lionel Aldophus Hart (H.L.A. Hart)  
1907-1992  
Legal Positivist

• He was the Professor of Jurisprudence at the University of Oxford  
• He wrote several books – the most famous was *The Concept of Law* (1961)  
• This book was republished with a posthumous (i.e. after his death) postscript in 1994  
• In *The Concept of Law*, Hart explains his theory of law  
• He also criticized others’ ideas. For example, he criticized John Austin’s theory. He wrote that Austin’s command theory did not take account of the “variety of laws” in a legal system.  
• There is a lot that could be said about Hart’s theory – too much for us to discuss here. We will look at just a few key ideas.  

**LAW AS A SYSTEM OF RULES**  
• For Hart, the *legal system is a system of social rules*  
• The rules are “social” in two senses:  
  o “social” because they regulate the conduct of members of societies  
  o “social” because they are derived from human practices  
• Hart thought that there were two kinds of rules:  
  o **Primary rules**  
  o **Secondary rules**  
• **Primary rules** = Impose a duty e.g. the rules of criminal law or the law of tort (e.g. negligence)  
  o These are rules of substantive law  
  o For example, road rules, the laws of negligence, tax laws etc  
• **Secondary rules** = Rules about rules  
  o These are the rules which allow the primary rules to be changed, enforced; they include constitutional rules and rules of procedure  
  o These can be divided into three types:  
    o **Rules of adjudication**  
      ▪ The rules which give power to officials to pass judgment in cases of alleged wrongs e.g. by ordering the payment of money or putting someone in prison  
    o **Rules of change**  
      ▪ The rules which regulate the process of change of the primary rules themselves e.g. The power to pass legislation in accordance with certain procedures  
      ▪ Any rule that says how to change, add to or delete a primary rule  
    o **The rule (or rules?) of recognition**  
      ▪ This is the foundation rule which tells any one of us how to know that a rule is a valid rule  
      ▪ It is the basic source of legal authority in any legal system  
      ▪ It is an ‘ultimate’ rule – (e.g. he compares is to the metre bar in Paris which is the ultimate test of the measurement of a metre) which we all assume is, itself, correct
• e.g. in the UK, what the Queen in Parliament enacts is law (at least before the UK joined the European Union)
• e.g. in Kuwait, what is published in *Kuwait Today* is law

- It is not exactly clear what the rule of recognition will say. Instead of being a rule that can be simply stated, it is more like a set of attitudes held by legal officials such as lawyers, judges, legislators etc about what constitutes law
- In a basic/primitive society, it might be a rule that says: anything written in a certain book, or anything written on a certain stone, is law.
- Hart thought that primitive societies only have primary rules, that is, rules about what you can and cannot do, but they don’t have secondary rules, that is, rules about how to change rules.

SEPARATION OF LAW AND MORALITY
- For Hart, law and morality are separate
- An evil law is still a “law”
- For example, Nazi laws regarding informing on people, spying etc. They were valid laws but after World War II, some people were prosecuted for breaching them
- There is a famous debate between Hart and Lon Fuller over this issue: Hart says that some laws are morally deficient, but are still laws. Fuller disagrees. To read more, see Freeman at p379.

HART’S IDEA ON THE ‘INTERNAL ASPECT OF LAW’
- The ‘legal system’ according to Hart will only exist when the rules of behavior are commonly obeyed by the citizens and when the rule of recognition is commonly accepted (hopefully by everyone, but at least by officials) – they must accept these rules from “the internal point of view”.

- What does the “internal point of view” mean? This is something that Hart developed and his theory is different from his predecessors such as Austin and Bentham here.

- He means that law depends on more than just external pressures that are brought to bear on humans; it also depends on an inner point of view – that the law is placing obligations upon us. We (both offenders of the law and others) must see the law as setting common standards of behavior, and that we will be criticized if we fail to meet those standards.

- Hart introduces the ‘internal aspect of law’ to distinguish law from mere habits

- MacCormick helps explain this by using an example. Let’s say a person is stopped at the traffic lights and the person is playing their radio. To the outside observer, there is nothing to distinguish between the two activities (stopping at the traffic lights and playing the radio) but to the driver the distinction is based on the different thought patterns involved: stopping at the red lights is an obligation and not doing so will be considered a lapse in behavior (by him/her and by others) which leaves the driver open to criticism. Whereas that is not the case with failure to play his/her car radio.

- So, the law has an internal aspect but it depends on how we see the rules, not just on what an outsider observes.
Criticism of Hart:

1. Is law just a 'system of rules'?
   a. Some criticize Hart by saying that he doesn't take into account the importance of principles
   b. Some argue that a legal system is much more than just rules
   c. For example, there is a principle that 'no man may profit from his own wrong'. Hart's system of rules ignores the importance of principles (see Dworkin, as discussed in Freeman Introduction to Jurisprudence at page 388)

2. Where does the 'rule of recognition' come from? What makes it valid? Hart says that the rule of recognition is used or assumed by the officials of the legal system. It is ascertained by reference to the attitude of legal officials, by their assumptions and actions:

   "In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule... For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers."¹

But as Margaret Davies points out,² who or what makes the officials official? Isn't it the rule of recognition that makes them the officials? If so, then this is a rather circular argument. The officials recognize the rule which recognizes them as officials!³

3. Doesn't Hart accept Natural Law to some extent? Yes. It seems that Hart does accept that 'natural' principles are not completely excluded. In order to provide the conditions for social survival, Hart accepts that there is a ‘minimum content’ of natural law. That is, there must always be prohibitions on killing and causing bodily harm, some minimal form of private property and a way of ensuring compliance with legal order. This ‘minimum content of natural law’ is what Hart thinks is essential in all legal systems to ensure human survival. So he might be called a "soft positivist" rather than a “hard positivist” because he allows for some natural law in his concept of law.⁴

4. Separation of law and morals – is it true, as Hart argues, that ‘some laws are laws but are they too evil to be obeyed’? Hart says that “under the Nazis there was law, even if it was bad law.”
   a. But why call evil laws with the name 'laws'?
   b. Are morally reprehensible laws still entitled to be obeyed? Why?

5. Do judges have discretion in “hard” cases? Are there, as Hart says, gaps in the law? Is there a “penumbra of certainty” and a “penumbra of uncertainty”? Dworkin disagrees with Hart on this and says judges don’t have strong discretion. Dworkin argues that even in hard cases there is always a “right” answer. Dworkin also says that the law is “gapless” (see Freeman at chapter 6 and at chapter 18) and Dworkin asserts that there is always one right answer to every case. Dworkin is sort of in between Natural Law and Legal Positivism. We don’t study him per se but he is an interesting alternative to Legal Positivism.

¹ H.L.A. Hart The Concept of Law 102
³ See Davies at 105-6. Jacques Derrida made the same type of observation about the US Declaration of Independence. That document claims to speak in the name of the people but it is the document itself which constitutes the people as a people! So, the purported foundation of authority proves to be no foundation at all.
⁴ See Davies, supra n 2, at 106 and
If you want to read more about Hart, consider researching the Hart-Fuller debate in the Harvard Law Review and the Hart-Dworkin debate. It is interesting to see how other legal philosophers have attacked Hart, and his attempt at responding to those attacks.

Further reading:
- Wikipedia has pages on HLA Hart, Ronald Dworkin and Lon Fuller which are good places to start
- Raymond Wacks *Understanding Jurisprudence*