

HART MINIMAL CONTENT OF MORALITY: AN EXPOSITORY ANALYSIS

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Abstract

H.L.A. Hart's minimum content of morality attempts to build a bridge between the opposing views of the positivists and the naturalists theorists in law. This paper attempts an expository analysis and affirms the position of Hart on the need for moral considerations in positive laws for social stability. It further argues that though a fury of criticism, from both positivists and naturalists have trailed Hart's propositions, his views are undeniably insightful in justifying the fact that without the premise of existence, self-actualization for both the individual and the society is a mirage.

Keywords: Hart, Minimum Moral Content, Positivism, Naturalism, Social Stability

Introduction

There exists a clear divide between the positions of advocates of legal positivism and natural law theorists. While the latter avers that law is synonymous with positive norms, that is, "norms made by the legislator or considered as common law or case law. Formal criteria of law's origin, law enforcement and legal effectiveness are all sufficient for social norms to be considered law,"¹ the former on the contrary holds the view that morality is "ultimately real and objective and is not relative in its primary truths to culture, subjective taste, or social agreement; morality is somehow grounded in human nature, which is a specific part of the general, the application of reason in examining human nature, and to some extent general nature, provides evidence for the specific content of our moral obligations."²

But coming from the legal positivist background, Hart goes beyond the basic theses of the positivist and contends that certain moral considerations need to be taken by the legislator for their promulgations to truly stand as laws. Hart did not make this assertion *ex nihilo*; rather he took the basic need for human survival as the premise that informs his minimum moral content. Hart proposed five of such minimal content. An analysis of these contents reveals that they are in truth basically essential and also in tandem with social realities. Hart avows that human survival is primary in an existential consideration.

To this end, this paper, through an expository analysis, justifies Hart's premise of human survival as essential while promulgating laws. We accede to the fact whatever an individual or a society aims to achieve is based on the existence of life. The paper is divided into five parts, the first part focuses on a clarification of the concept of legal positivism while the second focuses on natural law. An exposition Hart's conception of law makes up the third part while the minimal content of morality is discussed in the fourth part. An analysis of Hart's views is done in the fifth part to drive

home the submission that human existence is as basic as the need for laws in the survival of any society.

Natural Law and Legal Positivism

The need for society to be managed by laws cannot be overemphasized. Deciding to live in a society is synonymous with accepting to live by the laws of such a society. Laws are essential to regulate the activities of individuals within a society. The laws of the land are above every individual (both private and public) in the land. Alluding to Frank Schubert “we use law to regulate people in their relationships with each other, and in their relationships with government. Law reflects our societal aspirations, our culture, and our political and economic beliefs. It provides mechanisms for resolving disputes and for controlling government officials.”³ Hence, we can agree that “law is rarely out of the news. It frequently stimulates controversy. While lawyers and politicians celebrate the virtues of the rule of law, reformers lament its shortcomings, and cynics question its professed equivalence with justice. Yet all recognize the law as a vehicle for social change.”⁴

An important element of the law of any society is how the law came to being. This element is important because every member of the society is expected to accept and obey the laws. Defaulters against the law are equally expected to accept punishment meted out for their offences. This gives the law the power to be accepted as law. Essentially, there are two main philosophical schools of thought in legal theory namely; natural law and legal positivism.

Natural Law

In natural law the concepts of law, morality and reason are interrelated. It is accepted that what forms the basis of natural law is evident in nature and every moral agent is believed to have the ability to discover these laws from nature hence moral agents are expected to (ought to) adhere to these laws. Keith Culver sums this view up thus “So the natural law is in each person and is discovered by applying reason to general principles whose truth is self-evidently clear. This process results in practical rules for living that best fit our nature as rational persons who are generally good.”⁵ Citing Aquinas Culver writes further that “wherefore it [the rational creature] has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.”⁶ Citing the notable Roman Lawyer, Cicero, Wacks identified the components of natural. He writes that “true law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting. . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . [God] is the author of this law, its promulgator, and its enforcing judge.”⁷ Cicero’s understanding of natural law is mostly taken to be a classical view. A more modern account of natural is given by John Finnis. Finnis first clarifies the meaning of law and nature in the concept of natural law. He writes of law that “... though it certainly has other meanings, ‘law’ can be used to refer to any criteria of right judgment in matters of practice (conduct, action), any standards for assessing options for human conduct as good or bad, right or wrong, desirable or undesirable, decent or unworthy. That is how the word is used in the term ‘natural law.’”⁸ Similarly, concerning nature he writes that:

Though it too has a range of meanings, ‘natural’ can be used to signify that some of those criteria or standards are somehow normative prior to any human choices. On this conception, these prior standards are not the product of either individual or collective choosing or positing, and cannot be repealed, however much they may be violated, defied, or ignored. The idea is that acknowledging these standards in one's deliberations is part of what it is to be reasonable...⁹

The theses of natural law can thus be understood under four propositions as outlined by Patrick Hopkins. These include:

(1) morality is ultimately real and objective and is not relative in its primary truths to culture, subjective taste, or social agreement; (2) morality is somehow grounded in human nature, which is a specific part of the general order of nature, and is crucial for human happiness and flourishing; (3) the normative force and obligatoriness of morality is somehow the result of this grounding and may be understood using the terminology associated with a legal code; (4) the application of reason in examining human nature, and to some extent general nature, provides evidence for the specific content of our moral obligations.¹⁰

Legal Positivism

Legal positivism is mostly discussed in contrast to natural law in philosophical jurisprudence. Basically, positivists are of the opinion that the laws of a society are always products of the society overtime. Also, they deny a moral basis of such laws. Coleman and Leiter call this the ‘social thesis’ and the ‘separability thesis.’ According to these scholars “all positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention (the social thesis); second, that there is no necessary connection between law and morality (the separability thesis).”¹¹ Simply put the argument of legal positivism holds that “there is no other law but positive law: the existence or – more technically – the validity of law rests upon the mere fact of its being enacted by a historically determined human legislator (or norm-issuer in a broad sense): *ius quia iussum*.”¹² Whereas natural law derives from nature and is expected to be understood through reason, legal positivism derives from social conventions, they can be modified or changed depending on prevailing circumstances. Julie Dickson contends that:

Legal positivists understand law as having a fundamentally social nature: it is a human artifact which has been socially constructed. As the term legal positivism itself connotes, law exists in virtue of the fact that it has been posited: because human beings, and the social institutions they create—such as legislatures, courts and legal officials—have decreed or decided or recognized or practiced or enforced or interacted in some way with a given set of norms. Those human social processes bring legal norms into existence, and are also the means by which they are modified and/or extinguished.¹³

Legal positivism does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to law. Positivists do not judge laws by questions of justice or humanity, but merely by the ways in which the laws have been created. This includes the view that judges make new law in deciding cases not falling clearly under a legal rule. Practicing, deciding or tolerating certain practices of law can each be considered a way of creating law.¹⁴

Thus there is a clear divide between the thesis of both schools of thought concerning law but Hart with his minimum content of morality tries to lightly bridge this divide. He agrees to the fact that there is no necessary connection between law and morality but then went further assert that irrespective of the divide there are certain basic considerations that must be made when promulgating laws. These considerations are moral-like and they depend on the need for human survival. But this view is hinged on Hart’s conception of law.

An Exposition of Hart’s Conception of Law

Hart’s conception of law proceeded from his view that earlier understandings of law, specifically John Austin’s Command Theory, failed in their foundational basis, which he believed were rules

upon which they were built, hence the need to have a fresh start in our approach towards an understanding of how law should be conceived. Hart maintains that “the failure is an instructive one... because at each point where the theory failed to fit the facts it was possible to see at least in outline why it was bound to fail and what is required for a better account.”¹⁵ While identifying the root cause of the failure of these theories, Hart pointed to the essence of rules in the conception of law. He writes in *The Conception of Law* that “the root cause of failure is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law.”¹⁶

Thus Hart’s conception of law rests on his notion of rules of which he identified two namely primary and secondary rules. A combination of these rules is deemed as the essence of Hart’s legal philosophy.

Primary and Secondary Rules: Hart’s Conception of Law

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. Giving a general overview of both rules Hart writes that:

Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.¹⁷

In other words primary rules are “duty imposing rules. They impose certain specific duties upon the citizens of a state to act in a certain manner, or they may be subject to certain legal sanctions. Hart characterizes primary rules as basic rules. They tell the citizen what one can and cannot do under the law.”¹⁸ In essence, primary rules tell us what to do and what not to do. Furthermore, primary rules outline sanctions that will be meted when primary rules are contravened, as Starr puts it “primary rules are generally what the ordinary citizen means when he refers to something as the law.”¹⁸

Secondary rules are according to Hart on a different level with primary rules. As noted earlier they are parasitic on primary rules. According to Hart:

...they may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.¹⁹

Accordingly, Hart categorizes secondary rules as either rules of recognition, rules of change, or rules of adjudication. Rules of recognition says Starr “provide a mechanism for discovering just what is or is not a legitimate primary rule.”²⁰ According to Hart:

Wherever such a rule of recognition is accepted, both private persons and officials are

provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may... take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases.²¹

This is how the rule or recognition is identified in a simple society but in a modern one Hart notes that the situation is more complex because of the nature of the society. In a modern legal system where there are a variety of 'sources' of law, says Hart, "the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy."²²

The second rule is the rule of change. "These are necessary to efficiently allow primary rules to be amended. They specify how primary rules may be changed. For instance, the United States Constitution can be amended, and statutes can be repealed or modified by later statutes."²³ The dynamic nature of human society necessitates the amendment or outright change of certain rules, this rule of change gives room for such changes. It empowers the legislators or even judges to, based on contemporary realities, adjust rules.

The last of the rules proposed by Hart is the rule of adjudication. Of this rule Starr writes:

These rules are essential to a legal system of a complex society and are intended to remedy the inefficiency of a legal system with just primary rules. Rules of adjudication set criteria for determining when a primary rule has been broken and what procedure is to be followed when the primary violation has been established. Judges, commissions, and regulatory agencies are given authority when the occasion is appropriate to apply secondary rules of adjudication.²⁴

The combination of the primary rules and the secondary rules form the core of Hart's conception of law and they are equally termed the heart of any legal system.

Unarguably, the rules identified as primary and secondary by Hart are present in the legal system of any society but they may be labeled differently. Constitutions or other laws of a society have sections that deal with basic laws and the punishments for their violation; the constitution equally gives powers to these laws to be able to be obeyed as laws just as it provide processes of how laws can be changed. In the same vein, constitutions empower courts of laws or other constituted bodies to adjudicate in cases of disputes.

It is in the process of instituting these rules that Hart talk about the need for a minimum content of morality. Hart, as a positivist, believes rules or laws are social constructs but while constructing these rules there need to a moral basis. Hart does not subscribe to all the views of legal positivism. For instance, Starr points out that "he does not assert that laws are simply a product of sovereign command, or that moral judgments cannot be established as statements of facts can, by rational argument, evidence or proof. He does not maintain that a legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone."²⁵ He believes law should still have some moral colourations despite the fact that they are positive and social. 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."²⁶ Also, impartiality which is a moral principle is noted by Hart as essential in a legal system. Starr writes "Impartiality in rule application is a moral standard which, according to Hart, is necessary in a legal system. Thus, any judge applying a particular legal rule is expected to

do so uninfluenced by, to use Hart's words, "prejudice, interest, or caprice."²⁷ This shows an inclination towards morality which is solely within the purview of natural law as opposed to legal positivism.

Hart's Minimum Content of Morality

In chapter nine of *The Concept of Law* which he titled "Law and Morality" Hart was succinct in his identification of the fact that while instituting laws, moral considerations are made, thereby making him deviate from the central position of the positivists that there is no connection between law and morality. Hart contends that:

...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 particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.²⁸

This point draws Hart closer to aligning with the propositions of natural law but Hart clarified that this does not mean "that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it."²⁹ Rather, he introduces the teleological conception of nature to argue that it was in the law of nature that everything was heading towards an end, a destination which was suitable for it. He says:

The doctrine of Natural Law is part of an older conception of nature in which the observable world is not merely a scene of such regularities, and knowledge of nature is not merely a knowledge of them. Instead, on this older outlook every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good-or the *end* appropriate for it.³⁰

Hart maintains that the appropriate end of man which is obvious for all to see was survival or continued existence. He rightly observes that what makes sense of this mode of thought and expression is something entirely obvious: it is the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence.³¹

Hart consequently contends that if survival is the visible end of man then it becomes paramount that laws should contain minimum contents which will at all times guarantee the survival of man. More so, human interaction is inevitable and both laws and morals must coexist to ensure the safety of man. Hart identifies and explains these five contents thus:³²

- (i) **Human vulnerability.** The common requirements of law and morality consist for the most part not of active services to be rendered but of forbearances, which are usually formulated in negative form as prohibitions. Of these the most important for social life are those that restrict the use of violence in killing or inflicting bodily harm....If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: Thou shalt not kill.
- (ii) **Approximate equality.** Men differ from each other in physical strength, agility, and even more in intellectual capacity. None the less it is a fact of quite major importance for the understanding of different forms of law and morality, that no individual is so much more powerful than others, that he is able, without co-operation, to dominate or subdue them for more than a short period... This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation.

- (iii) **Limited altruism.** Men are not devils dominated by a wish to exterminate each other, and the demonstration that, given only the modest aim of survival, the basic rules of law and morals are necessities, must not be identified with the false view that men are predominantly selfish and have no disinterested interest in the survival and welfare of their fellows. But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible... As things are, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled.
- (iv) **Limited resources.** It is a merely contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil. These facts alone make indispensable some minimal form of the institution of property (though not necessarily individual property), and the distinctive kind of rule which requires respect for it.
- (v) **Limited understanding and strength of will.** The facts that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefits are obvious. Most men are capable of seeing them and of sacrificing the immediate short-term interests which conformity to such rules demands. They may indeed obey, from a variety of motives... On the other hand, neither understanding of long-term interest, nor the strength or goodness of will, upon which the efficacy of these different motives towards obedience depends, are shared by all men alike. All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many would succumb to the temptation... Sanctions' are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary co-operation in a coercive system.

Hart's and the need for a Minimum Content

No doubt a fury of reaction trailed Hart's minimum content of natural law. Legal positivists on the one hand did not accept the inclusion of moral considerations in positive laws. They wanted to maintain the clear distinction between both positions. This thought is replete in John Austin view that, the existence of law is one thing, its merit and demerit another. In other words, as Drury opines, no reference to justice or other moral principles need enter into the definition of law. The fact that a legal rule is unjust or morally iniquitous does not make it invalid.³³ Hart was not comfortable with this sort of position. He is of the view that if a legal rule is unjust then the life of citizens of the society cannot be guaranteed. The fact that societies cannot be without laws emphasizes that its laws need to be as just as possible.

On the other hand are the naturalists who believe that Hart most likely does not have a thorough understanding of natural law before adopting it into his positivist background. For instance, Cristobal Orrego criticizes how Hart talks about natural law without really mentioning it. Orrego writes that "according to Hart, the first aspect of natural law theory contends that there are certain principles of human conduct, awaiting discovery by human reason. This way of presenting the classical theory is flawed because of a question of terminology (which appears subtle) but has broad conceptual scope. Hart avoids using the classical terminology natural law."³⁴ Avoiding a direct use the term, in the view of Orrego, takes away some of its characteristics. This, he notes, "conceals an essential characteristic of the classical theory, and without an understanding of this

characteristic it is impossible to understand, even to a minimal degree, what Hart considers the second aspect of the theory, i.e. the requirement that human law be subordinated to natural law.”³⁵ In essence, Hart encroaches into the naturalist territory without giving due credence.

Also, Hart’s basic truism of survival is one fact that cannot be denied. Just as individuals struggle to survive societies equally struggle to survive. Territorial integrity is primary means through which a society justifies its need for survival so when Hart talks of moral contents based on the need to survive, denying it is contentious.

Thus, the relevance of Hart’s minimum content in the conception of law for fairness within the society cannot be overemphasized. If the protection of the life of an individual, his property and the overall regulation of his interaction within a society is seen as important, then the minimum contents will equally be taken as important. They could be varied as situation demands but they cannot be out rightly jettisoned.

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