

THE HERMENEUTICS OF H.L.A HART'S POSITIVISM AND THE SEPARATION OF LAW AND MORALS

Celestine Chukwuemeka Mbaegbu
Department of Philosophy
Nnamdi Azikiwe University, Awka, Nigeria
ezeakilebuchi@gmail.com
08033198321

Abstract

The problem of the relationship between law and morality looms large since the dawn of analytic jurisprudence. Earlier legal positivists reasoned to the fact that there is no connection between law and morality. But with the emergence of Hart, 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 Razz are morally arbitrary and indifferent to reality when we critically consider their no necessary connection thesis. To be sure, further discovery after analysing and interpreting Hart is his consistent view and claim that law and morality are bonded together in what can be described as mutual complementarity rather than severing one from the other. In short, there are many plausible natural law justifications for the positivity of law and this is something new which this article discovers as a contribution to the existing body of literature in the area of legal positivism. 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.

Keywords

Positivism, Law, Morality, Separation, Validity, Proposition

Introduction

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. Such inability to understand and grasp this particular work of Hart might be attributed to some chronicle of prejudices and preconceived ideas and biases. The prejudices are many but the strongest of them that might prevent proper grasp of Hart's separability thesis might stem from ones resort to comprehend him through the prison lens of secondary literatures especially those of Leslie Green and Lon Fuller on Hart without first and foremost having a first-hand encounter with the original works of Hart. Certainly ones initial conception of Hart's article on "Positivism and the Separation of Law and Morals" is bound to shift grounds after proper and careful perusal of the original article. Such an uninitiated researcher might think that Hart has gone the way of earlier positivists in a strong denial of any marriage between law and morality. But when one grasps the original article

THE HERMENEUTICS OF H.L.A HART'S POSITIVISM AND THE SEPARATION OF LAW AND MORALS-----*Celestine Chukwuemeka Mbaegbu*

“Positivism and the Separation of Law and Morals” ones understanding would go beyond the thesis that Hart’s only discourse was on the separability of law and morals. Surely, any understanding of the effort of Hart in this manner that portrays him as arguing for the separation of law and morals lives much to be desired. Thus, a dispassionate study of the Concept of law reveals Hart reacting to three doctrines of the positivists’ tradition namely; the imperative theory of law, the analytic study of legal language and the separability thesis. In what follows therefore, we shall concisely expose what an unbiased understanding of Hart is in this his public lecture.

H.L.A Hart’s Positivism and the Separation of Law and Morals

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 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.¹

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 and correctly too that “it should be further noted that modern legal positivists also strongly distinguish the validity of law from claims about objective moral truth”². But with regard to their theories; Murphy 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 law³.

H.L.A Hart belongs to the last group stated here. According to him “rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great”.⁴ H.L.A. Hart’s Lecture “Positivism and the Separation of Law and Morals brought a refreshing dynamism to legal positivism old philosophy that legal systems comprise strictly of positive law only. As earlier noted Hart approached this from two perspectives. The first, he did through disengaging it from the then over celebrated but gullible positivists’ traditional

doctrine of the imperative theory of law, the analytic study of legal language, and non-cognitive moral philosophies. Secondly, Hart tried to provide a new justification for the doctrine which he established in a mean way. But ordinarily, one would be tempted to discard Hart not to have said anything genuinely new from the thesis of the earlier positivist before him because he was still able to establish the fact that legal positivism involves as a matter of fact the separation of law and morals. 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."⁵

Hart did not by any means mean that law and morality be separated. Green agrees with Hart on this note in this well argued thought:

In order to pacify the lay people or literal-minded, Hart might have used the title "Positivism and the *Separability* of Law and Morals" in that lecture to capture the attention. However, a deeper analysis of his idea on this would reveal the fact that he never meant the divorce between law and morality. Thus, in the end he captures well his idea that "there is a necessary connection between law and morals or law as it is and law as it ought to be."⁶

This is the point we intend to emphasise here, many writers on Hart's separability thesis have badly misunderstood Hart and have gone astray. A notorious example is Lon Fuller in his article "Positivism and Fidelity to Law" was persistent and unrepentant in misconstruing Hart as really arguing for the separation of law and morality. The problems we observed was responsible with Lon Fuller misconstruing Hart are doubly faceted; the first due to his inability to understand that legal positivism is not a homogenous school of thought because members are not *consensus ad idem* on the nature and substance of law. The second problem is rooted in Fuller's mind-set about positivism as more or less facing a serious reductionist challenge while undermining the importance of metaphysics in understanding law. Now the best approach to understanding Hart's thought on "Positivism and the Separation of Law and Morality" is to itemise and analyse his reaction to the three traditional doctrines of legal positivism namely; the separation of law and morals, the analytic study of legal language and the imperative theory of law.

The separation of law and Morals

H.L.A Hart's intention in the separability thesis was to analyse the nature of law through a hermeneutical study of the concept of law. Hart approached this method not strictly with regard to the value of its objects and in that perspective morally neutral. However, Hart argues that "this is not the thrust of the separability thesis because there is no reason why a non-committal method cannot discover that there are necessary connections between law and morals."⁶ In talking about the place of morals in founding rules in Hart, Njoku observes that

THE HERMENEUTICS OF H.L.A HART'S POSITIVISM AND THE SEPARATION OF LAW AND MORALS-----Celestine Chukwuemeka Mbaegbu

“there is a relationship between them, but that the bone of contention between law and morality is how the relationship is to be conceived”.⁷ 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. And at this point the judge might let his moral conviction come to bear.⁸

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”.⁹ But this assimilation often ends in confusing one kind of obligatory conduct with another and to leave insufficient room for difference in kind between legal and moral rules and for divergences in their requirements. This kind of assimilation is what results in statements like that of Green who argues that “*an unjust law is not law*”¹⁰ and these are products of exaggerated situation between extremes. Furthermore, Hart argues that “there are different types of relation between law and morals”¹¹ such that it is important to distinguish some of the ways different things may be meant by the assertion or denial that law and morals are related. But he clearly emphasizes the basics that law, to some extent, has its roots in morals. Thus Hart opines:

It cannot seriously be disputed that the development of law, at all times and places has in fact been profoundly influenced both by the conventional morality and ideals of a particular social group and also by forms of enlightened moral criticism urged by individuals whose moral horizon has transcended the morality currently accepted.¹²

But for the case that there must be some conformity between law and morals, Hart argues that this must not be the case at all times. However, Hart being an inclusive positivist goes ahead to emphasise the reason morality be employed to judge law. Hart is therefore of the view that:

In the absence of this content, men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.¹³

As such the connection here between natural facts and content as well as legal and moral rules is based on a kind of purposive causality, i.e. a kind of causality deliberately directed to a purpose or end. According to Njoku “these can be represented in the following areas: Human vulnerability, approximate equality; limited altruism; limited resources; limited understanding and strength of will”.¹⁴ It should be noted that at this point morals and laws share a minimum content. But Njoku’s conclusion in this regard is that “morals have a place in founding of rules, but then rules should not be reduced to morals”.¹⁵ By this, Hart advises that “we take a wider perspective of the law; a concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues, whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them”.¹⁶ Furthermore, Hart will argue that an iniquitous law is law and must be valid. For wicked men will enact weak laws which others will enforce. In the candid view of Hart:

What surely is needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the

certification of something as legally valid is not conclusive of the question of obedience and that, however, great the area of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny.¹⁷

This is one of Hart's major reasons for initially conceding to Austin by keeping both the law and morals apart. But Hart further explains that "law and morals are not genuinely apart rather by so doing the law can be judged by morals".¹⁸ But when they are together they become same and you cannot sufficiently judge the other. Although Hart is a legal positivist, it should be noted that Hart does take morality seriously. Hart stated that law and morality are very close, though not necessarily related. He is deeply sympathetic to what he calls 'the core of good sense of natural law' and believes that law should continually be subject to moral scrutiny. Hart endorses the formal principle of justice as desirable in any legal system. 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".¹⁹ Thus, any judge according to Hart applying a particular legal rule is expected to do so uninfluenced by "prejudice, interest, or caprice".²⁰ Once again, however, the notion of impartiality will not take us too far down the road to morality. Hart himself noted that though most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice. This is not the same as the formal principle of justice since the judge could show adherence to the principle of formal justice and yet be influenced by prejudice, interests or caprice. Hart holds that "law is an instrument of social control".²¹ This means that the rules of law must satisfy certain conditions if they are to properly achieve this goal. For instance, citizens may reasonably expect that the rules of law will not be retroactively applied. A principle of fairness is involved here. Citizens should have both the ability and opportunity to obey the law. So the principle of formal justice, a principle of impartiality, and the principle of fairness are all built into Hart's concept of law which is a moral beginning for any legal system worth the name. However, it is only a beginning.

The Analytic Study of Legal Language

Hart reaction to the positivists' doctrine of the nature of law as a purely analytical study of legal concepts and as a historical and sociological study receives further and more clarification in his book *The Concept of Law*.²² Hart makes two very important methodological points in *The Concept of Law*. The first is that a philosophical theory of law involves conceptual analysis, meaning the clarification or elucidation of the concept of law and of the general framework of legal thought. The second is that "a philosophical theory should attempt to come to grips with certain puzzling issues concerning the normativity of law".²³ But after reading Hart's paper on "Positivism and the Separation of Law and Morals", one would venture to take this second point to mean that a philosophical theory of law should address the problem of the normativity of law. But Hart's own substantive theory does not offer a satisfactory conceptual analysis, nor does it truly come to grips with law's normativity. The reason for this, can be argued that Hart is also committed to methodological positivism, which holds that "a theory of law should offer external descriptions of legal practice that are 'morally neutral (and) without justificatory aid".²⁴ Hart's own theory of law, being external, is admittedly without justificatory aims because "it does not try to show participants how the social practice of law might be justified to them".²⁵ But the theory is not morally neutral; even though it does not offer a solution to the problem of the normativity of law in the way Raz's theory does. One reason for this is precisely that the theory is external; another is that it rests on a purely descriptive account of the concepts of obligation and authority. As far as these latter concepts are concerned, Hart is content simply to make the observation that official and

THE HERMENEUTICS OF H.L.A HART'S POSITIVISM AND THE SEPARATION OF LAW AND MORALS-----*Celestine Chukwuemeka Mbaegbu*

perhaps others accept the rule of recognition, meaning they regard it as obligation imposing. This is to describe the problem of the normativity of law rather than to offer a solution. The substantive difficulties faced by Hart's theory many scholars think have methodological roots. The related philosophical goals of analyzing the concept of law and addressing the problem of the normativity of law are plausible and appropriate ones for legal theory, but they cannot be accomplished by taking an external, purely descriptive approach. Hart therefore borrows the idea of a "purely descriptive theory from the methodology of science which is a very different kind of theoretical enterprise from philosophy".²⁶ Hart's concept of rule nevertheless does not seem to go beyond "functional analysis in the social control of behaviour".²⁷ Thus, it is easier to reason that even Hart himself did not understand clearly the methodology he was using in his philosophical discussions. Hart most often than not thought that prescriptivism is synonymous to descriptivism and at some point was almost not conceding that law as a matter of fact was more of a human and normative science than it is a natural science.

The Imperative Theory of Law

Hart a legal positivist though not in the strict sense of the word, approached philosophy of law from an alternative perspective to the theories of Bentham and Austin. He is of the view that "the focal point of legal philosophy is not in the command theory as advocated by earlier legal positivists but in rule".²⁸ His main argument against Bentham and Austin is that, laws may be somewhat different from the commands of the sovereign because they may also apply to individuals who made them and not only to those individuals who merely obey them. Laws could equally be distinguished from coercive orders in the sense that "they may not always impose duties or obligations but may rather confer powers or privileges".²⁹ Laws that impose duties and obligations on people whether or not they like it, Hart refer to such laws "as primary rules of obligation".³⁰ Rules of the primary type are close to the Benthamite-Austinian command concept. They are more or less like criminal legislations that simply prohibits act. Primary rules are laden with many difficulties, a system with only this kind of rules only tells one what not to do; there is no text to refer to when one is in doubt; it is not a flexible system to open up for easy change; moreover a system with only primary rules lacks a final and authoritative agency to handle issues of violations of rules and punishment of offenders. It is against this backdrop that Hart argues that "the system of primary rules of obligation is uncertain, static and inefficient".³¹ Secondary rules on the other hand empower officials and citizens alike in their responsibilities and interpersonal relationships. "Secondary rules of obligation states condition under which people within the law can freely and willingly, if they want to engage in certain transactions, change the legal positions of others".³² The introduction of the secondary rule moves the legal system from the pre-legal stage to a properly defined legal system. Consequently, the defects of uncertainty, staticity and inefficiency of the primary rules are remedied by the secondary rules of recognition which check the defect of uncertainty, rules of change which take care of the static nature of primary rules and rules of adjudication as that which check the inefficiency of primary rules of obligation".³³ Primary rules must be combined with secondary rules in order to advance from the pre-legal stage to a legal system. Hart was mindful of the fact that law needs to be separated from morality; thus, he thinks that "the validity of law is not based on the moral content of law, because law is still law even when it violates the principles of justice".³⁴ Hart's approach to the understanding of legal theory is not rooted in the idea that "the right way to regulate human behaviour must be through some immutable principles".³⁵ This is not to say that Hart submitted extremely in respect of discarding the intuitions of natural law. Hart falls under the category of the legal positivists that approach the study of law from the perspectives of looking at law as a system of rules or procedures permissible by a given legal system. This is because Hart was insistent that the

legal order is a closed system which admits only those norms prescribed by the legal systems itself. Hart's intention was to deliberately mark out a scheme by which law is to be identified and recognized as a legal rule and naturally close the door against metaphysical principles such as natural law. In other words, Hart's concept of law should be perceived as a design to remove extraneous values that tend to influence law. Central to his (Hart) argument is that:

In a given legal system there is bound to be an agreed procedure for law making and adjudication, and that rules to be recognized as laws must be clearly and if possible succinctly stated in line with these said formal procedures, otherwise such rules would be considered as everything but law".³⁶

Hart further opines that "nothing which legislators do make law is law unless they comply with fundamentally acceptable rules which as a matter of fact specify the essential law making procedure as required".³⁷ To say that a legal rule is valid means to invariably recognize it as passing the entire test provided by the rule of the same system. Thus, rules are articulated through social facts but made to assume legal character. Law for Hart is essentially a system of rules, and a legal system is a union of primary and secondary rules. However, social rules grow out of habits while legal rules in turn grow out of social rules.

Conclusions

The pioneers of legal positivism argue that legal validity necessarily excludes connections to moral truth. One other crucial finding in the reading of this text is that, earlier legal positivism championed by the utilitarians (Jeremy Bentham and John Austin) is morally arbitrary or indifferent to reality when we critically consider their "no necessary connection" thesis. It is even more surprising that later legal positivists like Hans Keelson and Joseph Razz did not learn anything from avoiding the pitfall of severing law from morality. Keelson for instance vehemently made case for the separation of the validity of law from claims about objective moral truth. But the major discovery after reading this text is that Hart should not be misconstrued as making case for the total separation of law and morality. After our dispassionate study of this article, we venture to say that the thought of Hart on the separability thesis is that, while Bentham, Austin and other legal positivists advocate for the severance of law and morality, Hart argues that there are some legal systems which permit appeals to moral truth on the question of law. In line with this, the author of this paper tried to make his own analysis from the Hartian discussion which is against the earlier legal positivists' exaggerated view. The truth is that law necessarily embodies some procedural principles that are moral in content. This Hartian view and position is antithetical to utilitarianism and extreme legal positivism that law is more involving than they think and as such it includes general principles that can be identified and utilized only by means of moral argument and appeal.

What legal positivism has not discovered is that there are many plausible natural law justifications for the positivity of law. However, pure moral norms for example "you shall do unto others what you would want done to you" are too narrow and open-ended to serve as reliable guides for human conduct. In order to control the unpredictability of human activities, law must specifically address empirical issues. If for example the law states "drink moderately" but another law states "do not drink more than two bottles of beer", surely, "drink moderately" seems to have intrinsic moral force, while "drink only two bottles" seems morally arbitrary. But in the context of law, to say merely "drink moderately" would invite lawlessness and thus be deeply immoral because what is moderate to one may not be to another. Whereas to specify the number of bottles is morally necessary for actually achieving some purport of the law. Thus, natural law shows us why it is morally necessary for law to be largely morally involving in content. In the same vein, earlier legal positivists before Hart

THE HERMENEUTICS OF H.L.A HART'S POSITIVISM AND THE SEPARATION OF LAW AND MORALS-----*Celestine Chukwuemeka Mbaegbu*

erroneously conceived that we must be able to identify legal norms without recourse to moral argument, because the point of a legal system is to provide a framework for social interaction in contexts precisely where there is no agreement about moral principles. But, we can see that there are good moral reasons for insisting on objective criteria for identifying valid legal norms, if we hope to sustain a legal order that can be respected by people experiencing cultural pluralism especially Nigeria. In fact, in making case against legal positivism, the author submits extremely that over a wide range of legal norms and institutions, the requirements for valid law identified by legal positivists are not only compatible with, but also find their deepest justification in ethical theory. Hart was clever enough to acknowledge this is his argument for the minimum content of morality in law. Legal positivism therefore can be said to have approached the concept of law from a narrow perspective and it was obviously necessary for Hart to come out with this public lecture "Positivism and the Separation of Law and Morals".

References

1. J. L. Austin, *The Province of Jurisprudence*, (London: Weidenfeld and Nicolson, 1954), pp. 184-185.
2. J. O. Omoregbe, *An Introduction to Jurisprudence*, (Ikeja: Jojo Educational Research and Publishers Ltd; 1972), p. 2.
3. J. Murphy, *Legal Positivism and Natural Law Theory*, (New Haven: Yale University Press, 2010), p. 3.
4. H. L. A. Hart, *The Concept of Law*, (Oxford: The Clarendon Press, 1961), p. 6
5. Leslie Green, "Positivism and the Inseparability of Law and Morals", in Edward. N. Zalta, (ed.).*The Stanford Encyclopaedia of Philosophy*, (Spring Edition, 2003), p. 1.
6. *Ibid*; p. 2.
7. F. O. C. Njoku, *Studies in Jurisprudence: A Fundamental Approach to the Philosophy of Law*, 2nd Edition, (Owerri: Claretian Institute of Philosophy, 2007), p. 56.
8. H. L. A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review*, 4. (1958), pp. 608-609.
9. *Loc. Cit.*
10. Leslie Green, p. 4.
11. H. L. A. Hart, *Law, Liberty and Morality*, (Oxford: Oxford University Press, 1963), p. 3.
12. *Loc. Cit.*
13. H. L. A. Hart, "Positivism and the Separation of Law and Morals", p. 596.
14. F. O. C. Njoku, *Philosophy in Politics, Law and Democracy*, (Owerri: Claretian Institute of Philosophy, 2002), p. 54.
15. *Loc. Cit.*
16. H. L. A. Hart, *The Concept of Law*, pp. 184-187.
17. *Loc. Cit.*
18. H. L. A. Hart, "Positivism and the Separation of Law and Morals", p. 611.

19. H. L. A. Hart, *The Concept of Law*, pp. 155-157.
20. Loc. Cit.
21. Ibid, p. 161
22. H. L. A. Hart discussed extensively in the *Concept of Law* that the study of the nature of law can be best from the descriptive approach. This is common with the 20th Century analytic jurisprudence.
23. S. Perry, "Hart's Methodological Positivism", in Jules Coleman, (ed.). *Hart's Postscript to the concept of Law*, (Oxford: Oxford University Press, 2001), p. 351.
24. Loc. Cit.
25. Loc. Cit.
26. Ibid; 353.
27. Loc. Cit.
28. Loc. Cit.
29. Loc. Cit.
30. H. L. A. Hart, *The Concept of Law*, pp. 34-35.
31. Loc. Cit.
32. Loc. Cit.
33. Loc. Cit.
34. Loc. Cit.
35. Ibid; p. 41.
36. H. L. A. Hart, "Positivism and the Separation of Law and Morals", pp. 593-596.
37. Loc. Cit.