LAW'S LEGITIMACY: A CRITICAL EVALUATION OF THE HART – FULLER, HART – DEVLIN, AND HART – DWORKIN DEBATES ON THE NATURE OF LAW AND ITS MORAL JUSTIFICATION*

Abstract
This article critically evaluates the Hart-Fuller, Hart-Devlin, and Hart Dworkin debates on the nature of law and its moral justification, examining how each debate addresses the central question of law's legitimacy. The debate's significance lies in their enduring influence on legal philosophy and theory, with each side offering distinct perspectives on law's moral foundation. This article aims to comparatively analyse the debates, assessing the strengths and weaknesses of each position and to determine which offers the most convincing account of laws legitimacy. Employing a doctrinal methodology, the article scrutinizes the key arguments and concepts presented in the debates. The findings reveal that while each debate contributes valuable insights, a balanced approach combining elements from each debate provides the most compelling account of law's legitimacy. The article concludes by summarizing recommendations for a more comprehensive understanding of law's moral Justification.

Keywords: Hart – Fuller Debate, Hart – Devlin Debate, Hart – Dworkin Debate, Nature of Law, Law's Legitimacy, Moral Justification

1. Introduction

In the history of jurisprudence and legal theory, the discourses on law and morality became so much controversial that series of debates, official and unofficial emerged therefrom. The said debates relate to issues of whether law is separate and/or separable from morality, whether law could be employed to enforce morality and whether the obedience owed to law and which law demands is derived or merely derivable from morality. These issues resolve to the questions; what gives law its authority? What makes it morally justifiable to obey legal rules and decisions? How do we account for law's legitimacy in a way that reconciles its coercive power with our intuitive sense of justice and morality? These questions have sparked intense debates among legal theorists, with three seminal debates standing out: Hart-Fuller, Hart-Devlin, and Hart Dworkin. These have shaped the landscape of philosophy of law, influencing how we understand the nature of law and its moral foundation. The Hart-Fuller debate (1958) revolved around the challenge of positivism, with H.L.A Hart arguing that Law is a social fact, separate from morality while Lon Fuller countered that law's legitimacy depends on its adherence to moral principles. The Hart – Devlin debate (1960's) centered on the role of morality in law, with Hart advocating for a neutral, value free legal system, while Lord Devlin argued that Law should enforce moral values to maintain social cohesion. The Hart-Dworkin debate (1970s-80s) focused on interpretation, with Hart emphasizing the importance of rules and Dworkin arguing that law is an interpretive practice, requiring a moral reading of legal texts. This article embarks on a critical evaluation of these debates to uncover the most compelling account of law's legitimacy. By exploring the nexus between law, morality and interpretation, it aims to contribute to deeper understanding of law's moral justification and its implication for legal theory and practice.

2. Hart – Fuller Debate (1958): Separation of Law and Morality

This debate relates to the sum of exchanges, interactions, disputations and refutations activated by and surrounding the seminal work of Herbert Lionel Amorphous Hart namely *Positivism and the Separation of Law and Morality (1958).*[1] In essence, the Hart–Fuller debate is an exchange between Lon Fuller and HLA Hart published in the Harvard Law Review in 1958 on morality and law, which demonstrated the divide between the positivist and natural law philosophy. Hart took the positivist view in arguing that morality and law were separate. Fuller's reply argued for morality as the source of law's binding power.[2] Perhaps a profitable way to approach this discussion is to navigate around the court's decision on one of the cases that provided the background to the debate namely, *the Grudge Informer Case.* The facts of this case are as follows; A wife reported her husband to the Nazi authorities alleging that the husband made insulting remarks about Hitler to her at home during one of his leave from duty. Consequently, the husband was tried and sentenced to death but the sentence was subsequently commuted and he was detailed to the Russian front. In 1949, immediately after the war, the wife was charged and prosecuted by the post-war German court for the offence of illegally depriving a person of his liberty.'[3] At trial, the court found the woman guilty despite her strong defence that her husband was punished by the court-marshal, under the laws in force at the relevant time – the Nazi Statutes. In giving the ratio for the judgment, the court held that the Nazi Statute under which the husband was found guilty was contrary to sound conscience and sense of justice of all decent human beings[4] and was therefore

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[1] This work was reproduced in HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) and Lon Foller's 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 Harvard Law Review, 630

[2] 'Hart – Fuller Debate', available at <https://em.m.wikipedia.org/wiki/Hart-%E2%80%93Fuller_debate.> accessed on 12/11/2023

[3] F Adaramola, *Jurisprudence* (4th edn, Durban: Lexis Nexis Butterworths, 2008) p.77

[4] S Nanerjee, 'The Relevance of the Hart and Fuller Debate Relating to Law and Morality – A Critical Analysis' (2017) 42 *International Journal of Law and Legal Jurisprudence Studies,* 129 (122-133)

utterly invalid for being devoid of justice and morality. This is consistent with the formula – *lex injusta non est lex.* The Court of Appeal in convicting the Grudge Informer reasoned that she knew that her report would lead inexorably to a certain range of results, the least harmful of which was a year's imprisonment, the worst, death. She thus deliberately made use of laws that most Germans knew were designed to terrorize the population and which many, even at the height of the Nazi domination, also knew to be immoral.[5] There were other cases tried by the post-war German Courts which also contributed to the background of the debate.[6] The Grudge Informer case and several other cases in which people who acted in accordance with the horrendous Nazi laws were tried and found guilty for acting in line with immoral laws were then 'applauded as the triumph of morality over positivism'[7]

Reacting to the behaviour of the post German court in the face of the Grudge Informer's, and related cases, Hart argued that 'the iniquitous nature of a rule which might disentitle it to obedience does not necessarily entail its invalidity.'[8] Hence, the conviction and sentencing of the woman is wrongful since the woman was acting on the basis of an existing law in force in Germany. Without any prevarication, Hart believes that once a piece of legislation satisfies the formal criteria of validity, it is law without more. Accordingly, punishing the informer who relied on the Nazi law in denouncing the husband would pose a 'moral quandary.'[9] Once laws are enacted, they demand obedience and citizens are called to so obey. It could best be said that an immoral law could be disobeyed but whether a person should be punished for obeying a valid law in force for reasons of its monstrosity is another question. In furtherance of his position, he observed that, It may be conceded that the German informers, who for selfish ends, procured the punishment of others under monstrous laws, did what morality forbade; yet morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbade. This is the principle of *nulla poena sine lege*.[10]

Professor Lon Fuller, a natural law jurist responded to Hart's contentions in his seminal paper titled 'Positivism and Fidelity to Law: A Reply to Professor Hart', published in the Harvard Law Review.[11] In this entry, he argued that the post-war German Court had the right orientation while Hart's criticisms were erroneous.[12] For him, 'law is a kind of order which has an internal moral structure to which it must conform to be law.'[13] According to Fuller, it is these moral standards that constitute the essence or principles of legality, precisely as being built into the concept of law. *A fortiori,* 'nothing counts as law that fails to meet these standards.'[14] What this internal moral structure, inner morality or morality of aspiration does is to 'propel human beings to strive for the ideal.'[15] He outlined the material constituent of this inner morality as follows: generality, promulgation, absence of retroactive legislation and lack of abuse of retrospective legislation, abuse of contradictory rules, congruence between rules and their administration, clarity of rules, avoidance of frequent change and absence of laws requiring the impossible. Fuller tenaciously held that 'in the absence of compliance with these eight postulates, what passes for a legal system is merely the exercise of state coercion,'[16] which in essence is offensive to the dignity of man. In his words, 'every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent.'[17]

Having set out the general principles for his argument, Fuller was very indignant at Hart's approach to the cases precisely because Hart has completely neglected the internal morality of law in his considerations. Consequently, upon this neglect, Hart in Fuller's view could not manage the dilemma arising from the Grudge Informer's case and other cases in *pari materia* with it. Professor Fuller was thus in full support of the post-war German Court's in their handling of the case(s) under review. In his view an iniquitous law is a lawless law and it is not hard for him to deny to it the name of law. Thus when a system calling itself law is predicated upon a general disregard by judges of the

[5] D Dyzenhaus, 'The Grudge Informer Case Revisited' *New York University Law Review,* (2008) 83*,* 1009 (1000-1034)

[6] One of such cases was that in which the defendant, a Nazi official arrested the plaintiff and her husband for hiding a half of Jews in their home. And when the husband tried to escape, the defendant killed him. Here the court held that superior order was no defence and the defendant was held to be personally liable. In this case the principle was affirmed that a statute may cease to be valid where 'the contrast between positive law and justice becomes so unbearable that the positive law being 'false law' must yield to justice. Yet another important case was that in which civil servants and judges were convicted and punished for helping to make and enforce Nazi laws F Adaramola, *op. cit.* p. 78

[7] I.Akomolede, *Introduction to Jurisprudence and Legal Theory* (Logos: Niyak Print and Law Pub., 2008)*.,* p. 15

[8] cf. BO Okere, 'The Relationship between Law and Morality: Dichotomy or Complementarity' *The Nigerian Judicial Review, (*2002) 10(1) p 9

[9] *Ibid*

[10] HLA Hart *The Concept of Law*, (2nd edn., Oxford University Press, 1994) p. 207.

[11] (1958) 71 Harvard Law Review, 630-672

[12] BO Okere, *art. cit.* p. 10

[13] I Akomolede, *op. cit.* p. 12

[14] Wikipedia, 'Lon L. Fuller', https://en.wikipedia.org/wiki/Lon_L_Fuller accessed on 12/11/2023

[15] I Akomolede, *op. cit.,* p. 11

[16] B.O Okere, *art. cit.,* p. 10

[17] LL Fuller, *The Morality of Law,* (New Haven: Yale University Press, 1969) p. 163; see also C Murphy 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy,* 251 (239-262).

terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the street, which no one dares challenge in order to escape even those scant restraints imposed by the pretence of legality, when all these things have become true of a dictatorship, "it is not hard for me, at least, to deny it the name of law".[18]

3. Hart – Devlin Debate: Legal Enforcement of Morality

The context of this debate was the legal and moral environment of the 17th century United Kingdom and a host of the common wealth countries. It came in the wake of the homosexual law reform in the jurisdiction. In fact, until 1861, sex between men was punishable by death in the United Kingdom.[19] And under the Criminal Law Amendment Act of 1885, homosexual relations between men remained illegal. It happened that with the end of the Second World War, came a sharp rise in arrests and prosecutions for the said offence. In fact, 'by the end of 1954, in England and Wales, there were 1,069 men in prison for homosexual acts with a mean age of 37 years.[20] As these arrests and prosecutions became prevalent the government warned itself of the danger that gay members of the civil service may be blackmailed into giving state secrets to the enemy – USSR, then. With such sensational trials of top government officials, namely Alan Turing and Lord Montagu, who are in custody of classified secrets, the official paranoia was heightened. Accordingly, the conservative Government quickly set up a developmental committee, headed by Sir John Wolfenden, Vice-Chancellor of Reading University.[21] The terms of reference for the committee being to consider and recommend reforms in the existing laws on homosexuality and prostitution.[22] And after three years of engaging study, research, consultations and brainstorming, the committee came up with a report made out in 155 pages. The substance of their recommendation was a reflection of the philosophy of The Street Offences Committee of 1927, headed by Huge Macmillan. According to this committee, it is a matter of universal notice that law does not concern itself either with private morals or with consequential ethical sanctions. The law only intervenes, the committee holds, when private conducts become inimical to rights of others. Thus, 'certain forms of conduct, it has always been thought right to bring within the scope of the criminal law on account of the injury which they occasion to the general public…'[23] As a matter of fact, the Wolfenden committee, accepted and applied the purport of this statement to their general approach. Next, and as a necessary component of their recommendation, the Wolfenden committee emphasized the pre-eminence and sanctity of freedom of choice and action of an individual. It therefore reasoned that freedom of choice is coterminous with private morality hence ought to be respected. Thus, unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law's business.[24]

As a free conclusion from the above presuppositions and positions, the committee recommended that 'homosexual behavior between consenting adults in private should no longer be considered a criminal offence.'[25] This controversial committee resolution was further predicated on the thinking that; the law's function is to preserve public order and decency, to protect the citizens from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others It is not, in our view, "the function of law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behavior".[26] In the wake of this recommendation, a serious public debate emerged. Notable in the hall of debate and pitched against each other were Lord Devlin,[27] a British Judge, and Herbert Lionel Adolphus Hart, prominent British philosopher. While the first attacked the philosophical basis of the report, the second mustered arguments to profoundly support the report. In what follows, this work will present the avenging positions.

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[18] LL Fuller, in HO Pappe 'On the Invalidity of Judicial Decisions in the Nazi Era *Modern Law Review, (1960) 23(3),* 260

[19] 'Wolfenden Report, 1957, Conclusion' <https://www.bl.uk/collection-items/wolfenden-report-conclusion> accessed on 13/11/2023

[20] P Higgins, *Homosexual Dictatorship: Male Homosexuality in Postwar Britain* (Baings Stoke: Palgraul Macmillan, 1996) p 56

[21] The Committee was actually called 'Departmental Committee on Homosexual Offences and Prostitution (Wolfenden Committee)

[22] cf. Wikipedia, 'Wolfenden Report' <https://en.m.wikipedia.org/wiki/wolfenden_report> accessed on 13/11/2023

[23] - 'The Wolfenden Report' (1957) 33, 4 *The British Journal of Venereal Diseases,* 205.

[24] - Wolfenden Report cited in T Szasz, *Laws, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices,* (New York: Syracuse University Press, 1989) p. 249. ML Friedland (ed.) *Cases and Materials on Criminal Law and Procedure* (5th ed. London: University of Toronto Press, 1978) p. 206; see also, Mkirby, 'Lessons from the Wolfenden Report,' (2008) 34, 3 *Common Wealth Law Bulletin,* 551 (551-559)

[25] B. Lewis, *Wolfenden's Witnesses: Homosexuality in Postwar Britain* (London: Palgrave Macmillan, 2016) p. 275

[26] Report of the Committee on Homosexual Offences and Prostitution, (Md 247, 1957 (UK) PP. 9-10. See also P Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate (2006), 10, ½, *The Journal of Ethics, 21.*

[27] Lord Devlin himself is coincidentally a member of the Wolfenden Committee and became the loudest dissenting voice on the floor of the committee.

In the opening pages of his *The Enforcement of Morals,* published in 1965, Lord Devlin recognized the Wolfenden report as an 'excellent study of two very difficult legal and social problems.'[28] He disapproved of the principle that private immorality is outside the province of law and the requirement that special circumstance must be shown if law must intervene into that domain without being labeled a trespasser. Lord Devlin noted that this idea of the harm principle was a carryover from John Stuart Mill and is absolutely a wrong principle to be followed.[29] In his Maccabacan Lecture,[30] he set out the outlines of what the proper principle should be thus: Society has a right to punish conduct of which its members strongly disapprove even though that conduct has no effect which can be deemed injurious to others, on the ground that the state has a role to play as a moral tutor and the criminal law is its proper tutorial technique.[31] More so, Devlin's next arm of the argument is of the sort that 'the environment in which we and our children must live is determined, among other things, by patterns and relationships formed privately by others than ourselves.'[32] Hence if homosexuality indulgence is left unrestrained, the institutions of marriage and family would change with an undetermined/indeterminable array of consequences. According to him if our society hates homosexuality enough, it is more justified in outlawing it, than forcing human beings to choose between the miseries of frustration and persecution, because of the danger the practice presents to societies existence.[33] In all these, he meant to demonstrate that the law is concerned with a minimum standard of behavior and not the maximum. These views of the Law Lord greatly influenced the judgment of the Court in The Ladies Directress Case namely: *Shaw v Director of Public Prosecutions*[34] wherein the appellant, who, for a fee, published an almanac of prostitutes, for the purpose of advertising them for commercial sexual intercourse, was convicted. As argued by Lord Devlin, the Court has the power to enforce moral principles. Lord Simmonds supported the idea, citing Lord Mansfield's ruling in *R v Delavalt* [35]which stated that the Court of King's Bench is the guardian of public morals and overseas offences against good morals. Indeed, the court of the King's Bench has the residual powers to address offenses that harm the public sensibility, but only when there are no laws made to handle such cases. This residual power of the court is rarely used, as parliament usually creates laws to address these issues. However, since it is impossible to anticipate every way in which someone's moral failure might harm society, the courts power serves as a safeguard to fill the gaps[36]

But Professor Hart would disagree with Lord Devlin in material particulars of the argument. Hart, together with all critics of Devlin, tagged Devlin a core traditionalist i.e., one who anchor his 'arguments on religion or a perfectionist theory of government.'[37] Hart found the argument of Devlin extremely alarming and so contested in the *corpus* only what he found to be its critical weaknesses. Accordingly, Hart identified in and summarized Devlin's argument into a triad of theses. He further structured the theses into a trilemma and proudly proceeded against each of the thesis. In the words of Basshan: Hart's overall response to Devlin takes the form of a trilemma. In essence, Hart argues as follows: it is difficult to say precisely what Devlin's argument is, but it appears to be A, B, or C. but none of these views is defensible. Hence Devlin's argument is apparently indefensible.[38] The theses symbolized as A, B, or C were what Hart variously annotated as the disintegration thesis, the definitional thesis and the conservative thesis.

First, the disintegration thesis[39] relates to Devlin's claim that society has the right to use the instrument of state in the enforcement of its shared morality, without which enforcement, the society might disintegrate or weakened heavily, upon the incidence of loss of that cherished morality. In Hart's analysis, the disintegration thesis is a normative claim strongly predicated on 'ambitious empirical generalization'[40] about what is needed to protect the society from breaking down or collapsing. It is Hart's worry that Devlin was unable to provide any empirical evidence to support his loud empirical generalization. And unfortunately, Hart argues, there are a plethora of empirical evidences against that claim.[41] In furtherance of his argument, Hart maintains that not a few societies have benefited from individual departures from common morality. He insists that so far, there is no society that has disintegrated or collapsed in Europe just because homosexual conduct had been decriminalized despite strong public opprobrium of that act.[42]

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[28] P Devlin 'Morals and Criminal Law' in D Jeske and R Fuvnerton (eds.), *Readings in Political Philosophy: Theory and Applications* (Ontario: Broadview Press, 2012) p 430.
[29] cf. P Devlin, *The Enforcement of Morals,* (London: Oxford University Press, 1965) p. 11.
[30] The Maccabacan Lecture in Jurisprudence was delivered by Lord Devlin in 1958 at the British Academy.
[31] R Dworkin 'Lord Devlin and the Enforcement of Morals' *Yale Law Journal,* (1966) 75 (3), 988
[32] *Ibid*., p. 993
[33] Ibid., p. 992
[34] (1962) AC 220
[35] (1763) 3 Burr, 1434
[36] *Shaw v Director of Public Prosecution, Supra* at 266-269
[37] G Basshan, 'Legislating Morals: Scoring Hart-Devlin Debate after fifty years *Ratio Juris, An International Journal of Jurisprudence and Philosophy of Law,* (2012) 25(2), 120
[38] Ibid.
[39] HLA Hart, Social Solidarity and Enforcement of Morality (1967) 35 *University of Chicago Law Review,* 1 (1-13)
[40] Ibid., p. 3
[41] HLA Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963) p. 71
[42] Ibid., p 52

Consequently, the disintegration thesis is dubious and fails on its weight in the opinion of Hart. Note that it is not absolutely clear that Devlin defends the above thesis.

Second, the definitional thesis relates to Devlin's definition of society as 'a community of ideas.'[43] The implication of this definition is that any alteration, change or total transgression of a society's shared moral ideas will lead inexorably to the extinction of that society, precisely as a community of ideas. Assuming but not conceding that Devlin defends this thesis, then Hart finds it regrettable and incapable of providing any support for the claimed society's right to enforce shared morality by means of its criminal laws. According to Hart, without more, the definitional thesis does not say anything about the goodness or otherwise of any moral norm. All it implies is that a society must have exactly the moral code it has at any precise moment. Hence, any change in the moral universe of the said society would lead to the extinction of that very society but also, the coming into existence of another. Hart finds this argument tautologous and one which hardly seems to be worth ventilating and thus could not support the legitimacy of morals legalization.[44] From a slightly different perspective, Hart reasons that Devlin has a confused idea of what a society is and predicates his argument on such definitional confusion. Hart believes that Devlin would either endorse a conventional or artificial definition of society but whichever one he adopts his argument fails.

Third, Hart discovered yet another direction of argument mustered by Devlin in urging the society's right to enforce morality by law. Devlin argues that the majority have the right to follow their own moral convictions because 'their moral environment is a thing of value to be defended from change.'[45] According to Hart, anyone who espouses the moral conservatism thesis must be able to demonstrate that: certain social system of a people, including their moral preferences are of great value and so worth preserving and that certain immoralities no matter how latent, operate to erode the values. What is more, the avowed defender of moral conservatism thesis must also be able to show that the cost of making and enforcing laws[46] against such immoralities are insignificant when compared to the need for preserving the threatened social institutions. All-in-all, to justify the moral conservatism thesis, it must also be shown that in close cases, it is the right of the people (or their elected representatives) to decide whether the necessary conditions for the justification have been satisfied.[47] Hart is of the opinion that none of these conditions have been satisfied by Devlin so as to sustain the conservatism thesis. It thus fails. Basshan presents the entirety of Hart's counterpoints to Devlin in this trilemma: 'you defend morality laws by appealing to either disintegration thesis, definitional thesis, or the conservativism thesis. But none of these views is defensible so your defence of morality law fails.'[48] Suffice it to enter here that Hart fully was in support of the Wolfenden Committee Report especially in its critique of moral's enforcement. Hart therefore makes a case for non-enforcement of morality or non-criminalization of private immorality.

Hart's rebuttal of Devlinian argument became short-circuited immediately he admitted that there could be core moral principles worth preserving even by law, example the prohibition of murder by criminal law. Hart shot himself on the leg when he canvassed that the domain of private morality is never within the law's jurisdiction. He did forget or was ignorant of the fact that there are issues of private morality which operate to strongly threaten the public morality which he agreed should be preserved. Indeed Nwauzi and Fab-Eme thinking the thoughts of these debaters after them are of the view that if the government considers that an issue of private morality will disrupt public order and decency; if the government considers that a private act of an individual will somehow manage to cause offence and injury to society at large, then the law should regulate that issue of private morality.[49] Much of what Hart did were academic and abstract in the sense of being removed from the regime of reality where a symmetry between law and morality is always self-evident.

As a matter of fact, what this part of the paper considers as a cardinal issue is: whether enforcement of private or public morality is relevant to social construction and sustainability? The answer both in Hart and Devlin is yes. Devlin was overt with the 'yes', in Hart, it was implied. And it is immaterial whether Devlin thinks that violating certain moralities would occasion a total collapse of society while Hart reasons that it can only lead to mere disruption and/or momentary slowdown of development. If at all violating private moralities can, more or less, in any case conspire against the good of state (the human flourishing), it shall be just, within the limits of the sanctity of human freedom, to protect the state and in that way, the citizens, by enforcing certain moralities and by prohibiting certain immoralities. This has been Devlin's position and critically considered, Hart did not succeed in abandoning it.

[43] P Devlin, *The Enforcement of Morals,* (London: Oxford University Press, 1965) p. 10
[44] HLA Hart cited in Basshan, *art. cit.,* p. 122
[45] G Basshan, *art. cit.,* 122.
[46] Loss of freedom, criminal justice cost, risk of blackmail, arbitrary enforcement etc.
[47]G.Basshan, *art. cit*., pp. 122-123
[48]Ibid., p.123
[49] L O Nwauzi & C D Fab-Eme, 'A Devlinian Analysis of Law and Morality in Nigeria' [2020] 1(2) *Redeemer University Law Journal* p. 285

4. Hart – Dworkin Debate

This debate[50] concludes the triad of debates on the relationship between law and morality in the construction of the legal systems of the nations. It is a discourse between HLA Hart and Ronald Dworkin which centers on Dworkinian critique of Hartian legal positivism as set out in Hart's master piece – The Concept of Law.[51] It was Hart's argument that judges in deciding cases operate exclusively within the bounds of rules of law but Dworkin contests this by emphasizing that over and above the rules, judges have access to a set of 'principles' in their formulation of judgments.[52] The most obvious implication of this 'differential positions is that for Hart, it is rules which are intrinsically not dependent or determined by morality but for Dworkin, the principles are conterminous with morality. Hence the debate attempted to explain the nature of law. It dealt with the question: 'what are the essential aspects of law, is it purely a set of rules or [does] it also contain morality.[53] In the magisterial opinion of Professor Shapiro: The 'real' debate between Hart and Dworkin, therefore concerns the clash of two very different models of law. Should law be understood to consist in those standards socially designated as authoritative? Or is it constituted by those standards morally designated as authoritative? Are the ultimate determinants of law social facts alone or moral facts as well?[54]

Hart very strongly pushed the view point that precisely as a closed system of primary and secondary rules working in close complementarity, morality does not play any essential role in laws' validity. It is all about the rules without more. He believed and so argued that when in the process of adjudication the rules get exhausted, the judges then move into the exercise of discretion. Pursuant to this voyage of discretion, the judge may access extra legal sources which may include moral norms and more. In this way and only in this way, morality may enter into the business of law but as a visitor. His argument is that morality may take part in this law's business but not as a significant or compulsory part of the same. Hence, Hart's notion of law is one that can stand tall without any reference to morality as '*quidity'*. Where law contains moral values as it may sometimes do, it does not go to validity but to moral justification of a law which remains a law with or without the justification.[55] In furtherance of his thesis, Hart did admit or concede at least three moral contents of law. These are the prohibition of violence, theft and fraud.[56] Yet this minimal concession cannot operate to levy the nature of law with a moral essence. Hence, he submits that we cannot by this 'mere moral presence' assume that morality is an essential part of law. In other words, 'law is not necessarily related to morality.'[57] The best that he can concede is that 'moral considerations can be included in a legal decision, as much as, morality may influence the law and justice.'[58]

In a magisterial demarcation between morality and law as it is, Hart argued that what is law *qua* law can only be sieved from history, social study and critical assessment without more. It is a closed logical system where proper decision can only be inferred from sets of rules that have been promulgated as appropriate. *On the other hand, morality is for Hart far removed from law as it cannot be established by force of 'rational argument and evidence.'*[59] Suffice it to note that in Hart's propositions the primary rules govern behaviors of the society while secondary rules are centered on questions of how primary rules are created, developed, interpreted and formally defined. Hence, the secondary rules function as a gauge to verify the validity of primary rules. Consequently, law is independent, and

[50] Note that the issue of relationship between law and morality is merely penumbral to this debate which of course contained such other core issues as the existence of judicial discretion, the foundations of rules, the function of law and the nature of any legal interference. The debate as a matter of fact was long and sustained and part of it was pursued posthumously by adherents and disciples of Hart and Dworkin. The shortest history of this debate was as follows: (1) In 1966, Hart published *The Concept of Law* (2) In 1967, Dworkin published an article criticizing Hart's theory. (3) In 1968 Hart published *Punishment and Responsibility.* (4) In 1969, Dworkin reviewed the book and criticized Hart's theory of excuses. (5) In 1972, Dworkin again criticized Hart's general theory. (6) In 1976, Hart criticized Dworkin and (7) Dworkin briefly replied. (8) In 1978, Hart criticized Dworkin's theory of rights. (9) In 1981, Dworkin replied. (10) In 1982, Hart criticized Dworkin's view of legal rights as a specie of moral rights. (11) Two years later, Dworkin replied to this criticism. (12) In 1986, Dworkin published criticisms of all theories of a sort he took Hart's to be. (13) In 1987, Hart responded to Dworkin's 1984 defense of legal rights as moral and criticized Dworkin's concept of jurisprudence. (14) In the same publication, Dworkin briefly replied to Hart. Cf. M. Bayles, 'Hart vs Dworkin' (1991) 10(4) *Law and Philosophy,* 349-381

[51] 'Hart – Dworkin Debate', Wikipedia, available at <http://en.m.wikipedia.org/wiki/Hart%E2%80%93Dworkin_Debate> accessed on 13/11/2023

[52] *Ibid.*

[53] PCKL Bello, 'The Controversy about the Essence of Law: A Dispute between Hart and Dworkin' (2012) 2(1) *Indonesia Law Review,* 54

[54] SJ Shapiro, 'The Hart – Dworkin Debate: A Short Guide for the Perplexed', in *Michigan Law,* University of Michigan Law School and Legal Theory Working Paper Series, 77, p. 18.

[55] PCKL Bello, art. cit., pp. 54-55

[56] HLA Hart, *Essays in Jurisprudence and Philosophy,* (Oxford University Press, 1983), p. 195

[57] PCLK Bello, art. cit., p. 55

[58] SJ Shapiro, 'art. cit., p. 18.

[59] HLA Hart *The Concept of Law,* (Oxford: The Clarendon Press, 1994), p. 302

therefore must be judged on its own internal elements. The validity of law is therefore determined by the relationship between these two elements, and never by reference to moral principles, a sense of justice or other social goals.[60]

What must be singled out as the essential position of Hart in the debate is that it is 'in no sense necessary truth that laws reproduce or satisfy certain demands of morality…'[61] Hart was only disposed to concede merely a contingent influence of morality on the laws. Hence, he says that 'moral examinations of law are possible and, in some cases, even beneficial.'[62] In this way, Hart takes the course of an inclusive positivist[63] without more. Thus, for any legal system to qualify as such, it must be established on the master rule of recognition which in turn has to be predicated upon the social fact of acceptance by legal officials alone and not on morality. What can further be made out of this is that Hart sees 'no connection between law as it is and … law as it ought to be.'[64] The best that can be accorded to morality being that it helps merely in the structuring of primary rules whose essential character consists in obligatory social norms with the enforcement power of social sanction. Accordingly, the idea implicit in Hart's call for a rule of recognition imbedded in secondary rules of law, is that, for law to apply to persons, it must be accessible to them. Here, we see a separation of law from a robust moral content in primary rules, but an acceptance of some minimal morality in the secondary rules. The minimal morality included by Harts' secondary rules is simply a means of addressing the morality implicit in the notion of an obligation to obey primary rules. In this sense then, Hart's minimal moral content provides a moral justification for the system of rule creation and application not for specific primary rules.[65]

Dworkin on his part, began with a sharp diatribe on Hart's 'model of rules' which represents the positivist doctrine. In his *Taking Rights Seriously,* Dworkin observes 'I want to make a general attack on positivism and I shall use HLA Hart's version as a target, when a target is needed.'[66] He made out two critiques against the Hartian discourse. The first critique was done in his paper *The Model of Rules* published in 1967 and republished in 1978 in his *Taking Rights Seriously.*[67] This initial critique attacked Hart's *Models of Rules* by calling attention to such other binding standards called principles which are equally essential to adjudication. These principles have reference to 'moral principles that underlie the community's institutions and laws.'[68] The second critique came in the wake of counter attacks made by scholars on Dworkin's first critique of Hart. In this further critique published in his *Law's Empire*[69]*,* Dworkin frowned at Hart's plain-fact view of Law according to which the grounds of law are predicated on the facts of consensus by loyal officials.[70] Instead, Dworkin tries to show that the court necessarily engages in a kind of constructive interpretation which requires 'imposing purpose on an object or practice in order to make it the best possible example of the form of genre to which it is taken to belong.'[71] And at this point the seminal principles of morality that incubates the law are necessarily re-connected with. According to Shapiro, whereas the first critique seeks to exploit the alleged fact that judges often take the grounds of law to be moral in nature, the second critique capitalizes on the alleged fact that judges often disagree with one another about what the grounds of law are.[72]

Accordingly, Dworkin in the process of his argument, contends that Hart's model of rules is not the whole truth because in the business of adjudication over a 'hard case' a court draws from 'moral or political standards, principles and policies in order to reach the appropriate decision.'[73] As it were, without denying that law comprises of 'sets of rules' Dworkin believes that law also consists of moral principles.[74] In furtherance of this proposition, he identifies two separate but continuous stages of development of a piece of law namely the pre-interpretive [the stage of

[60] PCLK Bello, *art. cit*., p. 46
[61] HLA Hart, *The Concept of Law* (3rd edn., Oxford: Oxford University Press, 2012), pp. 185-186
[62] SJ Shapiro, *art. cit.,* pp. 22-26.
[63]The exact meaning of inclusive positivism is easily configured from the three theses it defends namely: conventionality thesis, social fact thesis and separability thesis. Conventionality thesis says that laws are man-made and the social source is but the only source of law. Social fact thesis holds that, laws content derives from facts about social groups and not any superior moral fact. Separability thesis posits that morality and legality are therefore separable such that tests of legality does not have to make or take into account, moral considerations.
[64] HLA Hart, 'Positivism and the Separation of Law and Morals' *Harvard Law Review*, (1958) 71(4) 597-599
[65] MB Williams, 'Assessment of Dworkin-Hart Debate' (2005) Graduate Student Theses, Dissertations and Professional Papers, 5616, p. 13
[66] R Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), p. 23
[67] Ibid., pp. 14-45
[68] Ibid., p. 79
[69] R. Dworkin, *Law's Empire,* (Cambridge: Belknap Press, 1986)
[70] S Lacroix 'Widening the Discussion: The Hart-Dworkin Debate as a Continuum' <https://www.academia_debate_as_a_continum> accessed on 20/05/2020
[71] R. Dworkin, *Law's Empire, op. cit.* p. 52
[72] SJ Shapiro, *art. cit*., 77, p. 29
[73] - 'Concerning the Hart and Dworkin Debate' < https://www.lawteacher.net/free-law-essays/constitutional-law/concerning-the-hart-and-dworkin-debate-constitutional-law-essay> accessed on 23/5/2020
[74] R Dworkin (ed.), *The Philosophy of Law* (Oxford: Oxford University Press, 1977), pp. 47-49

identification of the law] and the interpretive [the stage of justification of the law] stages. It is at the latter stage that moral determination of the law makes its full blown epiphany. For instances, he observes that the crime of burglary is justified by the moral need for a person to protect his or her property. He insists that the continually changing nature of the law requires that it should be assessed and re-assessed and so justified in terms of principles, justice and morals and not just plain facts.[75] Attacking Hart's rule of recognition, he further argues that there is no such rule that determines what is law as against what is not law, otherwise judges will not be disagreeing within case law. On the other hand, in the event of 'hard cases' judges descend into the domain of morality, as available preferred interpretation network, to make their decisions.

Note that Dworkin actively demonstrated the moral intervention into or co-inherence with law by the use of two *locus classicus*. First, in *Riggs v Palmer*[76], a grandson who murdered his father so to benefit from his will was stopped by the intervention of a moral principle that 'one should not be allowed to benefit from his wrongs.' Second, in *Henningsen v Bloomfield Motors,*[77] the court held a car manufacturer liable as a result of injuries sustained owing to defective manufacturing not withstanding that the plaintiff signed a memorandum waiving the liability. Beyond this decision is the moral principle that a person is entitled in justice to a value he has paid for and nobody shall be paid for a value he has not given. Dworkin argued that these moral principles are more important than plain-rules and they form part of the legal corpus and constitutes the essence of the laws. He defined such principles as standards observed not because they will secure any economic/political gain or make a social situation desirable but because they comprise 'a requirement of fairness or some dimension of morality.[78] They are structures of an ethos which lies in the law. Dworkin identifies the problem of positivism as the neglect of these seminal moral principles with the supervention of secondary rules of Hart. He argues that 'a non-conclusive ethos pervades the system of legal rules and must be accounted for in legal reasoning and decision making.'[79] It is therefore his compelling opinion, in the debate, that morality plays more than a fundamental function in a legal system or system of laws but also an interpretive role in the formation of legal principles. Particularly, he opines that 'the invocation of moral principles embedded in the law offers an important clarifying tool for primary rules and gives a clearer conception of the shape taken by the legal system.'[80] Contrary to the Hartian position that in 'hard cases' the judiciary creates law through appeal to some form of strong discretion, Dworkin argues that there exists a plethora of moral principles underlying the primary rules and that in 'hard cases' the judiciary makes necessary recourse to such principles in adjudication. In this way, 'rather than creating law, the judiciary in a sense discovers the law.'[81] What this implies is that, unlike Hart's position that law is a matter of fact picked out by rule, adjudication on Dworkin's account relies not on facts about the law but on a range of moral principles derived from the pertinent, extant body of law. Dworkin's idea is that there is an ethos of the law that is applicable to any particular situation. When rules do not apply, judges then ought to look towards the ethos of the law for answers.[82]

In furtherance of this debate, Dworkin contends that Hart's model of Rules as social facts could neither capture the moral consequences of law nor the moral principles underlying the rules. In Dworkin's analysis, Hart wrongly believes that once the legal officials/society agrees on the rules, a sufficient ground becomes established for asserting those rules. Hence, Hart's concession of a 'morality of agreement' otherwise called conventional morality without more. But Dworkin insists on a concurrent morality substantively conterminous with and underlying the rules of law yet not determined by agreement as the sufficient ground for asserting the same. He considers this kind of moral foundation as crucial. Indeed, the fact that principles are routinely treated as law highlights that they do not comprise social rules embedded in a conventional morality, but normative principles embedded in a concurrent morality. Hence even when the 'rules run out' and judges find themselves in a doughnut hole', they remain custodians of the enduring moral principles that serve as the foundation of a society's legal system.[83]

Dworkin therefore reasons that there is a sustained co-inherence and continuity of law and morality. They are not strange bedfellows but two sides of the same coin. Morality is neither a meddlesome interloper into the business of law nor is it a welcomed august visitor that comes in when the strength of law is exhausted. It is a part and parcel of legal *corpus* and strictly constituted in the essence of the laws.[84] Dworkin was greatly indignant at Hart's neglect of

[75] 'Concerning the Hart and Dworkin Debate' *op. cit.*
[76] 115 NY 506, 22 NE 188 (1889)
[77] 32 N.J. 358, 161 A. 2d. 69 (1960)
[78] 'Concerning the Hart and Dworkin Debate,' o*p. cit.*
[79] MB Williams, 'Assessment of the Dworkian – Hart Debate' (2005) Graduate Student Theses, Dissertations and Professional Papers. 5616, p. 3
[80] *Ibid.*
[81] *Ibid.,* p. 14
[82] *Ibid.* p 17
[83] T Pavone, 'A Critical Adjudication of the Hart – Dworkin Debate' <https://hart-dworkin_debate_critical_review.pdf> accessed on 13/11/2023
[84] cf. PCKL Bello, *art. cit.,* p. 55

these moral principles and for attempting to establish legal validity by recourse to social facts alone. Such understanding of laws' nature as Hart's is grossly deficient as it only fits into the argumentative structure of law. Yet, the definitive understanding of law always 'involves a dispute that requires people to give the best answers based on moral considerations related to the purpose of the existence of the legal system itself.'[85] Contrary to Hart who ignored moral principles in his commitment to 'rules', Dworkin insists that moral principles have fundamental role in the entire theory and practice of law.[86] And in a more precise way, Dworkin argues that moral rights and legal rights as various legal systems may wish to designate are 'at least, species of the same genus and creatures of morality.'[87] Hart denies this position. He reasons that there are no necessary connection between the content of law and morality and there can be legal rights and duties, which have no moral justification whatever. Whereas Dworkin rejects this in favour of the view that there must be some form of prima-facie moral grounds for assertions of the existence of legal rights and duties. So, for him, legal rights must be understood as superstructures upon the moral universe and he further states that the opposed positivist doctrine, of the sort advanced by Hart, belongs to the peculiar world of legal essentialism, in which pre-analytical legal rights and duties without any kind of moral grounds or force are presumed.[88]

A critical consideration of the particulars of this debate points to the direction of a possible reconciliation. And the point of that reconciliation is to the effect that there is at least a minimum moral content in laws and legal systems. This becomes more obvious if one factors in Hart's meta-critique of Dworkin where he stresses that Dworkin's critique 'ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity, conformity with moral principles or substantive values…'[89] M.B. Williams shares the same sentiment of reconciliation in his assessment of the debate when he observed that '… Hart/Dworkin debate reaches an agreement of sorts on the necessity of some minimum moral content of a robust legal system.'[90]

5. Conclusion

The relationship between law and morality has been a perennial philosophical inquiry. This paper has engaged that agelong conversation through a critical examination of the Hart-Fuller, Hart-Devlin, and Hart Dworkin debates. Hart's legal positivism, with its emphasis on the separation of law and morality, provides a seemingly clear and objective framework for understanding legal systems. However, Fuller's Critique highlights the inherent moral dimensions of law, arguing for a necessary connection between legal validity and procedural morality. Devlin's work adds to the picture the role of social context and power relations in shaping legal norms. Dworkin, on the other hand challenges positivisms rigid framework, introducing the concept of legal principles and arguing for a more interpretive approach to law. His emphasis on rights and justice brings a moral dimension back into legal discourse, albeit in a different form than Fuller's. Hence, this paper reaffirms the enduring significance of natural law in understanding laws legitimacy. Despite the critiques of positivism and interpretivism natural law's emphasis on universal moral principles and human dignity remains the most compelling account of law's moral justification. The debates' inability to lay to rest the tensions between legal rules and moral rules underscores the need for a deeper approach, one that recognizes the inherent connection between law and morality. Indeed, by following natural law's insights, we can reclaim law's legitimacy as a moral and ethical enterprise rather than merely a social or political construct. Ultimately, this requires a renewed commitment to the principles of justice, equality and human rights, and a recognition that laws true authority derives from its conformity to the natural law. This position reconciles the debates and debaters.

[85] *Ibid.,* p. 57
[86] T Pavone, *op.cit.,* p. 46
[87] R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) chap. 17; See also IKE Oraegbunam, 'The Dialogics in Hart – Dworkin Debate on the Concept of Law' *International Journal of Comparative Law and Legal Philosophy,* (2020) 2(2), 11
[88] - 'Concerning Hart and Dworkin Debate' *op. cit.*
[89] Hart cited in T. Pavone', *op. cit.* p. 7
[90] MB Williams, *art. cit.,* p. 2