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Research Article

Separation Thesis of Law and Morality in H.L.A. Hart (An Appraisal of H. L. A. Hart's Concept of Law)

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Abstract: No one exists in isolation. The sustenance of every individual person as a human in a society is expediently determined by one's responses to law and morality. Think of a state of lawlessness, a state comparable to Hobbes' state of nature, where the morality of the people living there is at nadir, it then follows that chaos, anarchy and survival of the fittest takes precedence in such a society. Most of us are familiar with laws but few of us know what they are. The problem of the relationship between law and morality looms large since the dawn of analytic jurisprudence. Earlier legal positivists were of the view that there is no necessary connection between law and morality whereas both concepts are held to be the same by the natural law theorists. When Professor. H. L. A. Hart came to the intellectual scene, a new horizon opened to accommodate the inseparability of the two disciplines, namely: law and morality. Applying the methods of analysis and hermeneutics one discovers that the early legal positivists championed by the utilitarians like Jeremy Bentham, John Austin, Hans Keelson, Joseph Raz are morally arbitrary and indifferent to reality when we critically consider their no necessary connection thesis. Hart is widely known for his discussion and views about the relationship between law and morality. As a starting point, he acknowledge that there are various ways that law is intimately connected with morals but quickly asserts that this truth if not well considered may illicitly be taken as a warrant for different kinds of positions. From all indication, for Hart, law and morality are bonded together in what can be described as mutual complementarity rather than severing one from the other. Hart's theory mediates between the theories uphold by natural law theorists and the early legal positivist, otherwise known as exclusive legal positivists. And the conclusion is that the thought and idea of Hart on the separability thesis is that there are some legal systems which permit appeals to moral truth on the question of law which is what Hart means by inclusive positivism. This is in contradiction to the position of Bentham, Austin and other legal positivists who adhere to the severance of law and morality. The major task of this work is to explain deeper Hart's notion of law as the union of primary and secondary rules, his criticism and rejection of John Austin's view of law as command or sovereign's coercive order, together with solution to some of the profound immoralities of the world with a particular reference to Nigeria and to enthrone legal enforcement of morality.

Keywords: Positivism, Law, Morality, Separation, Rules, coercion

LITERATURE REVIEW

Attempt to resolve the problem concerning the relationship between law and morality has been made by various jurists, philosophers and scholars. Any casual or young scholar reading and developing interest in analytic jurisprudence is bound to be in a confused strife and an enduring struggle to understand properly what exactly the position and thought of H. L. A. Hart on his notorious public lecture at Harvard Law School in April 1957.

Hart theory of law as a union of primary and secondary rule is a key to science of jurisprudence for him as a refutation of John Austin's theory of command. For Hart, not all law imposes duty on people; there are some laws which confer power privately or publicly on individuals, judges and legislators.

In his book titled, Positivism and Separation of Law and Morality, he tries to synthesize between the views uphold by natural law theorists and legal positivists. For the natural law theorists, the source of law is something that is beyond man. Human laws tap their authenticity from natural law and law and morality cannot be separated apart. On the other hand, the legal positivists were of the view that there is nothing there, nature or God that makes law. For them, man is the maker of law and there is no necessary connection

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between law and morality. Man makes law to organize his society because man is a homo-socialis.

Some prominent philosophers and jurists who in their different times concerned themselves with the concept and critique of Hart's views on law and its relationship with morality are Lon L. Fuller, Ronald Dworkin, Joseph Raz, John Finnis, Philip Ostein, Gerald Dworkin and Basil Mitchell.

Lon L. Fuller(1964), a colleague of Hart at Harvard University and equally a natural law theorist sets himself towards refuting Hart's theory of law and he opines that the purpose of law is to subject human conduct to the governance of rules. He equally challenged Hart's positivist view of the relationship between law and morality and posited that every law must have an inner morality giving it credence and he offered a definition of law as "an enterprise of subjecting human conduct to the governance of rules"(Fuller; 1964).

For him, law has an internal morality that goes beyond social rules by which valid laws are made, that is to say, law has a fundamental connection with morality. He differentiated between morality of aspiration and morality of duty. Morality of aspiration in his term refers to morality of good life or aspiration towards excellence while morality of duty refers to the basic rules without which we cannot have an organized society. Fuller contends that the inner morality of law is chiefly the morality of aspiration than that of duty.

From Fuller's view, every legislation or law must have a moral commitment.

More so, Ronald Dworkin (1979) was very critical of the theory of law which has for long been taken to be the liberal theory of law. He rejected the theory that there can be a general theory of existence and content of law. This theory which Dworkin called "the ruling theory" has two parts. The first part of the theory is about the meaning of law while the second is about what law ought to be. The former which was much of Hart's interest is a "theory about the necessary conditions for the truth of a proposition of law. This is what is termed legal positivism which stipulates that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions and nothing else (Dworkin; 1978). Dworkin challenges and criticizes the theory of legal positivism as inadequate conceptual theory of law which should therefore be abandoned. He argued that it is wrong to suppose as we find in legal positivism that "… in every legal system there will be some commonly recognized fundamental test for determining which standards counts as law and which do not"(Dworkin; 1978). He therefore posits that no such test can be found in complicated legal systems such as Britain, United States nor can we find in them clear and ultimate distinctions between legal and moral standards as posited by the positivists.

Further still, Joseph Raz(1979) argues for the separation of law and morals in opposition to some natural law theorists but does not hold that law has no relation with morality. He rather proposes the view associated with some natural law theorists in his version of positivism. For him, there is a necessary connection between law and morality only in those situations where such morality is endorsed and practiced by the population. He further identifies the perennial and inexhaustible problem over the nature of positivist analysis of law as coming from the elusive meaning of 'positivism' in legal philosophy. For him, this problem or controversy can be overtaken if we approach legal positivism through the particular theses or groups of theses around which it revolves. He identified three of such areas namely:

The identification of law; the moral value of law; and the meaning of the key terms. These three areas are identified simply as social thesis, the moral thesis and the semantic thesis respectively. The social thesis holds that what is law and what is not law is a matter of social fact. It claims that the existence of and content of the law is a matter of social fact which can be established without resort to moral argument (Raz; 1995). Raz identifies this thesis as the more fundamental and responsible for the name 'positivism'

On the other hand, the moral value of law thesis holds that the "moral value of law (both of a particular law and of a whole law system or the moral merit it has) is a contingent matter dependent on the content of the law and the circumstances of the society to which it applies" (Raz; 1979). The semantic thesis about the nature of law is an attempt to define the concept of law. This kind of effort was boosted by the "…anti-essentialist spirit of much of modern analytical philosophy, and in particular by its tendency in its early years to regard all philosophical questions as linguistic questions"(Raz; 1995). The semantic thesis states that terms like 'rights' and 'duties' are not the same, they have different meaning in reference to moral and legal contexts.

Raz considered law as the activities of human beings and it should be separated from morality which represents the ideal or what should be but should represent the positivists' enactments following the social situation. He therefore emphasizes that while law may derive authority from a moral claim, legal theorists must not suppose that legal claims are morally legitimate just on the basis of its claim to have emanated from morality. As a matter of fact, Philip Ostein (1998) sought to resurrect Austin's command theory. Ostein in disagreement holds that Hart is essentially wrong and adduces that "all positive laws

can very plausibly be analyzed as orders backed by threats issued by a sovereign in a politically independent society"

Hart likens Austin's command theory to a gunman situation which leaves us with no other choice than total compliance but for Ostein, Austinian command leaves us with responsible choice.

However, John Ezenwankwo (2013) elaborates and brings Hart's position to limelight. He argues that the moment everything about morality is removed from law of the nations of the world, we would become wolves to each other(Ezenwankwo; 2013). This situation will result to anarchy, lawlessness and Hobbesian state of nature. For him, true law must have a link with morality and that the society following Devlin's thesis will actually disintegrate without the state apparatus (the law) in protecting the moral values in the society.

Moreover, Lord Devlin attacked the Wolfenden Report of 1959 for removing criminal sanction from consenting adults in homosexual practice, arguing that a society's shared morality is necessary for its existence as a recognized government and the justification for its enforcement by law was simply to preserve the essentials of societal existence (Devlin;1956).

Hart insisted that whether or not a society is justified in defending itself must depend on what sort of society it is and what steps to be taken are. Contemporary liberal theorists such as Feinberg and Ronald Dworkin agree with Hart that the state has no business punishing conducts simply because they are immoral.

Still on the same note, Basil Mitchel who is principally noted as a mediator between Hart and Devlin, holds that the function of the law is not only to protect individuals from harm but also to protect the rationally essential institutions of the society(Mitchel; 1970). He noted that Hart however amended his position by giving consideration to legal paternalism but did not give a clear indication whether there should be a distinction between a man's physical good and his moral good. Mitchell therefore in conclusion holds that the protection of institutions and legitimate concern for the ethics of the society may sometimes justify the enforcement of morality.

THE CONCEPT OF LAW

Hart in the first chapter of his book, *The Concept of Law*, considered the question of legal theory namely: what is law?

However it seems too difficult to give a concise definition of law. For Thomas Aquinas in his classical definition of law says that "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community"(Aquinas; 1485). It is further defined generally as a rule or measure of acts whereby man is induced to act or restrained from acting. Hart solely aim in his book 'The Concept of Law' was to further the understanding of law, coercion, morality as a different but related social phenomena (Hart; 1961). Hart does not in his book set out to tell his readers new things about law, but rather to tell them new things about things they already know about law. The question of legal theory what is law has been tackled by a number of theorists, philosophers and scholars yet there is no universal consensus on the definition of law. According to Hart (1961):

"Even if we confine our attention to the legal theory of the last 50 years and neglect classical and medieval speculation about the nature of law, we shall find a situation not parallel in any other subject systematically studied as a separate academic discipline"

His approach to the question what is law is vey remarkable for his indirect consideration of the question before him, in the sense that the question is not very much answered, it is not avoided either, it is rather transformed. According to Hart (1961) for every discussion of law, any averagely educated person should be able to identify the following five features of law.

A rule forbidding or enjoining certain types of behavior under penalty

Rule requiring people to compensate those they injure in certain ways.

Rules specifying what must be done to make wills, contracts or other arrangements which confers rights and create obligations.

Courts to determine what rules are and when they are broken and to fix punishment and compensation.

Legislature to make new rules and abolish old ones.

Despite this layman's knowledge or common knowledge of the basic feature of every law, the question what is law has persisted and people continued to give a divergent and at times a contradicting answers to the question.

Considering the perplexing nature of the question what is law and the paradoxical nature of the answers given by many theorists, Harts opines that the best way to approach law is to defer giving any answer to the query "what is law?" until we have found out what it is about the law that has in fact puzzled those who have asked or attempted to answer it, even though their familiarity with the law and ability to recognize examples are beyond question. What more do they want

to know and why do they want to know it. To this question, something like a general answer can be given (Hart; 1961).

LAW AS A COERCIVE ORDER

Hart criticizes the concept of law that is formulated by John Austin. Austin proposes that all laws are commands of a legally unlimited sovereign (Austin; 2000). That is to say, law is nothing but an order backed by threat of sanction. Austin claims that all laws are coercive orders that impose duties or obligations on individuals. Hart likens Austin's command theory to the role of a gunman in a bank and tries to establish the differences between the gunman's orders and those made by law. Hart says, however, that laws may differ from the commands of a sovereign, because they may apply to those individuals who enact them and not merely to other individual and they may not necessarily impose duties or obligations but may instead confer powers or privileges. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality and to mischaracterize the purpose and function of some laws and is to misunderstand their content, mode of origin, and range of application.

However, not all laws may be regarded as coercive orders, because some laws may confer powers or privileges on individuals without imposing duties or obligations on them. What then is law according to Hart?

LAW AS A UNION OF PRIMARY AND SECONDARY RULE

Hart in an attempt to separate the descriptive question of what law is from the prescriptive question of what law should be asserts that law in general is a union of *primary* and *secondary* rules. This theory remedies the defects in the theory of John Austin, yielding a model of law which is more consistent with empirical observations of legal systems. Austin's theory of law is defective in three ways. Firstly, Austin renders an incomplete account of law, by excluding "important kinds of laws that are neither commands nor backed up by coercive threats of sanction" from his definition of law. Secondly, Austin's model misrepresents "how laws are used in society" by taking what Hart later defined as an "external" view of law, and misidentifying the source of an individual's obligation to obey the law. Finally, the theory's test for assessing the validity of law requires the invocation of problematic concepts of "sovereign," and "command," which are inconsistent with the following realities: (a) the "sovereign" often cannot be identified using Austin's definition of "sovereign", (b) law can emanate from sources other than the sovereign, (c) the sovereign does not have unlimited legislative power in a modern state, and (d) legislative authority is continuous.

Hart's model addresses the above deficiencies. His definition of law includes the kinds of laws excluded from Austin's theory. He provides a more empirically consistent view on the role of law in society by positing that law is a type of social rule which is generally obeyed for reasons internal to the individual. Hart argues that laws are a type of social rules, not of commands. Specifically, laws are a type of social rules which, in case of violation, are associated with a physical sanction such as imprisonment, as opposed to moral sanctions, such as feelings of guilt.

He does believe that there is a normative aspect to the law, which is reflected in the obligation we feel to follow it. Hart believes that a more appropriate metaphor for thinking about laws is that of rules in a sporting competition. Rules can not only direct the players to perform or refrain from performing certain actions, but they also give directions to the umpire or score keeper. Furthermore, players feel themselves bound by the rules. The rules themselves provide a reason to act, not just the fear of punishment as in the command theory. Hart calls this point of view, where the existence of the rule provides an obligation for action, the *internal perspective to the law (Austin; 2000).* The separation of rules into these two different though related categories allows him to establish a method to determine the validity of a law, which is what determines whether it creates an obligation among citizens in a society or not.

PRIMARY RULE

Primary rules are "rules of obligation," *i.e.*, rules that impose duties.

According to Hart's definitions, primary rules either forbid or require certain actions and can generate duties or obligations. For a citizen with an internal perspective to the law, the existence of a primary rule will create an obligation for him or her to behave in a certain way. When we think of something being against the law, or required by the law, we are generally in the realm of primary rules. Thus Hart asserts that under the rule of one type, which may be considered the basic or primary type, human beings are required to do or abstain from certain actions whether they wish to or not (Austin; 2000).

These rules exist in even the smallest communities, "contain in some form restrictions on the free use of violence, theft, and deception," and are obeyed by the majority of the social group (Austin; 2000).They encompass all that Austin defines as true, or *positive* law. An informal system based strictly on primary rules has, however, three defects***: uncertainty, a static nature, and inefficiency***. For this reason, a proper legal system has *secondary rules*, which "are

concerned with primary rules," and serve to address the primary system's deficiencies (Austin; 2000).

SECONDARY RULE

Secondary rules are in a sense parasitic upon or secondary to the first i.e. primary rules. It sets up the procedures through which primary rules can be introduced, modified, or enforced. Secondary rules can be thought of as rules about the rules. It confers powers, public or private. They combat the three major issues of legal systems that *primary rules* can't–(1) uncertainty of the law, (2) efficiency of the law, and (3) static *quality* of the law. Each kind of *secondary rule* addresses a separate one of those three issues, yet all are interdependent (Austin; 2000).

If, in a particular society, there were no secondary rules but only primary rules of obligation, would a legal system exist? To this question, Professor Hart's answer is no. Such a body of rules would not constitute a system, but would be a mere "set" of rules. To constitute a system, there would at least have to be a secondary rule of recognition "uniting" the primary rules. A "set" of primary rules alone would "exist" if (and only if) the citizens viewed these rules from the internal point of view, *i.e.,* only if such rules were consciously regarded as standards of behavior and deviations from there were subjected to criticism. If this internal point of view were not widely disseminated, there could not, according to Professor Hart, "logically" be any rules of obligation (Austin; 2000). These secondary rules are divided into rules of recognition, rules of change, and rules of adjudication. Let us analyze them succinctly one after the other.

RULE OF RECOGNITION

This rule specifies criteria for identifying which rules are to count as rules of the system. Of these three secondary rules, Hart believes that rule of recognition is the most important. It tells us how to identify a law. In modern systems with multiple sources of law such as a written constitution, legislative enactments, and judicial precedents, rules of recognition can be quite complex and require a hierarchy where some types of rules overrule others (Austin; 2000). But, by far the most important function of the rule of recognition is that it allows us to determine the validity of a rule. Hart states that it is the remedy for the uncertainty of the regime of primary rules (Austin; 2000). It is a collection of standards and requisites that govern the validity of all rules; thus, the rule of recognition confers power to new rules by validating them. For a rule to be valid is to recognize it as passing all the tests provided by the rule of recognition (Austin; 2000).

RULE OF CHANGE

A second major defect of the simple regime of primary rules of obligation is that the regime is static-there is no way to introduce new rules or change old ones. In modern systems, there are secondary rules conferring powers on officials, e.g., legislators, and on private individuals, e.g., contracting parties, which enable these people to introduce new rules and change old ones. But since such secondary rules are not duty-imposing rules, not primary rules of obligation, they cannot, by hypothesis, exist in the simple regime. The effect of this is that the regime is highly *static-each* individual merely has fixed obligations to do or abstain from certain things. The remedy for this defect is the introduction of "rules of change" (Austin; 2000): rules which empower people to legislate and to enter private transactions for the purpose of varying their rights and duties. It ensures that the system does not remain at a static quality but instead is dynamic and progressive. Generally, they confer and prohibit power of the creation, extinction and alteration of primary and secondary rules.

Rules of change are interdependent with the other rules. Hart emphasizing on the "close connection between the rules of change and the rules of recognition, asserts:"Where rules of change exist, rules of recognition will necessarily incorporate a reference to legislator as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation" (Austin; 2000).

RULES OF ADJUDICATION

The third major defect of a simple society "governed" solely by primary rules is that in such a society there is no agency specially empowered to ascertain finally and authoritatively the fact of violation of primary rules. In modem legal systems, secondary "rules of adjudication" empower courts to make such determinations and to apply sanctions. But since such secondary rules are not duty-imposing rules, not primary rules of obligation, they cannot, by hypothesis, exist in the simple regime. As a result, there is unresolvable *uncertainty* as to the applicability of primary rules and an inefficient diffusion of the social pressure by which such primary rules are maintained. The remedy for this defect is the introduction of secondary "rules of adjudication," rules empowering persons authoritatively to apply rules and sanctions. They empower individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken (Austin; 2000). Rules of adjudication govern the election and procedure of the judiciary.

In conclusion, Hart's analysis of primary and secondary rules provides a very useful framework for understanding the sources of law and how we can

distinguish valid laws from invalid ones without entering into subjective moral territory. Hart's system creates a way to reconcile some of the inconsistencies in Austin's theory, while also incorporating some of the more normative nuances of the law without making any moral claims. Hart observes that people feel an obligation to follow primary laws, even in cases where the likelihood of being caught and punished is slim to none. Since Austin defines laws as demands issued by a sovereign under threat of sanctions, this observation cannot be explained by Austin's theory. Hart argues that this obligation does not come from the moral content of the law, but from its validity, which is why we need secondary laws to determine the validity of the primary laws. Because people who take the internal perspective to the law presume the existence of the rule of recognition, they accept to be bound by laws that are valid according to the criteria set forth in the rule of recognition and in the secondary laws derived from this rule.

Finally, what he calls a "union" of these two types of rules constitutes for him the "heart" of a legal system.

WHAT IS MORALITY

Morality is a serious business which is concerned with our whole way of life, particularly how we ought to live. *It* is a system of principles and values concerning people's behaviour, which is generally accepted by a society or by a particular group of people. From all indication, it is an essential part of every society's cultural heritage which is handed down from one generation to another. It is embedded in the consciousness of doing what is right and avoiding what is wrong. The concept morality is derived from Latin mores which refers to the customs and practices of people in the society. It represents the required behavior which finds expression in the morals and sometimes in the law of a society. Lon fuller classified morality into two: morality of aspiration and morality of duty.

Morality of aspiration, which is very much exemplified in Greek philosophy "is the morality of the good life, of excellence, of the fullest realization of human power" (Fuller; 1969). A number of people tend to think of morality as law; morality has a lot to do with law, it is very much related to law but it is not law and in fact there is more to morality than law.

The morality of duty on the other hand "lays down the basic rules without which an ordered society is impossible or without an ordered society directed toward certain specific goals must fail of its mark (Fuller; 1969).

In each case, morality implies adherence to certain standards of behavior or conduct.

LAW AND MORALITY: ANY CONNECTION?

The problem of the relationship between law and morality looms large since the dawn of analytic jurisprudence. If there is one doctrine that is distinctively associated with legal positivism, it is the separation of law and morality. The principal aim of jurisprudential positivists has been to establish that the essential properties of law do not include moral bearings. Austin (1954) captures this as follows:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law which actually exists is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

By implication, a law is that which is actually enacted as law irrespective of whether or not it conforms to any standard. This naturally leads into the case that the validity of the law does not depend on its moral worth; rather it depends on the fact that it has been enacted. In the opinion of legal positivism, there is no necessary connection between law and morality. This has been their doctrine right from their existence a fact well noted by Omoregbe when he observes that "it should be further noted that modern legal positivists also strongly distinguish the validity of law from claims about objective moral truth" (Omoregbe; 1972). But with regard to their theories; Murphy (2010) argues that:

"**It would be unfair to some positivists if we fail to acknowledge the fact that legal positivism can be grouped as exclusive and inclusive positivism. Some exclusive legal positivists' discussion is mainly on the fact that legal validity necessarily excludes appeals to moral truth while the inclusive legal positivists on the other hand claim that some legal systems can entertain or allow the appeal to moral truth in the finding of law".**

But with the emergence of Hart who is an inclusive legal positivist, a new horizon opened to accommodate the inseparability of the two disciplines, namely: law and morality.

As a starting point, he acknowledge that there are various ways that law is intimately connected with morals but quickly asserts that this truth if not well considered may illicitly be taken as a warrant for different kinds of positions. From all indication, for Hart, law and morality are bonded together in what can be described as mutual complementarities rather than severing one from the other. Hart's theory mediates

between the theories uphold by natural law theorists and the early legal positivist, otherwise known as exclusive legal positivists. The belief by the natural law theorists that there is a necessary connection between law and morality together with the notion that 'where the meaning of law is in doubt, morality has a clear answer to offer' is considered as a misguided and irrational by Hart. He however failed to provide an alternative but only left such situation to judicial virtues (Murphy; 2010). Unlike many legal philosophers, Hart does not compare and contrast "law" and "morals." Rather, he identifies similarities and differences between legal rules that impose duties and that segment of morality consisting of rules that also impose duties. Although such moral rules are not the whole of morality, they are the bedrock of morality.

For Hart, the significant similarities between legal and moral rules are as follows: both have a common core of content, e.g., both prohibit killing and interference with property. Both are generally believed to be essential to the maintenance of social life or some feature of it, and both generally concern what is to be done or not to be done in circumstances constantly recurring in the life of the group. Within the community there is general demand for conformity to both types of rules, and such conformity ordinarily requires no special skill or intellect. Behind both kinds of rules there is serious social pressure, though of varying kinds. Finally, the vocabulary of rights and duties is common to discussions of both kinds of rules.

He equally suggests several ways in which legal and moral rules imposing duties differ. First, he says that although the status of a rule as a legal rule is unaffected by community attitudes towards its importance, this is not true of a moral rule. It would be "absurd" to think of a rule as a part of the morality of a society even though no one thought it any longer important or worth maintaining. A second difference is that moral rules are immune from deliberate change. There are no moral legislatures or moral courts. However, Hart acknowledges that legal enactments sometimes set standards of honesty that ultimately "raise" the current morality. A third difference is that violations of moral rules are always excusable in those cases in which the violator shows that "he could not help it," while violations of legal rules are not always thus excusable, *i.e.,* liability may be "strict." Fourth, Professor Hart states that unlike the pressure exerted in support of legal rules, the pressure exerted to secure compliance with moral rules characteristically consists of emphatic reminders of what the rules demand, appeals to conscience, and reliance on the operation of guilt and remorse.

Finally, Professor Hart says that legal rules are identifiable by reference to a basic rule of recognition specifying the criteria for valid rules of the legal system. Moral rules are not thus identifiable.

Hart while not denying the existence of or some level of conformity with morality insists that this cannot be taken to be a necessary requirement for a law. He in fact holds that in every modern state we find in their law numerous influences of either morality or moral ideals which find their way into the societal law through either legislation or judicial process (Murphy; 2010). Beyond various ways in which, morality or moral ideals are incorporated in some societies, Hart points further that there are uncountable ways in which law mirrors morality and demands of justice. He notes that in some instances, statues are merely legal shells which in essence are demands of moral principles. For example the laws of contracts are often conceptions of morality and fairness. This basic principle of fairness emphasizes that laws should treat like cases alike and different cases differently. This constancy is necessary to give moral legitimacy to a legal order. Impartiality in rule application is a moral standard which, according to Hart "is necessary in a legal system" (Murphy; 2010). Thus, any judge according to Hart applying a particular legal rule is expected to do so uninfluenced by "prejudice, interest, or caprice" (Murphy; 2010). Once again, however, the notion of impartiality will not take us too far down the road to morality.

However, it is pertinent to note that by this new statement, Hart never wished for the extreme legal positivism's view that law and morality be kept separately and distinctively like the separation between religion and politics. But rather, he argues that morality dictates for law that which is obtainable and ideal for law, and law is expected to rise up to them. In the same vein, Hart did not mean that law and morality are enemies, instead, he argues that both should be kept side by side, so that morality should be used to judge law. Thus, for example, Green argues that: Racial discrimination is considered wrong and illegal because the society adjudges it to be morally wrong; the rationale for considering it illegal at the outset is to implement and provide a better understanding to the justification that it is morally unacceptable, and the best way to do this, is by demonstrating it through the using of ordinary moral terms such as "duty" and "equality" (Green; 2003).

H.L.A Hart's intention in the separability thesis was to analyze the nature of law through a hermeneutical study of the concept of law. In talking about the place of morals in founding rules in Hart, Njoku observes that "there is a relationship between them, but that the bone of contention between law and morality is how the relationship is to be conceived" (Njoku; 2007). This is the fact because for Hart: Both law and morals are social phenomena used for the social control of behaviour. Hart in this regard follows

the tradition of a necessary separation of law and morality but he does not deny the minimal content which they both share as normative systems. He also accepts the fact of the role of morality in founding of the law in hard or borderline cases, where law runs out in the face of application and interpretation, at this point the judge might let his moral conviction come to bear (Hart; 1958). But Hart also tries to warn that this relationship must not be over exaggerated, for the fact that they are both used as instruments of social control suggests that "law is best understood as a branch of morality or justice and that its congruence with the principles of morality or justice rather than its incorporation of order and threats as its essence" (Hart; 1958).

Finally, the necessary connection does not imply that all laws are moral rules, it merely requires that valid laws are not immoral. The procedural rule is only valid if it is not immoral. Its content does not itself need to be moral.

EVALUATION AND CONCLUSION

The researcher's position from the onset has been that H. L. A Hart's elucidation of the concept of law is laudatory and therefore can be compared as second to none before and after him. Hart began his exposition of law by refuting the notion of John Austin theory of law as commands. He thought he has found the key to the science of Jurisprudence by positing that law is nothing but a union of primary and secondary rule. His attack and arguments against Austin's command theory was thrilling as well as enlightening but was not convincing enough to consider Austin's command theory as comatose. The fact that there is an element of threat backed by threat is evident in every law. Even the power conferring rules are accompanied by element of threat. For instance, the judge is not bound by immediate threat of punishment if he fails to use the power confered on him to try cases but he certainly faces further threats of losing his job or running out of funds in the long run if he keeps refusing to try cases.

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