

AN EXAMINATION OF KARL OLIVECRONA'S LAW AS FACT

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Abstract

This paper examines Karl Olivecrona's Philosophy of law. He conceived law as a social fact and, therefore, value – neutral, thus denying any efficatory link with any metaphysical or moral ideals. However, the paper argues, contrary to Olivecrona's ideas, that laws are not entirely a human creation. It holds that there are human laws, as well as law of reason, both of which complement each other in the affairs of men. Using the evaluative method, the paper refutes Olivecrona's conception of law as fact, given the cheap and arrogant usurpation of positive laws by the sovereign. It compares the positivists' idea of law with the command theory and maintains that the positivists' lack of homogeneity of thought reveals its dependence on natural law. The paper argues that since natural law is universal and unchangeable, it is superior and foundational to positive law and provides the basis for the veracity and validity of human laws. The paper concludes that there is no human law outside and independent of the immutable law of reason because the justification or otherwise of human laws are dependent upon their conformity to the law of nations, the natural law.

Key words: Command theory, Human laws, Law of reason, Validity, Veracity.

Introduction

Karl Olivecrona (1897 - 1980) was a Swedish Jurist and Professor of procedural law in the University of Lund. He conceived law as a body of independent imperatives which is effective in bringing certain patterns of behaviour in the community. As a non – voluntarist, Olivecrona believes that there is no one individual or group of lawmakers whose will constitute law. Rather, in the effort to set patterns of behaviour, law expresses an emotive function which is regarded as imperative by the people.

Olivecrona belongs to the Scandinavian realist school. The major interest of the school was to explain the law as it is. Reality, for them, is analysed only through an investigation of the fundamental facts of the legal system. This way, assertions and propositions that are incapable of proof or verification are nonsense and unacceptable. The school also rejected the existence of any objective values of morality and absolutes such as goodness. They argue instead that the law creates our morality. The school holds that natural law is an illusion. Legal ideas, for them, are merely the rationalisation

of social facts that can be understood in terms of sets of the brain's responses to groups of stimuli.¹ They repudiate the idea of command theory. These were the major ideas that influenced the legal ideas which Olivecrona represented in his two major books namely, *Law as Fact* published in 1939 and revised in 1971, and *Realism and Idealism, Some Reflections on the Cordial Point in Legal Philosophy* published in 1951. Thus, for Olivecrona, law is a fact without any form of mystery; it is a human act through the process of legislation.

However, Olivecrona's representation of law is one sided. The risk is that enacted laws lack objectivity and thus prone to usurpation by the Sovereign and political leaders to make unjust policies. This way, there is need to not only allow checks but also subject human laws to the regulation and validation of the self – evident laws, the natural law.

Over time, arguments have raged between legal positivists like Jeremy Bentham and John Austin and the natural law theorists like Thomas Aquinas on the criteria for testing the justification or otherwise of laws as well as the basis to remedy unjust or immoral laws.

This work undertakes to show that although both laws complement each other in human affairs, natural law is superior and foundational to human laws because natural law is universal and unchangeable and thus not subject to the cheap usurpation and manipulations by political leaders. Instead, it secures protection, unlike human laws, to equality and liberty of all peoples. Thus, the work reveals the flagrant abuse of power and subjugation of the citizens by political leaders which positive law represented by Olivecrona's law as fact shows.

Meaning of Philosophy of Law

Philosophy of law or Jurisprudence, from its Latin word meaning the science of law, is the aspect of philosophy that shows interest in law both in theory, method and practice. Its interest is majorly on the foundation of law (*the grundnorm*), the method of promulgation and the impact laws make on a people. It also concerns itself with such basic problems or questions of whether there are bad laws as well as the justification for disobedience of such laws that may be considered as immoral or iniquitous. Thus, jurisprudence examines the meaning and purpose of law as well as bring to consciousness the extra legal principles by which a given law can be said to fulfill its purpose or not.

As expected, philosophers of law like Aquinas, Bentham, Hart, etc defined jurisprudence based on their different schools. Aquinas' interest was to find a

¹. L. B. Curzon, *Jurisprudence*, (London: Cavedish, 1995), p.169.¹

relationship between natural law and civil law. He understood civil law to be based on natural law either by accepting the conclusion of natural law or by making specific what the natural law leaves unspecific.² Thus, for Aquinas, law is the ordinance of reason for the common good of man. For Bentham and his disciple John Austin, law is a command of the Sovereign backed by sanction to compel obedience. Bentham in particular defined jurisprudence as “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power”.³ Thus, for Bentham, the Sovereign is the source of law. Although a legal positivist, Hart disagreed with Bentham's command theory because according to Hart, the sovereign may have limitations based on certain customary habits. For Hart, jurisprudence “does not discover new law, but reflects on existing laws and is concerned with the source of law, nature and workings of legal authority, nature of legal codification, the value of a strict system of judicial procedure and the method of reasoning”.⁴ Since according to Hart, jurisprudence is concerned with the source and nature of law, questions about its value and functions ought to be considered in legal ordering especially in relation to morality and justice.

Ndubuisi and Nathaniel define jurisprudence as the “sum total of organised reflection on the nature of law and its relations to the learned principles”.⁵ In terms of its essence, they opine that jurisprudence enables us to question the veracity of law and evolves the ideal principles by which to remedy the defects of law. By means of jurisprudence, both Philosophers of law and Jurists attempt to extricate from law inherent absurdities that are capable of rendering the legal order impoverished.⁶

As a concept, Jurisprudence is divided into analytical, historical, sociological and ethical kinds. The analytical kind is the domain of legal positivism which refuses any efficatory link between what law is and what it ought to be. Historical jurisprudence is the school of law that conceives law in general as the outcome of history. Its major interest is on the origin and concept of law. Sociological jurisprudence emerged as criticism against the analytical and the historical schools. Its major interest is on the effect of the law on the society and how it affects human social progress. Ethical jurisprudence focuses on the ideal state of the law. It's concern, like the natural law, is on

² Aquinas cited by Charles E. Curren, "Natural Law" in *The Modern Catholic Encyclopadia*, edited by Michael Glazier and Monika K. Hellwig, (Minnesota: Liturgical Press, 2004), pp. 578 – 579.

³ Jeremy Bentham, *Of Law in General*, ed H. L. A. Hart in the *Collected Works of Jeremy Bentham* ed. J. H. Burns, (London: Athlone Press, 1970), p. 1

⁴ H. L. A. Hart, *The Concept of Law*, (London: Oxford University Press, 1961), p. 89

⁵ F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, (Somolu-Lagos: Foresight Press, 2007), p.4

⁶ F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, p. 6

the morality and end or purpose of law as well as define the ideal principles by which law can be said to fulfill that purpose.

Jurisprudence is normally studied under two major sub – headings. The first is natural law and the second is (human) positive law.

Natural Law

Natural law, also called the law of nations or law of reason, is laws that are inherent in nature. They are laws of conscience that are found everywhere for the promotion of justice, peace and order. J. I. Omoregbe defined it as a “universal precept or command intended by nature to regulate human behaviour. It is the universal law which enjoins all human beings to do good and refrain from evil”.⁷ For Omoregbe also, natural law is the primordial law, the fundamental law and the foundation of all laws including human positive law. It is the ideal law and the ultimate source of all laws which defines and gives meaning to the veracity and validity of any positive law.⁸ J. W. Harris has offered a classical definition of natural law thus;

first, it is universal and immutable. In consequence, it is available at all times and in all places for those whose office it is to enact or develop law ... it is one conception of 'justice' in the sense in which justice stands for the righting of wrongs and the proper distribution of benefits and burdens within a political community.⁹

Indeed, Harris describes natural law as the true law which averts and prohibits wrong doing; no part of it can be repealed nor is it possible to abolish it entirely. For Harris, its obligations are binding and God is its author, its promulgator and its enforcing judge.¹⁰ In a similar trend, Ian Mcleod offered a succinct summary of the meaning of natural law thus: “did I deem that thou a mortal man couldest by a breath annul and override the immutable, unwritten laws of heaven. They were not born today nor yesterday. They die not and none knows whence they sprang”.¹¹ Both Harris and Mcleod definitions appear to agree with Thomas Aquinas who conceives natural law as participation in the divine plan or law in the rational creature. Aquinas explains that God has formulated a plan for the world and has given human beings reason so that reflecting on the human nature made by God they can discern how God wants us to act in this world.¹² Indeed for

^{7.} Joseph I. Omoregbe, *An Introduction to Philosophical Jurisprudence*, (Lagos: Joja, 1994), p.xi.

^{8.} Joseph I. Omoregbe, *An Introduction to Philosophical Jurisprudence*, p. xii.

^{9.} J. W. Harris, *Legal Philosophies*, (London: Butterworths & Company, 1980), p, 7.

^{10.} J. W. Harris, *Legal Philosophies*, p. 8.

^{11.} Ian Mcleod, *Legal Theory*, (London: Macmillian Press, 1999), p. 32.

^{12.} Aquinas cited by Charles E. Curran, “Natural Law” in *The Modern Catholic Encyclopadia*, ed. Michael Gazier and Monika K. Hellwig, (Minnesota: Liturgical Press, 2004), p.578.

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Aquinas, Natural law is “an ordinance of reason for the common good made by him who has the care of the community and promulgated”.¹³

Thus, natural law is the law of reason which emanates from nature and is intended to guide human conscience and provide the basis for the justification of human laws. Angus Brook cites Thomas Aquinas as saying that “human nature participates in the eternal law through the human capacity to reason and form knowledge of what is good as well as decide how we ought to act in order to make the good real in our own lives and the lives of others.”¹⁴ For Aquinas also, human law is derived from natural law which human beings did not create. Rather, human law consists of particular rules, and the human sovereign puts it into effect. He argues that unlike human laws, natural law reflects reality which includes but not limited to the human capacity to use reason to act for a good end and the moral reality of the temporal world it is created to govern.¹⁵ Its major attraction lies on the fact that it transcends the letters of the law to the realm of the spirit of the law. As a higher law, its appeal is the degree to which it determines if human laws are morally binding on subjects and that way point to the extent of obedience the law can enjoy in ensuring public good. It is the universal law of human rights and human dignity and pride that bestows equality on all men as well as the responsibility for its protection against abuses.

Positive Law

Positive law also called human law maintains opposite stance with natural law. It seeks to explain law both in theory and practice as essentially man made through a process of enactment. To the positivists, there is no law but positive law. Citing John Austin, R. W. M. Dias defined human law as “commands of the sovereign supported by sanctions”.¹⁶ Dias also conceived it to “denote the law that is actually to be found, *positum*, as contrasted with what the law ought to be”.¹⁷

On his part, Karl Olivecrona conceives (positive) law as “law posited by a supreme authority in society expressing its own will”.¹⁸ He believes that positive law has come to “signify law actually in force, law effectively applied, law factually valid and the like”.¹⁹

^{13.} Aquinas cited by Charles E. Curran, “Natural Law” in *The Modern Catholic Encyclopadia*, p. 576.

^{14.} Brook, Angus. “Metaphysical Foundations of Natural Law Tradition”, p. 17. Written on 2 May 2019. Retrieved on Monday 26 2023.

^{15.} Charles E. Curran, “Natural Law” in *The Modern Catholic Encyclopadia*, 594.

^{16.} R. W.M. Dias, *Jurisprudence*, (London: Butterworths, 1964), p. 359.

^{17.} R. W.M. Dias, *Jurisprudence*, p. 351.

^{18.} Karl Olivecrona, *Law as Fact*, 2nd. (London: Stevens & Sons, 1971), p. 65.

^{19.} Karl Olivecrona, *Law as Fact*, 2nd ed., p. 65.

Olivecrona writes that:

In reality, the law of a country consists of immense mass of ideas concerning human behaviour accumulated during centuries through the contributions of innumerable collaborators. These ideas have been expressed in imperative form by their originators, especially through formal legislation, and are being preserved in the same form in books of law. The ideas are again and again revived in human minds accompanied by the imperative expression.²⁰

Thus, Olivecrona conceived law as social conventions or social facts accumulated over time and legislated into laws. This way, Olivecrona denied John Austin's idea of law as a command. Thus, indicating lack of homogeneity of ideas among legal positivists.

However, one common denominator among them is their disassociation of law from a priori or metaphysically cognised ideas. For these legal positivists, there exists no affinity between law and extraneous moral ideals. Law for them, is posited by authority as autonomous and should not be compared with any metaphysical ought. They argue that the proposition of the natural law theorists to the effect that positive law is relative upon natural law principles is indefensible or untenable. They insist that law is a moral – neutral entity and once it has been promulgated by the appropriate state authority, it cannot be adjudged immoral or unjust by any standard outside the province of the law in question. In other words, that there is an unconditional obligation on the part of the citizenry to obey the law without recourse to whether such a law is unjust or immoral.²¹ Thus, the positivists perceive law purely from the empirical, inductive dimension. Law, for them, is an independent enterprise made or executed by men and which carries sanction against violations

Issues in Karl Olivecrona's Law as Fact

Karl Olivecrona presented his ideas of law into four major groupings. The first is the nature of law. The second is the manner in which laws are expressed. The third is the psychological pressure or the influence which a law has on the people, and the fourth is what he termed law and morality.

The Nature of Law

Olivecrona believes that every rule of law is a creation of men. The rules have always been established through legislation. This way, laws are produced by natural cause and

^{20.} Karl Olivecrona, *Law as Fact*, (London: Oxford Up, 1939), p. 31.

^{21.} F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, p. 114 - 115

effect.²² Thus Olivecrona opens his work by out rightly rejecting the idea of command theory of law, since for him, the notion of command presupposes one person who commands and another who is commanded.²³ According to him, the laws of the modern state are not the command of any individual nor can they possibly be said to be that of the state given that the state is an organisation and an organisation cannot issue a command unless however from a prominent member of the state like the President.²⁴ Thus, he qualified the content of the rule of law as an idea of an imaginary action by a Judge in an imaginary situation. Here, Olivecrona supposes that the law imagines the actions that a Judge will take if faced with a person accused of breaking a rule. He however adds that a rule of law is never intended to be regarded in isolation. It is always connected with other rules and its meaning does not emerge unless the connection is observed.²⁵ On this basis, Olivecrona conceived his notion of the content of the rule of law as ideas of imaginary actions by people in imaginary situations. The application of the law consists in taking these imaginary actions as models for actual conduct when corresponding situations arise in real life.²⁶ Olivecrona believes that the law is not a command and is never so expressed. He associated commands to imply some form of personal relationship arising from direct order from a superior to a subordinate in the form of words, or gestures and which is intended to affect or influence the receiver's will and subsequent actions. He, instead argues, that commands of the law are never issued by any one individual nor is it addressed specifically to any one person.

How Law is Expressed

Law, for Olivecrona, is not a command and is never so expressed. He associates commands to implying some form of personal relationship arising from direct order from one person say a superior to a subordinate in the form of words or gestures and which is intended to affect or influence the receiver's will and subsequent actions. In this regard, Curzon agrees that commands of the law are never issued by any one individual nor is it addressed specifically to any one person. It is an imperative statement issued independently of the context of a mere personal command of the superior to the subordinate.²⁷ In a similar fashion, JG Riddal offers a descriptive definition of a rule. To him, a rule is always described as "this action shall be performed under such and such circumstances, this right shall arise from such and such office, this official shall have this or that power".²⁸ Thus, rules of law are expressed in an imperative form. Olivecrona

^{22.} Karl Olivecrona, *Law as Fact*, p. 16.

^{23.} Karl Olivecrona, *Law as Fact*, p. 35.

^{24.} Karl Olivecrona, *Law as Fact*, p. 35.

^{25.} Karl Olivecrona, *Law as Fact*, p. 29.

^{26.} Karl Olivecrona, *Law as Fact*, p. 20 – 30.

^{27.} L. B. Curzon, *Jurisprudence*, p. 172.

^{28.} JG. Riddall, *Jurisprudence*, 2nd ed. (London: Butterworths, 1999), p. 238.

made it categorically clear that law cannot be regarded as commands, for while command is at personal relationship of one and another, the commands of the state are impersonal and independent. They are nobody's commands nor are they specifically addressed to any one person. It is in this notion that Olivecrona regards laws as independent imperatives. He cited an example of what he means by law as independent imperative with the giving of the Ten Commandments to the Israeli nation by Jehovah which was not addressed to any particular person in mind. He writes:

they are nobody's commands, though they have the form of language that is characteristic of a command. The rules of law are of a similar character. They are imperative statements about imaginary actions, rights, and duties, etc. As we have seen, they cannot be defined as anybody's commands.²⁹

Olivecrona made a difference between real commands and some independent imperatives. According to him, "a real command cannot be transcribed into a sentence expressing a judgment. The judgment: "Blow your nose",³⁰ for example cannot be replaced by a sentence like this: "It is really so that you shall blow your nose". Olivecrona argues that such a sentence if taken literally appears as absurd. He explains though that an independent imperative may sometimes be replaced by a sentence which expresses a judgment. He cited the example of the Decalogue with the imperative; "Thou shalt not steal". Olivecrona explains that it does not in the least appear to us as intellectually absurd to replace this expression by saying: "It is really so that you shall not steal" or "It is your duty not to steal". Formally, these sentences give expression to judgments. And we believe that real judgments lie behind them".³¹ Indeed for Olivecrona, command utterances are only to create suggestion in order to influence the mentality and the actions of other people. There is no real judgment behind the sentences.

Psychological Pressure

On establishing the rules of law, Olivecrona believes that the purpose of lawmakers is to influence the action of the populace. This, for him, is done through influencing their minds. According to him, the influence is a psychological one which rises from the knowledge that a bill has been promulgated into law which has a binding force. Olivecrona believes that the citizens respect and habitually obey the law without reflection or opposition as patterns for their conduct.³² This is informed by the belief that the law makes an imprint in the minds of the people which oblige them to obey it

^{29.} Karl Olivecrona, *Law as Fact*, p.43 – 44.

^{30.} Karl Olivecrona, *Law as Fact*, p.45.

^{31.} Karl Olivecrona, *Law as Fact*, p.45 – 46.

^{32.} Karl Olivecrona, *Law as Fact*, p. 54.

without question. J. I. Omoregbe affirms that the “law has such a powerful grip on the minds of the people that it becomes a reality in their minds. It is this psychological effect it has on the minds of the people that constitutes the essence of law rather than the process by which it is passed or the authority from which it emanates”.³³ Thus, for Olivecrona, the law has a psychological effect on the people when they realise that the law has been duly promulgated by a competent authority, for example, the President when he performs a legal function or formalities by signing bill into law.

Beside the attitude of the mind, another important factor that conditions obedience to the law is what Olivecrona referred to as organisation. Explaining what he means by organisation, he writes that “there must be a body of persons ready to apply the laws if necessary by force since it would be clearly impossible to govern a community only by directly influencing the minds of the great masses through law giving.”³⁴ Olivecrona means here that the fact a people are conditioned by psychological pressures to accept the binding force of the law does not mean that force is not required to ensure compliance with the law. Instead, he considers that in every community, force is consistently applied through the officials of the state more particularly through police measures against disturbances, infliction of punishment, and execution of civil judgments. In all these, physical violence or coercion is the ultimate expedient.³⁵ Though he considers the application of force to ensure compliance to law, Olivecrona feels that conventional view of force as a backup for the law available as a last expedient must be discarded. Rather, he holds that “it is impossible to maintain that law in a realistic sense is guaranteed or protected by force. The real situation is that law consists chiefly of rules about force, rules which contain patterns of conduct for the exercise of force”.³⁶ For Olivecrona, rules consist of rights and duties. He frowned at accepting the classification of laws which prescribe conduct, for example, don't drink while driving, as being primary and laws about the consequences of disobedience as secondary. For him, laws about the application of force are primary while laws which prescribe conduct are secondary.

Law and Morality

Olivecrona conceived law in terms of cause and effect. He means that when we internalise the law, it remains in our consciousness causing certain prohibition in accordance with the law. He attempts to repudiate what he considered to be a traditional thought that certain things are morally wrong and out of those things the state decrees that certain ones should be made criminal. He explained his position from

33. Joseph I. Omoregbe, *An Introduction to Philosophical Jurisprudence*, p. 126.

34. Karl Olivecrona, *Law as Fact*, p. 55.

35. Karl Olivecrona, *Law as Fact*, p. 124.

36. Karl Olivecrona, *Law as Fact*, p. 134.

entirely a behavioural point. He writes:

Everyone grows up in a community where a legal machinery has existed since time immemorial The character is necessarily formed under the influence of our surroundings especially in early years. The society where we live puts its stamp on our ideas. But among the force working within the society the law is without doubt one of the foremost.³⁷

Olivecrona continues to insist that the law cannot be the projection of some innate moral convictions in the child, since according to him, the law has existed long before the child was born and that when he grows up and becomes acquainted with the conditions of life he is subjected to the influence of the law. For him, the first indelible impressions are entirely derived from the law. However, the effect is not just to create fear arising from the sanctions which may cause the individual to adjust certain attitude. He believes that it also has a positive moral effect in that they cause a deposit of moral ideas in the mind.³⁸

Omoregbe has offered a vivid explanation of what Olivecrona means thus:

At the beginning, sanctions may be necessary to enforce compliance with the new law, but as time goes on the idea of the action comes to stay (when it has been internalised) in the minds of the people marked by its prohibition. It comes to be seen by the people as a prohibited (forbidden) action. At this stage, sanction will no longer be necessary since the imprint of prohibition now accompanies the idea of the action each time it appears in the minds of the people.³⁹

Olivecrona contends that this is the origin of the sense of morality, that is, that morality originates from law. He explains in this regard that the law is expressed in an imperative language, for example, you shall not steal. These imperatives are absorbed by the mind. We take them up and make them an integral part of our mental setting. Olivecrona suggests that certain factors interplay to make the rules of law absorbed by the people. Outstanding among these factors is the enormous influence the imperative commands weigh especially as they have powers of sanction behind them as well as the fact that some persons of high authority has assented to them. He argued that these factors combine to make a profound impression on the mind causing us to take the fundamental commands of the law to heart as objectively binding. Olivecrona writes "the individual is caught in the laws' grip from the earliest stage in life and moral ideas are developed under its influence."⁴⁰ Riddall in agreement with Olivecrona identified other factors to include: "relevant rules must appear reasonable, the application of

^{37.} Karl Olivecrona, *Law as Fact*, p. 153.

^{38.} Karl Olivecrona, *Law as Fact*, p. 154

^{39.} Omoregbe, Joseph I. *An Introduction to Philosophical Jurisprudence*, p. 128.

^{40.} Karl Olivecrona, *Law as Fact*, p. 156

sanctions must be regular and impartial, and the imperatives of the law must be communicated by parents, teachers and superiors'.⁴¹ Indeed for Olivecrona, it is the existence of the law and the knowledge of the force that lies behind the law that Olivecrona said is one of the chief factors in the molding of our moral standards and not the other way round.

The Command Theory and Olivecrona's Notion of Law

The utilitarian Jeremy Bentham and his disciple John Austin popularised the command theory of law. For both Bentham and Austin, the law is a command of the sovereign. It is authoritative and absolute and cannot be challenged. Bentham conceives law as the personal will of the sovereign employed to subjugate his subjects. Bentham contends that law is the sovereign's command born out of his personal volition to modify the conduct and ensure the unwavering allegiance of his subjects. Bentham's intention was to ensure that there is no invocation of any metaphysical or a priori principles to challenge the sovereign's will. Hence Sabine and Thorson reported that for Bentham, "we must remove from the province of law, psychological and ethical factors which fix on one hand what the law can do, and on the other hand, what it can widely try to do".⁴² Thus, Bentham showed his rejection of any extraneous moral or metaphysical ideals as standard for determining whether a given law is just or unjust.

According to Austin, law is a command of the sovereign backed by sanction. He insists that the attachment of sanction is important to compel obedience to the commands of the sovereign. To Austin also, the ruled have unconditional obligation to obey the sovereign's will no matter how immoral they may consider the command to be. Thus for Austin, law cannot be questioned. According to him "the existence of law is one thing, its merit or demerits is another. 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".⁴³ Therefore for Austin, there is nothing like the morality of law, even if a law is pernicious or iniquitous, it remains enforceable so long as the sovereign has acceded to it. In this sense, public opinion or public consent do not matter. Everyone must obey the law or be adequately sanctioned for infracting upon the sovereign's command.

Ndubuisi and Nathaniel inform us that two basic issues are involved in the command theory of law. The first bothers on the content of law while the second relates to the

⁴¹. JG. Riddall, *Jurisprudence*, p. 247.

⁴². Sabine, G. H. and Thorson, T. L. *A History of Political Theory*, (Hong Kong: Bright Sun Printing Press, 1973), p. 617.

⁴³. John Austin, *The Province of Jurisprudence Determined*, ed., Weildenfeld et. al., (London: Library of Ideas, 1954), p.188.

psychology of political authority. Under the positivists' conception, the contents of the law do not matter. It does not matter if the contents are inhuman or consist in an insult or assault to human dignity and pride. That is why John Austin does not believe in any form of morality of law. For him, there is nothing like the enforcement of law even if it is morally deficient. Austin's argument is based on his conviction that law is the volition of the sovereign. Therefore, the people have an obligation to obey the sovereign's command.⁴⁴ The second issue relates to the pride which the command theory confers on political office holders. The risk of this theory is the tendency to rise to the level of arrogance, high-handedness and arbitrariness of those in authority. On the two accounts, the command theory makes room for dictatorship, tyranny as was the case in the totalitarian rule of Mussolini of Italy.⁴⁵ In effect, command is not an essential feature of law since it employs brute force to secure observance. Sanction itself is stipulated to protect the law. For Omoregbe, the essential feature of law is obligation. According to him, obligation distinguishes the command of the law from the command of an armed robber which lacks obligation. Omoregbe identifies this lack of obligation as a major weakness of the command theory. He holds that "law by its very nature entails obligation which it imposes on those subject to it. This obligation, which is of moral nature, accounts for the sanctity of law and the reverence it deserves".⁴⁶ Indeed, obligation to the law secures the obedience of the citizens to the law and given that obligation and obedience are a function of the human will predicated on reason, the power of the human mind to invent the good and the ideal, command cannot be the essential feature of law.

For Olivecrona, law is purely a creation of men through the process of legislation. This he clarified in the context of people's habitual social experiences that are promulgated into law. He contends against the notion of law as a command because the sovereign has assented to the bill. For him, the royal assent is only an exercise of duty or legal rights of a person in high authority, it is not a command. A command, for him, is usually from one person who commands to another who is commanded and which comes in form of direct instruction or body gestures in personal relationship. But the state is not a person but an organisation and an organisation cannot issue a command, he argued. This way, Olivecrona said that people erroneously regard law as command because laws come in imperative forms or languages, for example, 'thou shalt not kill'. Thus, he argued that laws are not made by one person nor are directed to any particular person. They are independent of any personal relationships. This way, he regards laws as independent imperatives.

^{44.} John Austin, *The Province of Jurisprudence Determined*, ed. Weildenfeld and others, (London: Library of Ideas, 1954), p.188

^{45.} F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, p.136.

^{46.} Joseph I. Omoregbe, *Metaphysics Without Tears*, (Lagos: Joja, 2011), p. 108.

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Ultimately, the contention between the command theorists and Olivecrona is unwarranted. Whether law is a command expressed in command languages or independent imperatives reveals their difference in linguistic choice and dispositions as well as expose the positivists' lack of homogeneity of thought. Our contention is that rather than fight on linguistic expressions that confer no real difference in legal understanding, legal positivists' ought to adopt a meaningful language of legal statutes and judgement that does not look like mere desires or wishes of those in authority. The languages of law will be meaningful if they express morality, equity, justice, objectivity, etc. These languages are in themselves metaphysical and provide the principle and foundation upon which the legal edifice are developed and built.

Towards Assessing Karl Olivecrona's Law as Fact

In his agnostic metaphysics, David Hume made a distinction that led to the dichotomy between fact and value, the former possessing an *aposteriori* content while the latter takes on to *apriori* posture. According to him;

It is impossible for normative propositions to be derived from factual propositions. We must restrict ourselves to what is, which we are acquainted with, not with what ought to be, because there is no logical justification for deriving what ought to be the case from the analysis of what is actually the case.⁴⁷

Thus, for Hume and other positivists, factual phenomenon has no efficatory relationship with metaphysical or moral ideals. In other words, law is a matter of fact since it is deduced from political and social reality and thus has nothing in common with speculative inquiries. The positivists' insist that law is about human conduct which cannot be adjudged as unjust or immoral on any extraneous criterion that is likely to obscure its factual stance and more so that nothing could invalidate it even if it is iniquitous. The positivists' thesis is hinged on the assumption that "legal provisions are to be identified as legal by their empirical, observable sources in legislation, decided cases, customs, codes or whatever, the moral status of these sources being irrelevant to their status as sources of legal provisions. Legal validity is not relative to morality.⁴⁸ Indeed for the positivists, law is moral and value neutral. Its existence and constituent parts are social facts and explainable only in empirical terms.

However, legal positivists' sharp distinction and preference to law as it is rather than law as it ought to be offers no satisfactory account of the human total experience. The legal positivists' disapprobation of moral ideals signals the austerity of moral principles that should guide human relations among members of the society. The inherent danger

^{47.} David Hume, *Inquiry Concerning Human Understanding*, (Oxford: Clarendon, 1978), p. 20.

^{48.} F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, p. 122

of this moral-free, mechanical law is the bequeathment of the character of rigidity, inflexibility and infallibility as well as a moral right for a law to contain iniquity. Ndubuisi and Nathaniel's fear about this moral austerity in law is that it can warrant official arrogance, high-handedness and arbitrariness in the political authority. The concern is the people's tendency to aversion and resistance against the law. Their prescription to check these abuses is to "subject law to the dictates of supra-legal moral elements" given the tendency that the legal order is likely to be beastly without reference made to superior moral principles outside positive law.⁴⁹ In this content, the aversion against Olivecrona (and other legal positivists') stems from his refusal to recognise that certain laws are laws of reason which are impressed in human conscience. Such laws that forbid us from genocide or ethnic cleansing are laws of reason meant to preserve human life on earth. They are moral laws of reason that transcend time and space and are not subject to the manipulations of the lawgivers. For Thomas Aquinas, although human beings make laws, but the human capacity to make laws does not make human laws not to be subjected to the general law of reason. He insists that that which is not just seems to be no law at all thus suggesting that enacted laws that are unjust or immoral are not qualified as law no matter the political authority that acceded to it. Accordingly, Thomas holds that human laws must be examined from the point of its justness. He means by this that laws that are unjust or immoral enactments are not living in human conscience inspite of any temporal consequences. Thomas, however, did not justify civil disobedience as a resistance against unjust laws. He could be understood since he was understood to be writing for theological institutions to avoid scandalizing the community.⁵⁰

John Austin's idea of command and consequent sanction has been criticized by Jonathan Crowe. Crowe described Austin's idea of sanction as "coercion or threats". Sanction for Crowe is "as a wall constructed to serve as a physical barrier to transgressive conduct".⁵¹ According to him, the primary function of law is to guide the action of its subjects. He noted however that law "fulfills this function not primarily through threats of force, but rather by creating sense of obligation to act in specific ways, not merely as forcing or manipulating them to do so".⁵² Crowe proposes therefore that law serve as a deontic marker by creating a sense of social obligation. To him, this deontic constituent of law is what holds the generic authority of law.

Similarly, Olivecrona's conception of law as a social convention and accumulated

^{49.} F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, p. 161

^{50.} Charles E. Curran, *Natural Law. In The Modern Catholic Encyclopedia*, p. 595.

^{51.} Jonathan Crowe, "Metaphysical Foundations of Natural Law Theories" in Geroge Duke and Robert P. George" (eds.), *The Cambridge Companion to Natural Law Jurisprudence*, (Cambridge: Cambridge Up, 2017), p. 16. www.Papers.ssrn.com. Accessed on Monday 26 2023.

^{52.} Jonathan Crowe, "Metaphysical Foundations of Natural Law Theories" p. 16.

(historical) experiences fails to reckon that human beings have been living in communities and observing certain moral laws of conscience before the actual enactment of the human laws. In other words, there are universal, immutable laws of reason which all men every where obey for the sake of conscience and not for fear of sanctions. These laws are not subject to changes by any change in the cultural life or experiences of any people. Instead, they lay the foundation upon which rises all human laws; they are metaphysical and constitute the spiritual consciousness or awareness that informs the activation of all meaningful social life within every social setting. In the words of Dennis Patterson;

Natural law is unchanging overtime and does not differ in different societies; every person has access to the standards of this higher law by use of reason; and only just law really deserve (the) name law, and in the way of definition of the term 'law' there inheres the idea and principle of choosing what is just and true.⁵³

Thus, natural law lays credence to the fact that nature confers many inalienable rights on people such that no sovereign had usurped without the people's resistance. Also, the disparagement of metaphysical or moral ideals by the legal positivists runs in contrast to the universality of human nature. Human nature and law of nature in their natural fusion are universal, intelligible and objective. They are self – evident truths ordained as safeguard to protect and promote the equality and natural liberties of all men. They are the principles upon which human rights and human dignity rest. Their essence is to provide metaphysically based principles that will guide the promulgation and adjudication of human laws.

Conclusion

It was Samuel Shuman who said that “no complete or adequate theory of law can be given without the inclusion somewhere of a criterion of value”.⁵⁴ Shuman's idea is an affirmation of the complementarity of natural law and the human laws in human affairs. In this direction, Olivecrona and other legal positivists rejection of metaphysical ideals is a negation of actual human experience. In fact, it is impossible to contemplate an idea of a law that is extricated from metaphysical or moral ideals which make laws meaningful by defining and promoting the ideals of justice, equity, human conscience, morality, etc. Undoubtedly, these legal ideals are universal, unchangeable and provide the basis for the veracity and validity of positive laws. Thus, natural law is not only superior to the ever changing human laws; it also provides justification and dependence for the theory, method and practice of human laws.

^{53.} Patterson Dennis, (ed.), *A Companion to Philosophy of Law and Legal Theory*, (Oxford: Blackwell, 1996), p. 224.

^{54.} Samuel Shuman, *Legal Positivism*, (Michigan: Wayne State Up, 1963), p. 29.

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