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H.L.A Hart on Legal Positivism: Implications for Contemporary Nigerian Legal System

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Abstract
There is no doubt that law is a defining feature of government or any socio-political organization in the civil society. The problem of how to reconcile law and morality has been a signature issue in philosophical jurisprudence. Law and morality represent two seemingly opposing paradigms which lie at the intersection between philosophy of law and moral philosophy. This paper examines the nature and character of legal positivism in Hart's philosophy of law. It x-rays the implications of Harts legal theory for administration and dispensation of justice in the Nigerian legal system. It adopts qualitative research method and employs textual analysis. It provides conceptual clarification of salient themes and topical issues bordering on Hart's jurisprudence. It posits, in conclusion, that morality is indeed a proviso or conditio sine qua non in the determination of legal justice. It recommends a reconstructive adaptation of Harts conception of legal positivism in contemporary Nigerian legal system.
Keywords: *Hart, legal, positivism, implications, contemporary, Nigerian, legal, system.*

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Introduction

The intellectual burden of this paper is to examine the plausibility of legal positivism in Hart's perspective. It is a philosophical excursus of Hart's jurisprudence showing its deep implications for the Nigerian state. Little wonder that law is a state apparatus or instrument of social engineering that is intended to serve as a blue-print or master-plan for proper ordering of societal life. The following fundamental and vexing questions are thought-provoking: Can immoral precepts pass as laws? What is the ethical foundation of law? How does law relate to morals? What is/are the point(s) of convergence or divergence between law and morality? What is the minimum content of natural law that should reflect in positive laws? Can natural law and positive law be complementary? Are they at crossroad? These and many other thought provoking questions confront or agitate the minds of scholars who are deeply preoccupied with the nature and character of jurisprudence especially the meeting points between law, which is the product of a social contrivance, on the one hand, and morality, which is basically naturalistic, on the other hand.

Meaning of Legal Positivism

Legal positivism is one of the major currents, emerging trends or evolving dynamics of philosophical jurisprudence. It is an approach to analyzing and understanding the nature and character of law as a state ordinance and instrument of social control. It is basically concerned with legality. Thus, it undermines the place of morality in the realm or sphere of legality. Attempting to give a working definition of legal positivism, Francis Ogunmodede avers that :

> The positive-analytical school puts emphasis on the external but human element as the formal source of law, in sharp contrast to the divine and immutable source of law school. Indeed the role of state as the final arbiter, law giver or legislator in the promulgation of law is highlighted. Thus, law is generally defined as the order or command of the sovereign or king or state which has the absolute and indivisible power and authority to impose sanctions on erring subordinates (155).

The import of the foregoing is that legal positivism stresses the indispensability or primacy of positive laws or specific legal codes in a legal system. It follows that the core values, ideals or major assumptions of legal positivism stand diametrically opposed to those of the natural law school or the divine command persuasion. Still attempting to properly situate legal positivism in its right perspective, Green writes that:

> (Legal positivism) is a school of jurisprudence which holds the view that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted or recognized by a government entity or political institution, including administrative, executive, legislative and judicial bodies (135-158).

Implicit in the above except is the fact that legal positivism ultimately reduces law to the status of societal conventions devoid of moral norms or ethanol connotation. It sees law as nothing but sets of codes or principles promulgated by government and its institutional agencies using the apparatus of state power. At any rate, law, from the point of view of the legal positivists is indeed an artificial creation or social contrivance. Thus, it is the product of human contrivance that is instituted to bring about harmony, orderliness and stability in the civil society. On his own part, Francis Njoku adumbrates that:

> Legal positivism is an approach to the question of law. Such an approach claims that law is characteristically created and posited by the authority of the society who provides its role source of validity… legal positivists believe that law has to do with positive norms, such as made by the legislative bodies. They are averse to law having its roots from divine commandments, human rights or reason; or having bearing with moral scrutiny (41).

It is evident or crystal clear, from the above position, that legal positivism is a variant of empiricism. Put different, it is a strand of legal empiricism given the fact that is emphases the uniqueness of law enacted by a civil authority over and above divine command which is predicated on the background or foundation of abstract morality or pure reason. If differs fundamentally from the metaphysical foundation of morality or postulates of morality based on the role of reason in the Kantian perspective. What is more, Ofei aptly submits that:

> (Legal Positivists) uphold that laws should not reproduce or satisfy certain demands of morality. The positivist school emerged in the 19th century and it is a reaction against the prevailing method of thinking at that time which is the *a priori* method. Modern thinkers and theorist alike contended that whatever is enacted by the law making body or agency is what society hold as law (77).

This statement by Ofei underscores the glaring fact that law is absolutely conventional. In this regard, the enactment of any constituted authority passes for law within the context or confines of legal positivism. Idowu has this to say about the nature and character of legal positivism:

> It is the strongest objection to the tenets of natural law… which denies the existence or reality of the natural law and claims to be able to fully explain law (both in theory and practice) without any reference to the natural law (23-23).

The logical implication of the foregoing is that the legal positivist school of jurisprudence is the direct opposite of the natural law orientation. It is, by and large, a spectrum or strand of the pure theory of law. It is important to note that the word 'positivism' is derived from the Latin word 'positus' which means to posit, postulate, or firmly attach the existence of something. Legal positivists define law by firmly attaching its meaning to written decisions made by governmental arms that are employed with the legal clout to regulates particular areas of society and human conduct. Thus, any body of rules, regulations codes or ordinances instituted by recognized authority translate into law. It is also important to note that the primary essence of establishing government as an institution of the state is to make laws that will have binding effect on members of the society or citizens of the state, so to speak.

Hart on Open Texture of Legal Rules

There is no doubt that the open texture of legal rules occupies an important place in Hart's jurisprudence. According to him:

> … the inherent human condition and language make the act of making choice an incessant battle in our daily lives and dealings which are part of the humans existential contingency; thus our language and rules are intrinsically 'open textured' in which case, there is room for judicial discretion (Hart *The Concept of Law* 41*).*

Hart contends that in the application of legal rules, including the interpretation, there would be particular and novel cases where rules will be exhausted. In such situations, the law is peculiarly limited in applying general rules to all particular cases to which they are destined (Igwe 71-72). Hart described this as 'open texture' and argues that judges are left to their own discretion in such scenarios. Put differently, open texture of legal rules implies that whenever the general rule or social rule has limitation in course of application (without judicial precedent), the court has right to resort to official discretion. This explains the manifestation of open texture of logical rules in Hart's understanding (Hart 129-131). Hart depicts a clear picture of a rule having a core of certainty and a penumbra of doubt. This suggests that each rule has a central, indubitable aspect and also a peripheral area. They (rules and standards) as stipulated by Hart, will have what has been termed clear rules and core of certainty on the one hand and open texture and penumbra of doubt on the other hand.

Hart on Judicial Discretion

Another significant theme or key concept that runs through the lines and pages of Hart's conception of law is judicial discretion. This manifests when the courts are left to their discretion in the open texture of law and which is at their disposal to arrive at a balance where there is a conflict arising there of (Nnadozie 42-43). Hart opines that in deciding hard cases, a judge's moral intuition can prevail but he insists that where a judge decides a hard case on the basic of his moral conviction, he does not conversely certify the validity of the law he enforces on moral guide, that

is, on the condition of its moral content. According to Hart, already laid-down rules take care of ordinary cases as the court would have us believed, but in complex cases that are problematic, there are no laid-down rules to follow. This is where the judges discrete and give whatever adjudication they deem fit in the circumstance. Hart says that is always the case where it is indubitable that rules have *core* and the *penumbra* where the judge decides (Hart 12). The foregoing presents a panoramic view of judicial discretion.

Moreso, Hart paints a vivid picture of judicial discretion when he contends that:

> Skepticism about the character of legal rules has not, however, always taken the extreme form of condemning the very notion of a binding rule as confused or fictitious. Instead, the most prevalent form of skepticism in England and the United States invited us to reconsider the view that a legal system *wholly,* or even *primarily,* consists of rules. No doubt that courts so frame their judgments as to give the impression that their decisions are necessary consequence of predetermined rules whose meaning is fixed and clear (Hart 12).

Hart's position on judicial discretion is lucidly expressed in the above passage. It shows clearly that the courts can frame rules that could enable them adjudicate a trivial case that has no legal rule specifying its mode of application, interpretation, and adjudication. In fact, where no such standing rule exists, the court can invent one to guide its proceedings. Hart further notes that:

> In very simple cases this may be so; but in the vast majority of cases that trouble the courts, neither statutes nor precedents in which the rules are allegedly contained allow of only one result. In most important cases there is always a choice. The judge has to choose between alternative meanings to be given to the words of a statute or between rival interpretations of what a precedent 'amounts to' (12).

In a particular legal system, there are a number of case that have no pre-existing precedents or established statutes upon which they can be decided. In such circumstances, the judge is left for discretion at his liberty, in which case, he is guided accordingly by his personal moral conviction. This, indeed, is a powerful tool in the analysis of a legal system.

In any legal system, there may be cases in which existing laws are vague or indeterminate and that judicial discretion may be necessary in order to clarify existing laws in these cases. Hart also argues that by clarifying vague or indeterminate laws, judges may actually make new laws. He explains that this argument is rejected by Ronald Dworkin, who contends that judicial discretion is not an exercise in making new laws but is a means of determining which legal principles are most consistent with existing laws and which legal principles provide the best justification for existing laws.

According to Hart, the inherent human condition and language makes the act of making choice an incessant battle in our daily lives and dealings which are part of the human existential contingency; thus our language and rules are intrinsically 'open textured' in which case, there is room for judicial discretion. Hart contended that in the application and interpretation of rules, there would be particular and novel cases where rules will be exhausted. In such situations, the law is peculiarly limited in applying general rules to all particular cases to which they are destined. Hart described this as 'open texture' and argued that judges are left to their own discretion in these situations. The

courts are left to their discretion in the open texture of law and which is at their disposal to arrive at a balance where there is a conflict (Hart 129-131).

Conclusion

In this paper, we have argued that Hart's perspective of legal positivism, no doubt, is a novel attempt to reconstruct the theoretical framework of legal philosophy. He holds that natural law contains certain elementary truths, which are of importance for understanding both morality and law. Hart calls these truths the 'minimum content of natural law'.

It is, however, important to note that Hart's conception of legal positivism is not error-free. His philosophy of law (legal positivism) is an outright violation of standard ethical theory or normative principle. Legal positivism has had a distorting effect on legal philosophy and of curse, administration or dispensation of justice in the Nigerian legal system. His contention that law and morals are separate realities or that law is valid whether moral or immoral is simply untenable. Hart's attempt to ignore the internal morality of order, i.e. the inner morality, is logically flawed. What is more, it is prone to infringing on the human rights or dignity which law is meant to protect.

In conclusion, a case is made that the Nigerian legal system should not be patterned using Hart's model or paradigm of legal positivism.

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