International Journal of Arts and Humanities

ISSN: 2581-3102

Volume:02, Issue:12 "December 2018"

THE SUBSISTENCE OF MORALITY IN LAW: A SYNOPSIS OF H. L. A HART'S CONCEPTION OF THE LAW

Uchenna Nympha Nkama

Philosophy Department, University Of Port Harcourt, Nigeria

ABSTRACT

Whether natural or positive, every law has an author with certain demands of morality. Thus, this paper discusses the subsistence of morality in law, a synopsis of H. L. Hart's conception of the law. According to Hart, there is no logical interconnectivity between law and morals, and that law is not simply a command backed by threat. Instead, Hart hinged his conception of the law on a system of rules. In view of this standpoint, the issues raised by Hart's conception of law include what is morality, what is law, what is Hart's minimum content of natural law and judicial discretion, among others. The aim is to reveal the problem in Harts legal positivism that is scarcely explored by other scholars. The work contributes to knowledge by submitting that one cannot help but queue into the notion that morality cannot be eschewed from the law.

Keywords: law, morality, jurisprudence, legal positivism, judicial discretion

INTRODUCTION

There are sundry controversies over what is law and what ought to be law and its relationship with morality. These issues are entrenched on what constitutes law and morality where different philosophers and jurists differ in ideas on the ground of the 'is' and the 'ought.' (I.e. what is law? and what ought to be law?). Hence, the dilemma of whether the 'ought' can be derived from the 'is' is an unending matter in philosophy and jurisprudence. That is, can a statement of fact 'is' derive from a normative statement 'ought'? This is because human society is imbued with social norms disquieted with legal and moral issues. This is what is called Hume's guillotine (Hume, 1739, p.335). However, for the purpose of this study, the focus will be on the 'is' which is considered a statement of fact. The aim of the study is to reveal the problem in Harts legal positivism that is scarcely explored by scholars.

WHAT IS LAW?

ISSN: 2581-3102

Volume:02, Issue:12 "December 2018"

Many attempts have been made to defining what is law and set boundaries between what considered to be law. Some earlier attempts on the excursus include W. Blackstone, J. L. Austin, and H. L. A Hart among others. It could be said to be regulations on civil demeanors that is approved by the state and disapproving what is wrong. However, the meaning of 'What is law' is weighty in all contemporary societies and has endured throughout history. Philosophers and jurists affrays themselves in an attempt to unlock secrets hidden in its logic (Pembroke, Thomson, and Sarre, 2006, p.11). The philosopher and jurists provide a definition of law according to the school of thought to which the scholar belongs giving strands to positive law and natural laws respectively.

The natural law refers to the supposed rights and privileges inherent in human nature and endowed by nature. According to St. Thomas Aquinas, a medieval philosopher, the law is defined as an ordinance, a directive, a command, a stipulated rule or system and promulgated by one who has the welfare of the community at heart. Aquinas was a major exponent of the natural law theory in its classical form. He viewed the law in four ways, namely eternal, divine, natural and human laws. Human law he said is derived from divine law and natural law (Aquinas, 1911, p.la, 2ae, 95, 2).

On the other hand, positive law refers to the statutes made by human for the conducts of actions of the members of the society by the state apparatus. That is, whatever is to be considered law is built on social phenomena. Jeremy Bentham (1748-1832) who is the major exponent of legal positivism viewed law essentially as a command issued by a sovereign to his subordinates or by a superior to inferior who owes him allegiance. This definition was adopted by John Austin (1790-1851) who supposed that the existence of law is one thing but its merit and demerits is a different thing entirely. John Austin, like Bentham, conceived law as a command backed by sanction. Han Kelsen (1881-1973) a renowned jurist and H. L. A. Hart (1907-1992) lend credence to legal positivism and revised its dictum. Hart submitting that law is basically an organized set and a fusion of primary and secondary rules. However, whether natural or positive, every law has an author with demands of morality.

WHAT IS MORALITY?

Morality means different things to different people in different fields. On a general note, morality is defined as the principle that examines the rightness or wrongness of human conduct setting boundaries between good and bad in the manner of behaviors. The term which takes its root from the Latin word, *moralitas* means manner, character, or proper behavior. According to Long and Sedley (1987), morality is the differentiation of intentions, decisions, and actions between those that are distinguished as proper and those that are improper (p. 366-67).

ISSN: 2581-3102

Volume:02, Issue:12 "December 2018"

Every law has a moral bearing. Yet, many scholars have attempted to divorce morality from law. It is pertinent to note that law and morality are both systems of rules having normative characteristics. They both order and regulate human conduct in society. Consequently, all efforts to completely separate law from morality have been a wide goose chase, yielding no result. Unfortunately, the legal positivists view otherwise.

WHAT IS HART'S STANDPOINT ON THE LAW?

In *The Concept of Law* (1961), H. L. Hart detailed the domain of law and morals arguing that both are not necessarily connected logically; that moral justification has no place in the parlance of legal rights and duties. He viewed the issue of law and morality as being very close though not necessarily related. He demonstrated his sympathy to what he called "the core of good sense of natural law." That is, a valid law is a law whether it is bad or good, just or unjust; that an enacted law though it is morally iniquitous is still the law. That, there is a difference between what law is and what it ought to be.

Thus, on the issues entrenched on what constitutes law and morality where different philosophers and jurists differ in ideas on the ground of the 'is' and the 'ought', Hart rejects the ideas that morality necessitates legal validity. He supposes that society has advanced and reached such a stage that law is different from morality, that law is a variety of social control different from morality. However, the analysis of the obligatoriness of law stemming from social rules; and the connection or disconnection of these social rules from the moral rules of the society seem to pose a problem in understanding Hart's philosophy of law.

While critiquing Austin's theory, Hart took Austin's theory supposing that it does not account for all kinds of law and that not all laws are commands. That is, if the law is essentially a command backed by force or by the threat of evil consequence as Bentham and Austin have argued, then there is not much difference between law and the command of a gunman backed by threats of evil consequences in case of failure to comply. According to Hart, this would amount to saying that penal statutes are the only laws there are, which is not true; there are other varieties of law, for instance, the law of contract (Hart, 1961, p.28). Thus, Hart departed from Austin's command theory and hinged his legal positivism on a rule system and distinguished between social rules and legal rules.

According to Hart (1961), the rule is central to and ordering the constant pattern of behavior amongst a set of individuals with a shared pattern of attitude within a group. This pattern becomes a common standard of conduct to which all members of the group are required to conform. Social rule lies at the root of every legal system (p.55). Social rules grow out of habit while legal rules grow in turn, out of social rules. The legal rule is considered a 'standard of

ISSN: 2581-3102

Volume:02, Issue:12 "December 2018"

behavior to which people are supposed to conform'. He said standards are necessary in our law because, in view of the highly variable nature of possible combinations of circumstances, it is not always possible to identify in advance the relevant features of cases to which rules might be applied.

In a bid to arriving at the validity of the law, Hart further distinguished between primary rules and secondary rules. The amalgamation of these two rules constituted the pivot and center of his legal system (Hart, 1961, p.96). Hart differentiated between criminal law and contracts. According to Hart, primary rules are mandates to set in motion guidelines. It supposes that sanctions and concrete punishments abound in criminal law but meager in contract law, and concerns more with initiating contracts for the purpose of enacting the law. This purpose mandates them to set in motion their own guidelines. With this in perspective, Hart projected that primary rules carry with it obligatoriness.

On the other hand, secondary rules according to him modify and enforce the primary rules. He termed them power-conferring rules which give individuals power of attorney and also to enact laws and contract agreement. Hart outlined three types of secondary rules namely; rules of change, adjudication, and recognition. These secondary rules are a panacea in solving puzzles, eradicating injustice and bringing justice to bear in practice. Hart saw the rule of recognition as the most pertinent and the bedrock of the legal system. It is also regarded as the foundation of a complicated social procedure which is regarded by officials in the legal system.

WHAT IS THE ASSOCIATION BETWEEN LAW AND MORALITY?

There is "no logical interconnectivity between law and morals" is the statement of H. L. Hart (1958, p.595). According to Hart, there are notwithstanding areas of divergence and convergence between legal rules and moral. Although such moral rules are not the whole of morality, they are the bedrock of morality; and as rules, they invite comparison with legal rules. For Hart, the significant similarities between legal and moral rules are that there is a core of content common to both rules. This content, for example, murder and covetousness are forbidden legally and morally; in proper functioning and correctness of any community, both rules are very critical dictating permissibility and impermissibility, admissibility and inadmissibility. Hart further buttresses the interest in making sure that the tenets of both rules are strictly obeyed which sometimes come in the form of sacrifice which requires no glorification but a fact of what should be done (Hart, 1961, p. 107).

Furthermore, Hart identified some areas in which legal and moral rules contrasts. For instance, in a community people tend to be indifferent to legal rules, unlike moral rules. There is an incessant and constant change of legal rules by legislative bodies which is alien to moral rules but Hart

admitted that the flux in legal rules still hikes the level of morality. According to Hart, the flouting of moral rules could be tolerated where the defaulter could not avoid committing the offense or is penitent and remorseful for such acts. Also, the insistence in keeping to the dictates of legal rules is different from that of moral rules, moral rules have to do with one's conscience and remorsefulness if one commits the offense. Finally, the rule of recognition outlines the standard of validity for legal rules which recognizes them unlike moral rules (Hart, 1961, 176-77).

WHAT ARE JUDICIAL DISCRETION AND OPEN TEXTURE RULES?

The term 'open texture' was first introduced in 1945 by Fredrick Weismann in a paper titled 'Verifiability'. It refers to the possibility of universal vagueness in empirical statements (p.2). In other words, according to Hart, judicial discretion requires an open texture rule. For Hart, the value-ladenness of language and the inherent condition of man has made choice making a never-ending battle in our daily living and dealings. This is, of course, an existential characteristic of the man. Language and rules are intrinsically 'open-textured' in which case, there is room for judicial discretion in legal application and interpretation.

According to Hart, in the process of application and interpretation of rules, there would be particular and novel cases where rules will be exhausted. In such situations, the law is noticeably limited in of application of general rules to all related cases. This situation is what Hart describe as 'open texture.' He went further to argue that judges are left to their own discretion as well as the courts left to their discretion in an open texture. The rule applicable in such situations is jurisprudence which is at their disposal to arrive at a balance where there is a conflict (Hart, 1961, pp. 129-131).

Furthermore, Hart portrayed a rule as having a core of certainty and a shadow of doubts. The implication is that each rule has a central, indubitable and a peripheral area. On deciding hard cases, Hart opines that a judge's moral induction can prevail however insisted that, where the judge decides a hard case on the basis of his moral conviction, he does not conversely certify the validity of the law. He merely enforces on the prudential ground, that is, on the condition of its moral content (Hart, 1961, p.12).

WHAT IS THE MINIMUM CONTENT OF NATURAL LAW?

There are immutable standards to legal considerations considering the nature of human existence and living conditions. This is demonstrated by Hart by conjecturing a minimum content of natural law. Hart's contention with natural law is basically its classical form and its affinity with the theoretical metaphysical setting. He emphasized that the nature underlying the doctrine of natural law in its classical form was already outdated. However, he felt that this doctrine has

survived to this present day because it was not really dependent on the outdated concept and the theoretical metaphysics but on a more sublime fact. That is, it contains some truths which are important to law and morality. These truths constitute the core of the natural law doctrine of Hart called 'the minimum content of natural law'.

The minimum content presented as its pivot the relationship between law and morals that must be present for the actualization of the survival strategies of man's association with one another. Hart contended that in effect, certain situation abounds which are unchangeable and the fact that survival is very pertinent in man's existence; there are standards that must be met. Such rules make up the very existence of law and morals. He stipulated that in this survival strategies certain impediments must be eradicated which include; human vulnerability, approximate equality, limited altruism, limited resources, limited understanding and strength of will. For Hart, that the above stipulations are the core of good sense or the required tenets in actualizing survival and his own way of repositioning natural law on a better footing. All these are relevant to the proper analysis of law and morals of which it would be sufficient to base their definition formally.

EVALUATION OF H. L. HART'S LEGAL THEORY

Every law has an author (human or nature) with demands of morality. Therefore, the affinity or blend between law and morality is so tight such that it is difficult to disperse one from the other. There is always an overlap. Hence, legal positivists differ on the relationship between law and morality. For example, Holmes, a legal positivist, in a bid to separate law from morality admitted that law is thoroughly permeated with morality to such an extent that the history of law is "the history of the moral development of the race and the practice of law tends to make good citizens and good men" (Holmes, 1897, p.549).

Although the distinction between law and morals is a cornerstone of positivist legal theory, Hart's attempt to make a clear break from Austin's position of law while maintaining the legal positivist tradition leads to ambiguous use of key concept such as obligation. The Hart's doctrine of judicial discretion (Hart, 1961, p.128) becomes conspicuous at this point which Dworkin (1977) in his work, *Taking Rights Seriously* disagreed with. According to Dworkin, if there are no legal rules binding a judge, there are legal principles to which the judge must abide. Consequently, for Dworkin, any theory of law must be a theory of how cases ought to be decided which begins, not with an account of the political organization of a legal system, but with an abstract ideal on moral-political consideration (p.22).

It is crystal clear that Hart halts between legal positivism and legal naturalism. The inconsistency in his thoughts was further demonstrated by Hart's admission of the inseparability of law and

morals. This is obvious in his doctrine of 'minimum content' in *The concept of law* (1961). Maybe, the philosophy of minimum content is a revision of the earlier position in *Positivism and the separation of law and morals* (1958) where Hart submitted that there is no logical interconnectivity between law and morals. It is nonetheless a matter of inconsistency of thoughts.

Continuing in this inconsistency, Hart postulated the neutrality of morals in the enactment of laws (1961, p.181) but permitted the inculcation of moral tenets and values in the validity of the rules of recognition. Rule of recognition stipulates the meter for those with an internal point of view (1961, p.105). In disagreement with Hart's "no logical interconnectivity between law and morals, legal rights and duties" (Hart, 1958, p.595), Dworkin (1977) suggested a total incorporation of morals into the legal system. Corroborating with Dworkin was Fuller (1964). According to Fuller (1964), allegiance to the system of law is of moral value and this has been the basis for the claims of some legal theorists that law has a vital relationship with morality.

CONCLUSION

After a brief analysis of Hart's Theory, it is an overt situation that Hart tried as much as possible to maintain his stance as a notable legal positivist in the bid to separate morals from the law. The attempt met a brick wall. As it were, one cannot help but queue into the notion that morality cannot be eschewed from the law.

It is an obvious fact too that societies break up from within more often than they are broken down by outside forces. The internal rubrics that knit societies are amorality. When no common morality is observed, there is disintegration, chaos, uprising, among other things that destabilize the stability of the society. It would not be denied that law, whatever else it does has the effect of regulating human behavior and it is hoped that it would perform the role well and morally. Furthermore, legal reasoning is a distinct, highly established and dignified type of moral reasoning. In actuality, there is no actual legal reasoning in a reasonable and successful society without a distinct moral standard.

In conclusion, there is a place for natural law in Hart's positivism despite the terminological cloudiness and ambiguity. Therefore seeing Hart could not divorce his positivist dictum from that of the naturalists. Hart could be designated a 'soft positivist'.

REFERENCES

Aquinas, T. (1911). *Summa theological*. London: English Dominican.

Dworkin, R. (1977). *Taking rights seriously*. London: Gerald Duckworth & Co. Ltd.

Hardin, R. (2001). Law and social order. *Philosophical Issues, Social, Political and Legal Philosophy* (11.1), 61-85.

Hart, H.L.A. (1961). *The concept of law.* Oxford: Oxford Univ. Press.

_____ (1958). Positivism and the separation of law and morals. *Harvard Law Review* (71.4), 593-629.

Holmes, O.W. (1897). The path of law. *Harvard Law Review* (10.8), 457-478.

Hume, D. (1739). *A treatise of human nature*. London: John Noon.

Fuller, L. (1964). *The morality of law* (rev.ed.). London: London Univ. Press.

Long, A., & Sedley, D. (1987). *The Hellenistic philosophers: Translators of the principal sources with philosophical commentaries*. Cambridge: Cambridge Univ. Press.

MacCormick, N. (1978). *Legal reasoning and legal theory*. Oxford: Oxford Univ. Press.

Pembroke, M., Thomson, J., & Sarre, R. (2006). *Introduction to law* (4th ed.). Australia: Lexis Butterworths.

Weismann, F. (1945). Verifiability. Proceedings of the Aristotelian Society, Supplementary Volume XIX. Retrieved from: http://legacydirs.umiacs.umd.edu/~horty/courses/readings/waismann-verifiability.pdf

