

Original Paper

The Relevance of H.L.A. Hart's Concept of Law and Morality in the Battle against the Profound Immorality of the Contemporary Society: A Philosophical Reflection

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Abstract

Hart believes that one truism of human nature is that the overwhelming majority of human beings wish to survive; in order they would rather live than die. If we wish to live, it is imperative that the society be developed which will ensure our survival. Law is an instrument of social control, by implication, in the absence of laws; man tends to be wild, i.e., to say to behave like a beast without manners. Law and morality checkmates the excesses in man in the society. The aim of this research, therefore, includes: To address the controversial issue with respect to the actual meaning and definition of law by Professor Hart. To dispel skepticism in the modern mind by elucidating what makes some of the societal norms (morals) a legal rule. To show similarities and differences between law and morality, pointing out their necessary relationship or connection. Finally, to critically examine some of the profound immoralities of the Contemporary society. This research would adopt the expository, analytic and evaluative methods of philosophical inquiry. By using the expository method, the work shall introduce H. L. A. Hart's concept of law and morality. Also, through the use of the analytic and evaluative methods, his concept of law and some of the profound immoralities in the global community in general shall be x-rayed.

Keywords

law, morality, immortality, relevance, contemporary, society

1. Introduction

The German thinker, Hans-Georg Gadamar has often been associated with the maxim that no one speaks from nowhere. This adage finds adequate expression on the issue of background to any philosophical venture. Thus the question of historical background from time immemorial has been essential in the history of philosophy.

This project came about as a result of the researcher's interest on the disagreement between the two schools of thought in jurisprudence: *the natural law theorists* and the *legal positivists* in their views on the notion of law and morality. For the natural law theorists, law and morality are intertwined, by implication they cannot be separated apart while the early legal positivists uphold that there is no necessary connection between law and morality.

Professor Hart (1994), in his essay "Positivism and Separation of Law and Morality" synthesizes between the two schools of thoughts by averring that though there is no necessary connection between law and morality, there is some kind of complementarities between the two. Thus he opines:

"The law of every modern State shows at a thousand points the influence of both the accepted social morality and wider general ideas. These influences enter into law either abruptly and avowedly through legislation or silently and piecemeal through the judicial process".

Hart had the sole aim of furthering the understanding of law, coercion, and morality as a different but related social phenomenon (Hart, 1994).

Hart, who is an Inclusive legal positivist, in an attempt to show the relationship between law and morality, criticized and rejected John Austin's theory of law as commands of a legally unlimited sovereignty (Austin, 2000). That is to say, law is nothing but an order backed by threats of sanction. For Hart, it is in the union of primary and secondary rules that he finds the meaning and definition of law. Law is a social rule which gears towards social control of the people in the society.

Consequently, Hart's position on the theory of law, the question becomes; if in a particular society, there were no secondary rules but only primary rules of obligation, would a legal system exists? Has the development of law been influenced by morals or development of morality being influenced by law? Must some references of morality enter into an adequate definition of law or legal system? Or is it just a contingent fact that law and morality overlap? Equally, is law open to moral criticism? Is it morally permissible to enforce morality as such? Ought Immorality as such be a crime?

It was Hart's notion of complementarity which gives birth to the afore stated questions that arouses the interest of the researcher on the separation thesis of law and morality in Hart and solution to some profound immorality in the Contemporary society with particular reference to Nigeria. The rate at which countries of the world legalize some profound immoralities such as abortion, bestiality, gay marriage or same sex marriage, euthanasia etc on the account that it is not the law's business is quite alarming. One questions the relationship between law and morality which should be seen as a means of social control. In Nigeria, the rate at which bloods are spilled everyday by the so called Fulani herdsmen and Boko Haram sects, yet no one talks and we pretend that nothing is happening. It bits the

imagination of a greater number of people that the law of this country is being violated by the same people who make the law. What's a contradiction! It was Hart's 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 that set off this project.

2. Method

2.1 Methodology

This research would adopt the expository, analytic and evaluative methods of philosophical inquiry. By using the expository method, the work shall introduce H. L. A. Hart's concept of law and morality. Also, through the use of the analytic and evaluative methods, his concept of law and some of the profound immoralities in the global community in general shall be x-rayed.

2.1.1 Significance of the Work

The impact of this study is to enlighten the readers concerning the relationship between law and morality. More explicitly, therefore, one can learn that where the law of the society is in doubt, morality has an answer. It helps us to know how certain profound immoralities should be tackled by the society. Finally, the work will go a long way in injecting into the Contemporary man, a correct application of legal ideology. This ideology will help to restore the humanity original morality and legal system.

3. Result

Hart believes that one truism of human nature is that the overwhelming majority of human beings wish to survive; in order they would rather live than die. If we wish to live, it is imperative that the society be developed which will ensure our survival. Law is an instrument of social control, by implication, in the absence of laws; man tends to be wild, i.e., to say to behave like a beast without manners. Law and morality checkmates the excesses in man in the society. The research, therefore, addressed the controversial issue with respect to the actual meaning and definition of law by Professor Hart. It tries to dispel skepticism in the modern mind by elucidating what makes some of the societal norms (morals) a legal rule. The research equally shows the similarities and differences between law and morality, pointing out their necessary relationship or connection. Finally, it critically examines some of the profound immoralities of the Contemporary society.

4. Discussion

4.1 Hart's Concept of Law and Morality

Hart, who is an inclusive legal positivist, in an attempt to show the relationship between law and morality, criticized and rejected John Austin's theory of law as commands of a legally unlimited sovereign (Hart, 1994). That is to say, law is nothing but an order backed by threat of sanction. For Hart, it is in the union of primary and secondary rule that he finds the meaning and definition of law. Law is a social rule which gears towards social control of the people in the society.

As a starting point, he acknowledges that there are various ways that law is intimately connected with morals but quickly asserts that this truth if not well considered may illicitly be taken as a warrant for different kinds of positions. From all indication, for Hart, law and morality are bonded together in what can be described as mutual complementarities rather than severing one from the other. Hart's theory mediates between the theories upheld by natural law theorists and the early legal positivist, otherwise known as exclusive legal positivists. The belief by the natural law theorists that there is a necessary connection between law and morality together with the notion that "where the meaning of law is in doubt, morality has a clear answer to offer" is considered as a misguided and irrational by Hart. He however failed to provide an alternative but only left such situation to judicial virtues (Murphy, 2010). Unlike many legal philosophers, Hart does not compare and contrast "law" and "morals". Rather, he identifies similarities and differences between legal rules that impose duties and that segment of morality consisting of rules that also impose duties. Although such moral rules are not the whole of morality, they are the bedrock of morality.

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

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

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

Hart while not denying the existence of or some level of conformity with morality insists that this cannot be taken to be a necessary requirement for a law. He in fact holds that in every modern state we

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

Consequently, with Hart’s position on the theory of law, the question becomes; if in a particular society, there were no secondary rules but only primary rules of obligation, would a legal system exist?. Has the development of law been influenced by morals or the development of morality being influenced by law? Must some references of morality enter into an adequate definition of law or legal system? Or it is just a contingent fact that law and morality overlap? Equally, is law open to moral criticism? Is it morally permissible to enforce morality as such? Ought immorality as such be a crime?

4.2 Profound Immoralities in the Present day Society and Solutions

In the absence of law, man tends to be wild and our morality seems to be at nadir. There is in human nature, an ineradicable tendency toward mischief and even evil (Viereck, 1956). We do things contrary to the way nature has made it. Time has gone when people uphold moral values as a status quo of their community or society. We no longer see morality as something we need to cherish and preserved. Immorality is seen today as a thing of democracy. Our young girls celebrate nudity in the name of fashions. There is a moral decadence among our citizens especially the youths. Our existence as human is largely determined by our attitude to law and morality.

The idea of profound immorality or evil has its origin in the feelings of the society about particular actions having a felt character that rankles and disturbs the average persons. They are evils of the type that contravene or go contrary to the societal well-conceived values. Profound immoralities do need to be witnessed but the feeling that such actions are going on within the community disturbs the common man in the street. They go with the feeling of disgust, shame, disappointment and are affront to the societal values and institutions. It is disgustingly evil and detested not because it harms but because it is inhuman and by its nature, it is considered as evil. Because of the intensity of such disturbance to the community and even to a common man in the street, such actions that affront, disturb with greater intensity the communal standards require protection from the law. The community and its members need protection from such actions especially when they are indefensible.

John Ezenwankwo opines that “such evils or immoralities are not specifically marked out by their harm,

offence or wrong to others or by their personal nature in terms of the victim but by their depravity as evil of a kind that is considered inhuman, beastly and wicked” (Ezenwankwo, 2013).

The question of legal enforcement of morality has been attacked by many philosophers especially H. L. A. Hart, but for profound immorality, its consideration for legislation is not based on harm or offence but because it is evil and unnatural.

Some of the profound immoralities are as follows: Homosexuality/Gay marriage; Bestiality; Necrophilia; Abortion; Euthanasia; Professional boxing; Massacre by the herdsmen and Boko haram sects; and Embezzlement of public fund. For the scope of this research, we shall limit our studies on certain issues like, abortion, homosexuality, massacre by the herdsmen and embezzlement of public fund.

4.2.1 Homosexuality

This is sexual relation or attraction between two members of the same gender. The practitioners in this form of sexual orientation among humans are referred to as gay in the case of men and lesbians in the case of women. Apart from the scriptural condemnation of homosexuality as a contravention of the Divine and natural laws, people have all through the history considered homosexual acts as unnatural. From the knowledge of physics, like charges repel while unlike charges attract, this is an indication that homosexual act is abnormal even against the law of mechanics. The Wolfenden committee sees “homosexuality as a sexual propensity for persons of one’s own sex. Homosexuality, then is a state or condition, and as such does not, and cannot, come within the purview of the criminal law” (Winslow, 1972).

While Europe and America struggle to get rid of moral statues in their books, most African countries do not even contemplate to remove moralistic legislations as they feel that these mores best keep their society together in the line of Devlin’s disintegration thesis. Devlin in his Social disintegration thesis argues that the state’s failure to employ the criminal law in suppressing immorality such as homosexuality will ultimately be destructive to that society.

African countries especially Nigeria has rightly valued heterosexuality as natural means of procreation and considers homosexuality as unnatural. This is evidence in criminal codes of most African nations. For example, in Nigeria, the Criminal Code and Efcc consider homosexuality as unnatural offences against morality and stipulate fourteen years imprisonment for offenders. In chapter 21, No. 213, it legislates that any person who: Has a carnal knowledge of any person against the order of nature; or Has carnal knowledge of any animal; or Permits a male person to have a carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years (Olajide, 2004).

The Nigerian countrymen and legislators have rightly insisted that homosexual act is profoundly immoral and they have refused to remove these laws from their legal book despite the opposition from various international human rights groups. In an effort to reinforce this law, the Nigerian Legislature (Senate) on the 29th of November 2011, banned same sex marriage stipulating a 14 years jail term for

offenders and they equally banned all Gay clubs from operating in the country with a 10 years imprisonment for defaulters.

4.2.2 Bestiality

This is sexual relation between an animal (a cow, horse, goat, pig, etc.) and a human being. Many people feel a strong sense of revulsion on hearing, witnessing or even being within the neighborhood of bestial practices. Just like homosexuality, bestiality, if serious action is not taken against it, it would soon become the common discussion as an evil that should concern no one following the trend of liberalism that proposes criminalization on the basis of harm principle alone. Some bestial practitioners even argue that they should be loved in spite of their orientation: "... rather than forcing us into chemical treatment or imprisoning us, or casting us out, perhaps it is time for society to take a closer look at its attitudes towards us. As long we don't harm or hurt any people or our partners, as long as we are still productive, functional members of society, why, then the opprobrium? Why not let us be? Is society harmed by diversity or enriched? Please think about it" (Delaney, 2003).

Bestiality is a free floating immorality or evil whose criminalization is not based on the harm or offence principle. Dekker thinks that those who engage in bestiality should be considered as prohibiting the sacred and therefore should be decisively dealt with even with something if there is, that is more than the law itself. Thus he asserts: "Even without a court in the background, it is bad enough to be found committing bestiality. This is why it is taboo" (Delaney, 2003). Till date, bestiality remains illegal in the United State military under article 134 of the uniform code.

4.2.3 Massacre by the Fulani Herdsmen and Boko Haram Sect

Life is sacred and precious, therefore, it needs to be defended. In our country People are being slaughtered like a cow everyday in the country by the so called Fulani herdsmen and Boko Haram sects but it bits my imagination that after much talking, it is not followed up with required action. The fundamental human rights—right to live is being infringed upon and we all go about as nothing is happening. Man has become a wolf to other men. Every day in our country, we hear on the news the attack on a particular community or a particular church by the so called Fulani herdsmen. These herdsmen make life miserable for the people living in those areas. Are we to continue to live in fear in our fatherland?

One questions the morality behind the activities of these herdsmen and Boko Haram sect who on their attacks, commit a lot of atrocities like raping, the disemboweling of a pregnant mothers, bombing public places, kidnapping teenagers in schools, creating child soldiers, forcing a son to sleep with his mother, etc.

It is simply all these pathetic incidents and the present situation of the present day society with particular reference to the Nigeria country with regard to the actions of this deadly Islamic sect that propelled the researcher to question; is contemporary man a beast or man still?

4.2.4 Abortion

It is derived from Latin word "*aboriri*" meaning to perish. Abortion can be said to be the termination of

pregnancy or “expulsion of the foetus from the womb before it is viable, that is before it can live outside the mother” (Conslaves, 1985). It could be direct and indirect. In direct abortion, there is a willful destruction of the foetus in the womb while in indirect abortion; the death of the foetus is not intended. The issue of abortion, especially the moral dimension, has been very controversial. So many women who favour abortion do it on the ground of sex (feminism). They were of the opinion that they are free use her body and make choice on what to do with her body including the choice of whether to terminate her pregnancy or not. Many nations particularly the western nations have passed the law legalizing abortion. Their reasons range from population control to rights of the woman over her body. It is pertinent to note that, there are some actions which many be legal but they are not moral. Legality has to do with law while morality has to do with the conscience and human action.

Unlike the western countries, Nigeria has not legalized abortion because of the great value they place in human life. We are of the view that destroying a life which we cannot create is an abominable act. It is possible that people commit abortion in private, but this does not justify abortion as something that is against the law’s business on the ground of harm principle. Evil is evil, it is evil at all times and places.

4.3 Suggested Solutions to the Profound Immorality in the Contemporary Society

Firstly, there should be a legal enforcement of morality. This should not base on harm principle, but on the need to promote the societal well-cherished values. Homosexuality, abortion et cetera should be frowned at even by the common man in the street.

Furthermore, there should be enlightenment and sensitisation of the citizens on the dangers of profound immoralities in the society. In this sense, individuals should be thought on the negative effects of these free floating evils on humanity.

Public speakers and motivational speakers should focus more on how to tackle all these immoralities in the society. Chronic homosexuals and bestial should be referred to a proper and competent guidance and counselors. This falls within the jurisdiction of the clinical psychologist.

Still on the same note, there should be a mental decolonization of the citizens to accept their societal well-cherished values together with the adoption of Devlin’s social disintegration thesis which argues that the state’s failure to employ the criminal law in suppressing immorality such as homosexual will ultimately be destructive to that society.

With particular reference to the Boko Haram insurgence in Nigeria, there should be a competent government, aids and supports should be sought for equally.

Moral instruction should be taught in all levels of education in order to curb all these atrocities in the Contemporary society.

Finally, morality is the foundation of every society, to replace a building foundation with another cannot be done without bringing down the whole structure. If we agree that the society need to be protected from such profound immoralities or evils, we need to do that with the societal apparatus. That apparatus is the law.

4.4 Conclusion

The impact of this study is to enlighten the readers concerning the relationship between law and morality. It will make present what has been written and discussed for years. More explicitly, therefore, one can learn that where the law of the society is in doubt, morality has an answer. It helps us to know how certain profound immoralities should be tackled by the society. Finally, the work attempted injecting into the Contemporary man, a correct application of legal ideology. This ideology will help to restore the humanity original morality and legal system.

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