



UN-sanitized (Unjust) laws: A general discussion on the theories of law

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Abstract

The researchers adopted the black letter law methodology to make a comparative study on the various theories of law and draw a conclusion based on Reasonability, conscience, moral values and justice. Notwithstanding the various disagreements as evidence from the various schools and theories, the researchers with the utmost humility believe that a ruler or government has the authority to act for the common good, however, in situations where such a ruler or government acts in a way that is inconsistent to the common good or any of the principles of practical reasonableness such actions lack the authority that they should have had and such laws with the utmost respect lack moral authority, they do not bind the conscience of man and one is neither morally obliged to conform to such laws.

Keywords: UN-sanitized, general discussion theories law

Introduction

Law! What is law? What makes a law good or bad? And at what point can a law be classified as an un-sanitized law? To answer these questions is not as simple as it looks, since there are no simple definitions or explanation for the aforementioned. A person can only draw his or her conclusion depending on the school of thought that he or she belongs to, even with such a conclusion, it will still remain a rebuttable one and not conclusive since even the proponents of a particular school seem to have their disagreements.

For centuries, legal philosophers have propounded various theories about the nature of law and for every conclusion, the more inconclusive it becomes. For instance, according to John Austin all law that is properly 'so-called' as law that can be the subject of jurisprudence is human law, and so there is no room for natural law, in other words, there can be nothing of meaning to be derived from that which could be called 'natural law'. In His positivist theory of jurisprudence, he suggests that all laws are initially derived from commands as set out by a sovereign, from whom sanctions are enforced in instances of disobedience against that law. He argues that the fear of which coerces those citizens into obeying the law in the first place. In the words of Austin:

"where a positive law, not fashioned on a custom, is favourably received by the governed and enforced by their opinions or sentiments, we must deem the so called law, set by those opinions or sentiments, a law imperative and proper of the supreme political power" (Austin 1995, p. 166).

However, Hart (another positivist) puts forward his theory of law which he termed as: "a descriptive account of the distinctive features of law in general as a complex social phenomenon" (Hart 1994, p. 246) ^[9]. According to Hart law

should not be seen as an account of how people apply the concept of law, but rather as an account of what distinguishes systems of law from other systems of social rules. On Hart's view, it is the presence of a rule of recognition establishing criteria of validity that distinguishes law from other systems of social rules.

It is in light of the above that the writers will discuss the various theories of law and draw a conclusion based on Reasonability, conscience, moral values and justice.

Methodology

The researchers adopted the "black letter law" or Doctrinal Methodology: as this method will enable the researcher reduce the study to an essentially descriptive analysis of technical and coordinated legal rules to be found in primary sources.

The rationale behind the adoption of such method is to be able to organize, gather and describe the legal rules and to offer interpretation on the development and importance of the authoritative legal sources in which such rules are considered with much emphasis on case laws and academic commentaries (Mumin and Hamid, 2021) ^[13].

The black letter law or doctrinal methodology mainly focuses on the law itself as an internal self-sustaining set of principles which can be accessed by reading the law itself, judicial decisions and scholarly opinions on the subject matter of the study.

The researchers are confident that the black letter law will help limit the study to only secondary sources of legal data such as:

1. Case law: and
2. Academic commentary on the area of law under study.

This paper consists of three (3) main sections. Section one (1) captures the introduction. Section two (2) does a discussion on some selected theories of law. Section three (3) concludes the paper and captures the necessary proposed recommendations.

Discussion on the Theories of Law

Natural law theory

Under the natural law theory, proponents of the school hold the view that law is derived from a higher law, which is contained in certain ‘principles of morality’. These principles are sourced in either religion (through scriptures) or reason. According to theologians, these principles are under the control and governance of a God or figure of Deity and which eternally controls all of creation. Furthermore, it is their believed that all human arrangements, including law, must conform as far as possible and practicably to these principles. Secular theorists believe that such principles originate from man’s conscience: a conception of morality, which is inherent to all men, and part of their nature. Such principles or rules are discoverable through the application of human reason and form the genesis of law making, constituting the higher law from which all human laws must conform (Raz Joseph, 1998) ^[14].

One of the most famous pioneers of the naturalist theory of law is the Italian philosopher, *Thomas St. Aquinas (1225-1274)* whose theory of law was hugely influenced by the doctrine of the Church (Catholic Church) (Donally, 1998: Mumin & Hamid, 2021)^[4]. According to St. Aquinas, for any law to acquire validity, it must have four main tentacles of which include:

1. It must be eternal: that God’s grand plan for the whole of the universe:
2. It must be Divine: this refers to those laws that were revealed in scriptures:
3. It must be natural: this has to deal with the facts that law in themselves must conform to the laws of nature: and
4. It must be Man-made: refers to those laws that were reduced by man into various legal documents such as: the constitution, statutory laws, among others.

St. Aquinas’s theory of law predominantly emphasised on the basic principle that a person must participate in divine law and must also be guide to morality and ethics (Mumin & Hamid, 2021) ^[13]. In general, the proponents of the natural law school of thought hold the firm believe that there were rights and obligations, which belonged to the individual based on the simple facts that they were born humans as opposed to the mere facts that they were members of a particular State or Nationality (Daclacoura, 1998: Mumin & Hamid, 2021) ^[13].

The later stages of the 18th century and into the 19th century where emphasis was placed on the notions of State power and State coercion, there was a declined into the naturalist concept of law. This era also saw a rise in the positivists’ theory of law which was spearheaded by the likes of Jeremy Bentham and John Austin. The pioneers of this school sought to separate the notions of what law is as opposed to what the law ought to be. The positivists hold the view that the concept of morality and law should be kept apart and the principles of Natural Law should be totally extinguished. Daclacoura (1998) asserts that the earlier concept of the natural law legal theory lacked a political content. He went further to state that the natural theorist failed to determine the relationship between the individual and the state (‘the right-bearer and the duty- holder’).

In *The Morality of Law*, *Lon L. Fuller (1902-1978)* argues that law is subject to an internal morality consisting of eight

principles: (a) the rules must be expressed in general terms: (b) the rules must be publicly promulgated: (c) the rules must be (for the most part) prospective in effect: (d) the rules must be expressed in understandable terms: (e) the rules must be consistent with one another: (f) the rules must not require conduct beyond the powers of the affected parties: (g) the rules must not be changed so frequently that the subject cannot rely on them: and (h) the rules must be administered in a manner consistent with their wording (Fuller 1964, p. 39). On Fuller’s view, no system of rules that fails minimally to satisfy these principles of legality can achieve law’s essential purpose of achieving social order through the use of rules that guide behaviour. A system of rules that fails to satisfy: (b) the rules must be publicly promulgated or (d) the rules must be expressed in understandable terms, for example, cannot guide behaviour because people will not be able to determine what the rules require. Accordingly, Fuller concludes that his eight principles are “internal” to law in the sense that they are built into the very existence or condition precedent for law:

“A total failure in any one of these eight directions does not simply result in a bad system of law: it results in something that is not properly called a legal system at all” (Fuller 1964, p. 39).

The 20th century saw a rebirth of Natural Law approaches to the study of law. One of the chief reformers of the naturalist theory was John Finnis born on the 28th of July, 1940. The ‘Finnisian’ concept of natural law is based on several headings, the chief of which was described by the author as the ‘Basic Goods’ of Life: This theory is based on the supposition that mankind sets out to obtain things they perceive to be good for themselves. In doing so, man must exercise practical reason to obtain that good at any one time. Finnis isolates eight of these goods which, according to him, cannot be broken down any more and so refers to them as ‘basic goods’ in life. These are, he says, fundamental and do not derive from other goods: analogous to the moral equivalents of chemical elements. They are generally things which for most people make life worthwhile and according to Finnis are self-evident. They list as follows: *Life, Knowledge, Play, Aesthetic, Experience, Friendship/ Sociability, Practical Reasonableness, Religion and Marriage* (John Finnis, 1980) ^[6]. Flowing from the above, John Finnis argues that the human ‘basic goods’ must be utilised in a community or society so as to achieve the pursuit of a common good. The concept of the “common good” he argues requires a legal system but that there is a possibility for such a legal system to sometimes work against the common good: Finnis acknowledges this and states that a ruler has the authority to act for the common good. If he acts in a way that appears to go against the common good or any of the principles of practical reasonableness such actions lack the authority that they should have had. Just as Aquinas believed, Finnis says such laws lack moral authority, they do not bind the conscience of man and one is neither morally obliged to conform nor not to conform. Or put more simply unjust laws are a perversion of law and do not bind man’s moral conscience (John Finnis, 1980) ^[6].

Natural law and the shariah

The shariah can be akin to the naturalist concept of law as

propounded by St Aquinas. By way of emphases, the shariah has already put in place a laws to govern humanity irrespective of the person's nationality, believes, gender, race or any other descriptions, such person is entitled to enjoy those basic right based on the mere facts that that person is born human and such should be recognised and respected by all Muslims. This law is derived from a higher law (divine law), which is contained in certain 'principles of morality'. These principles are sourced in either religion (through scriptures) or reason. (Mumin & Hamid, 2021)^[13].

Positivism (Positivist theory of law) / the pedigree thesis

John Austin (1995)^[2], by borrowing heavily from the works of Jeremy Bentham, argues that the key distinguishing attribute of a legal system relies heavily on the presence of a sovereign who according to Austin is habitually obeyed by most people in the society, but not in the habit of obeying any determinate human superior (Austin 1995, p. 166)^[2]. To further elaborate Austin's theory, a rule or law can only be said to be legally valid (that is, is a law) and enforceable in a given society or State if and only if the supposed law is commanded by the sovereign in the Society or State and is backed up with the threat of a sanction. It must however be emphasized that in Austin's view, the severity of the threatened sanction is irrelevant: any general sovereign imperative supported by a threat of even the smallest harm is a law.

Notwithstanding the sugar coated theory propounded by Austin, the command theory had several problems and criticisms: one of such criticism has to do with the notion of the 'sovereign'. The reason for such criticism is that there is no identifiable sovereign especially in a democratic society. Taking countries like *Ghana* and *the Gambia*, for example, the ultimate political power is vested in the people, who elect both the head of the executive and the lawmakers to represent their interests. It must be noted that notwithstanding the fact that these elected persons have the power to coerce certain behaviour on the people, they are in actual sense regarded as servants of the people and not as repositories of sovereign power. The people (electorate) also, on the other hand, seem theoretically speaking to be the repository of ultimate political authority but in actual sense lack the immediate power to coerce behaviour. Thus, in democracies like that of *Ghana* and *the Gambia*, the ultimate political authority and the power to coerce behaviour practically speaking resides in different body of persons. Another criticism directed at the Austinian theory has to do with his notion that the sovereign lawmaking authority is incapable of legal limitation. Flowing from Austin's argument, a sovereign cannot be legally constrained because no person (or body of persons) can coerce herself (or itself). Since constitutional provisions limit the authority of the legislative body to make laws, Austin is forced to argue that what we refer to as constitutional law is really not law at all: rather, it is principally a matter of "positive morality" (Austin 1977, p. 107)^[1]. In practical terms, the Austinian theory of law is inconsistent with Constitutional democracy. The Ghanaian Courts regard the procedural and substantive provisions of the constitution as constraints on legal validity. The Supreme Court of Ghana in the case of *Hamidu v. President Kufuor [2001-2002]*^[8] SCGLR 86 at 100 held:

"Under the 1992 Constitution, even if the body in question

is independent from any other authority, the courts can still assume jurisdiction in disputes alleging that that institution, is acting in violation of the Constitution..."

The Supremacy Clause, *clause (2) of Article 1 of the Constitution of Ghana, 1992* states:

"The Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."

It must be on record that the concept of the supremacy of the 1992 Constitution of Ghana has been emphasized not only in *Article 1(2)* as stated above, but also in *clause 8 of Article 295* which states:

"No provision in this Constitution or any other law to the effect that a person or authority shall not be subject to the direction or control of any other person or authority in the performance of any functions under this Constitution or any other law, shall preclude a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with the Constitution."

In the same way, section 4 of the Constitution of *The Gambia, 1997* provides for the supremacy of the Gambian Constitution. It states:

"This Constitution is the supreme law of The Gambia and any other law found to be inconsistent with provisions of this Constitution shall, to the extent of the inconsistency, be void."

In the case of *Jeng (No 4) v Gambia Commercial & Development Bank Ltd (No 4) [1997-2001]*^[10] GR 679, the Supreme Court of *The Gambia*, in asserting the supremacy of the Constitution, 1997 held that section 23 of the Assets and Recovery Corporation Act, 1992 (No 23 of 1992), was inconsistent with the provisions of section 128 (1)(a) of the Constitution to the extent that the former purported to eliminate a right of appeal to the Supreme Court provided by the latter.

The most influential critic of Austin's work is done by another positivist by name *Herbert Lionel Adolphus Hart* in his work, *"The Concept of Law"*. Hart points out that Austin's theory provides, at best, a partial account of legal validity because it focuses on one kind of rule, namely that which requires citizens "to do or abstain from certain actions, whether they wish to or not" (Hart 1994, p. 81)^[9]. Whereas every legal system must contain so-called primary rules that regulate citizen behaviour, Hart believes a system consisting entirely of the kind of liberty restrictions found in the criminal law is, at best, an undeveloped or primitive legal system.

According to Hart, the concept of coercive force as suggested by Austin made him (Austin) fail to notice the presence of a second kind of primary rule that confers upon citizens the power to create, modify, and extinguish rights and obligations in other persons. As Hart points out, the rules governing the creation of contracts and wills cannot plausibly be characterized as restrictions on freedom that are backed by the threat of a sanction. These rules empower persons to structure their legal relations within the coercive framework of the law-a feature that Hart correctly regards as one of "law's greatest contributions to social life."

Hart is of the view that the existence of a 'power-conferring primary rules', indicates the presence of a more complicated system for regulating behaviour. But what ultimately

distinguishes societies with developed systems of law from those with only undeveloped or primitive and backward forms of law is that the former have, in addition to the primary rules, secondary rules that have as their subject matter the primary rules themselves, as these secondary rules 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 way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined (Hart 1994, p. 92)^[9].

According to Hart, there are three types of secondary rules that mark the evolution from primitive forms of law to developed legal systems:

1. The rule of recognition, which “specifies some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts” (Hart 1994, p. 92)^[9];
2. The rule of change, which enables a society to add, remove, and modify valid rules: and
3. The rule of adjudication, which provides a mechanism for determining whether a valid rule has been violated.

According to Hart, every society with a developed legal system necessarily has a rule of recognition that articulates criteria for legal validity that include provisions for making, changing and adjudicating law. Law is, according to Hart, “the union of primary and secondary rules” (Hart 1994, p. 107)^[9]. With Hart’s view in mind, Austin’s theory would be considered as a total failure and waste of time since it fails to acknowledge the importance of secondary rules in manufacturing legal validity.

Hart also finds fault with Austin’s view that legal obligation is essentially coercive. According to Hart, there is no difference between the Austinian sovereign who governs by coercing behaviour and the gunman who orders someone to hand over her money. In both cases, the subject can plausibly be characterized as being “obliged” to comply with the commands, but not as being “duty-bound” or “obligated” to do so (Hart 1994, p. 80)^[9]. To Hart, the application of coercive force alone can never and will never give rise to a legal obligation or otherwise. But accordingly, Hart is of the opinion that Legal rules are obligatory because people accept them as standards that justify criticism and, in extreme cases, punishment of deviations:

“What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, and ‘right’ and ‘wrong’” (Hart 1994, p. 56)^[9].

To summarize Hart’s concept of law, it must be noted that there are two minimum conditions sufficiently necessary for the existence of a legal system, which in the words of Hart:

“On the one hand those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its

rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials” (Hart 1994, p. 113)^[9].

However, just like how Hart criticized Austin, his concept of law also suffers from the same deficiency as that of Austin’s as if both theories were different variant of the same noble COVID-19 virus. On his gunman writ large criticism, it must be emphasised that irrespective of the gunman’s belief that he or she is entitled to make the threat, the victim is obliged, but not obligated, to comply with the gunman’s orders. The gunman’s behaviour is no less coercive because he believes he is entitled to make the threat.

Additionally, on the rule of recognition, it must be noted that only the officials of a particular legal system take the internal point of view towards the rule of recognition that clothed them with valid authority to enact, execute, adjudicate, and enforce laws. The simple presence of a belief in the officials that they are entitled to make law cannot give rise to an obligation in other people to comply with their enactments any more than the presence of a belief on the part of a gunman that he is entitled to issue orders gives rise to an obligation in the victim to comply with those orders. Hart’s minimal legal system is no less coercive than Austin’s legal system.

Separation thesis

The second thesis which forms part of the central core of legal positivism is the separation thesis otherwise known as the separability thesis. Under the separation thesis, positivists argue that law and morality are completely separate and distinct. In other words, the law is totally divorced from morality. To put it in the words of Hart: the separability thesis is no more than the “simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so” (Hart 1994, pp. 181-82)^[9]. Insofar as the object-level interpretation of the separability thesis denies, it is a necessary truth that there are moral constraints on legal validity, it implies the existence of a possible legal system in which there are no moral constraints on legal validity. To further elaborate on the separability thesis, it provides that there are no any possible connection between morality and governance by law.

Interpretive theory of law

A leading figure under this theory of law is *Ronald Myles Dworkin (1931-2013)*, in his book *Law’s Empire*: he argued the concept of law as integrity flowing from which judges interpret the law in terms of internal consistency to moral principles, most especially the principles of justice and fairness.

Dworkin in his book argued that legal practitioners can have two main issues or concern about the law. He stated that there is no doubt that Lawyers can concur on the criteria a rule must satisfy to be legally valid, but differ on whether those criteria are satisfied by a particular rule. To further illustrate Dworkin’s argument, two lawyers might be in agreement that a rule is legally valid if enacted by the state legislature, but might be in disagreement on whether the said rule at issue was in fact enacted by the state legislature. Such disagreements are pragmatic in nature: consequently pose no theoretical difficulties for positivism.

On the second concern, this to Dworkin is inconsistent with

positivism: Lawyers often agree on the facts about a rule's creation, but disagree on whether those facts are sufficient to endow the rule with legal authority. Such disagreement is considerably deeper than empirical or pragmatic disagreement as it concerns the criteria for legal validity. This in contrast to positivism who claimed such are exhausted by the rule of recognition. Dworkin calls this second kind of disagreement "theoretical disagreement" about the law.

According to Dworkin, theoretical disagreement conflicts with the pedigree thesis for the simple reason that the latter explains the concept of law in respect of shared criteria for creating, changing and adjudicating law. This in Dworkin's words:

"If legal argument is mainly or even partly about the properties that make a proposition legally valid, then lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false. Their arguments would be mainly or partly about which criteria they should use. So the project of the semantic theories, the project of digging out shared rules from a careful study of what lawyers say and do, would be doomed to fail" (Dworkin 1986, p. 43)^[5].

It must however be noted that Dworkin's theory of law is to some extent connected with H.L.A. Hart's concept on the rule of recognition, nonetheless Dworkin rejects Hart's concept of a master rule in every legal system that is used as a criteria to identify all valid laws based on the ground that this would entail that the process of identifying law must be uncontroversial, Dworkin argues that people have rights even in cases where the correct legal outcome is open to reasonable dispute. Dworkin further disagrees with the positivists argument on the separation between law and morality as to him (Dworkin), constructive interpretation implicates moral judgement in every decision about what the law is.

Conclusion and Recommendations

In conclusion, notwithstanding the various disagreements as evidence from the various schools and theories, the researchers with the utmost humility believe that a ruler or government has the authority to act for the common good, however, in situations where such a ruler or government acts in a way that is inconsistent to the common good or any of the principles of practical reasonableness such actions lack the authority that they should have had and such laws with the utmost respect lack moral authority, they do not bind the conscience of man and one is neither morally obliged to conform to such laws.

Additionally, the researchers are of the humble view that law should be construed as integrity flowing from which judges interpret the law in terms of internal consistency to moral principles, most especially the principles of justice and fairness, Reasonability and conscience. And that any law that fails to meet these tests is unjust, un-sanitized and same should not have the full effect of law as it lacks both moral and legal efficacy.

Recommendations

The researchers with the utmost humility recommend that every law in order to meet and fulfill its purpose must take into consideration the following:

1. Equal concern: every law must prior to its promulgation take into consideration the concerns of everyone so as

to be able to as far as practicable meet the needs of the citizenry.

2. Respect for personal integrity: it is in the view of the researchers that any law that fails to respect the personal integrity of its citizens and humanity at large is no law at law and such law should be unconditionally rejected. Since the issue of personal integrity is a right that all manner of persons should enjoy just by the simple fact that one is born human. It is our view that without limitations, the personal integrity of persons who are even sentenced to prison or convicted must as well be respected since we only hate the crime and not the person.
3. Economic equality: any law must take into consideration the creation of a just and free market so that all manner of persons are able to benefit as far as practicable from the economy and monopolistic ideologies should be frowned upon.
4. Moral fibre: any law that fails to take into consideration the moral fibre of the community in which it governs is nothing short of a comedy show and such should be given no consideration. This is based on the fact that every law must be one of a kind and as such must consider the political, social and religious beliefs of its people: anything short of this will make the law as useless as the paper it would be printed on.

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