

Positivism fuller morality

Experience, Human Nature



In order to understand Fuller's objections to the positivist outlook, it is imperative that we properly grasp positivism, in particular the theory put forth by Hart. We shall, therefore, start with positivism and its main schools of thought. Thereon the objections outlined by Fuller will be applied in light of the various discussions which took place during the Hart-Fuller debate. Finally the concept of inner morality of law shall be detailed and dissected, weighing its merits and demerits with the other major school, i. e. positivism.

Positivism developed in the early 19th century as a response to the Natural law notions linking law with morality. Positivists arguing that law need not be moral in order to be laws. There has to be, they so argued, a criteria whereby laws are created, enacted and implemented without taking recourse to the morality of being or things at every instance in that regard. Therefore while positivism holds that to be valid law, all that is required is that it should issue from a competent legislator after following the prescribed process, natural law theory requires in addition that such law, to be valid, must conform to some ideal principle (which may emanate from morality, reason, God, or some other such source).

The first positivist was Jeremy Bentham, his positivism being linked to another philosophical argument of his, that of utilitarianism; ' the greatest good for the greatest number', they would say. The principle approach being that the essence of the law is grounded in human will and it need not have any divine power to be laws. However, it is not that positivists say that there is no link between law and morality, their point being that laws need not be moral in order to be laws.

Within Positivism, there are two different schools of thought; one being from the lineage of Austin and Bentham, who argue the “ Pedigree thesis”; the other asserts that legal validity is a function of certain social facts. Borrowing heavily from Bentham, Austin argues that the principal distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by most people in the society, but not in the habit of obeying any determinate human superior. Therefore, in Austin’s theory, any general sovereign imperative supported by a threat of even the smallest harm is a law.

This theory has its problems, firstly, in modern democracy, there is no visible “ sovereign”, the power ultimately lies with the people who use their vote to choose their respective representatives, who in turn are bound to abide by the laws of the state, and serve the people of their nation in a manner becoming of them as legislators and parliamentarians.

The most potent attack on Austin, and his thesis, came from Hart in his groundbreaking work *The Concept of Law*. Hart argues 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 argues that there ought to be a set of primary and secondary rules, which derive their authority and ‘ sanctity’ from the Rule of Recognition., Hart believes a system consisting entirely of the kind of liberty restrictions found in the criminal law is, at best, a rudimentary or primitive legal system.

Austin’s theory, as Hart has rightly pointed out, lacks the necessary tools whereby we can identify the ability of a citizen to contractually obligate a

person or an entity to do certain act in pursuance of the terms of an agreement which they may have entered into. Further, Austin failed to take into account the ‘right conferring’ ability of a person when he or she enters into a contract between private entities. 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

In Hart’s theory, secondary rules are different 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.

Therefore, Hart distinguishes three types of secondary rules that mark the transition from primitive forms of law to full-blown 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; (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.

The second thesis comprising the foundation of legal positivism is the separability thesis. In its most general form, the separability thesis asserts that law and morality are conceptually distinct. This interpretation implies that any reference to moral considerations in defining the related notions of

law, legal validity, and legal system is inconsistent with the separability thesis. As H. L. A. Hart describes it, 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”

Therefore, we can see that positivism is essentially based on the notion that laws are, perhaps, complicated in their nature and effect and cannot be judged, or defined, under a particular set of belief based on morality. At any level, positivists have tended to adhere to the notion that morals, although important in ones life, are not required to play a role where they define the very laws which govern, or regulate, a given country or society.

A discerning voice was raised by Fuller with regard to the positivists approach towards the philosophy of law. In *Morality of Law*, Fuller argues that there is an inner and external morality of law. The later is, essentially, the minimal moral standard which is required for a particular community to maintain their legislative standards. He argues that there is no ultimate law on which any given law rests, there ought to be a support system of moral attitude which bind the entire system.

Fuller argues that law is subject to an internal morality consisting of eight principles; the rules must be expressed in general terms; the rules must be publicly promulgated; the rules must be prospective in effect; the rules must be expressed in understandable terms; the rules must be consistent with one another; the rules must not require conduct beyond the powers of the affected parties; the rules must not be changed so frequently that the

subject cannot rely on them; and the rules must be administered in a manner consistent with their wording.

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. Thus, if any of the principles as stated above are transgressed, a given law will become void of its inherent powers and cease to have any jurisdiction on the matter(s) which it so purports.

These internal principles constitute a morality, according to Fuller, because law necessarily has positive moral value in two respects: firstly, law conduces to a state of social order and secondly, by respecting human autonomy because rules *guide* behaviour.

Fuller has argued that Hart's distinction between 'law' and 'morality' is indeed a distinction between 'order' and 'good order'. Fuller argues that even a rudimentary idea of order has a 'moral content' to it, the inner morality of laws. Where law's inner morality is not respected one would fail to make laws at all. Hart, in Fuller's view, has utterly failed to take into account the moral aspect of laws, and eventually that of a legal system. Therefore, it was so argued, a system based on the rule of recognition, primary rules and secondary rules was not worth the ink it was written in until the concept of 'inner morality' of law was infused into it. This would change the entire dynamics of Hart's model, hence the famous Hart-Fuller debate.

Dynamic positivism certainly supports Hart's view that Nazi laws were also laws (though wicked laws). But the reasons which dynamic positivism gives are deeper and more consistent than those of Hart.

A typical example considered in the Hart-Fuller debate was of the wife of a German who reported her husband to the Gestapo for criticizing Hitler's conduct of the war. The husband was tried and sentenced to death, but his sentence was converted to service as a soldier on the Russian front. The husband survived the war, and after the war instituted legal proceedings against his wife. The wife's defence was that her husband had committed an offence under a Nazi statute of 1934. Post-war Germany, however, held the wife liable.

Hart argued that the decision of the court was wrong, as the Nazi law of 1934 was a valid law (as it satisfied his "rule of recognition"), whereas Fuller contended that the Nazi regime was so "lawless" that nothing therein could qualify as law.

The basic principle of Nazi law was laid down in the Enabling Act of July 12, 1934 passed by the German Reichstag which amended the German Constitution by permitting Hitler to issue decrees inconsistent with the Constitution, including decrees passing the budget, making treaties, and even amending the Constitution. As declared by Goering to the Prussian prosecutors on July 12, 1934 "The Law and the will of the Fuhrer are one"

Hart concedes that something like Fuller's eight principles are built into the existence conditions for law, he nevertheless holds that they do not

constitute a conceptual connection between law and morality. However, Hart's response does not take into regard the fact that most of Fuller's eight principles double as moral ideals of fairness. Fuller's principles operate internally, not as moral ideals, but merely as principles of efficacy. Insofar as these principles are built into the existence conditions for law, it is because they operate as efficacy conditions-and not because they function as moral ideals.

Fuller's jurisprudential legacy, however, should not be underestimated. While positivists have long acknowledged that law's essential purpose is to guide behavior through rules (e. g., John Austin writes that "[a] law .. may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him", they have not always appreciated the implications of this purpose. Fuller's lasting contribution to the theory of law was to weed out these implications in the form of his principles of legality.

The Grudge Informer case, a number of women used Nazi law encouraging people to spy on their fellow citizens for breaches of that law to rid themselves of their husbands. The men were invariably posted to 'punishment battalions' on the Eastern Front, where the majority were killed. Some, however, survived the war (and sometimes captivity in Soviet hands, arguably worse than the war) and brought legal actions against their ex-wives. Hart, the best response to the grudge informer problem would be to pass retrospective legislation. This has the 'merit of candour', as it

would push out into the open the moral quandary presented by such cases. One must choose between letting the informers go unpunished and the frankly undesirable device of a retrospective statute. This choice should be transparent and widely debated. For Fuller, by contrast, law contains its own internal morality. Where this morality is not followed one fails to make law at all. As such, Fuller suggests that the statutes under which grudge informers were operating are likely not to have been valid law in this moral sense, as they would probably fail to meet minimal standards of generality, transparency, consistency and so forth. However he, like Hart, finished up endorsing retrospective legislation, or at the very least arguing as though the Nazi statute did not ever exist as law, which has the same effect. We have seen that Fuller gives morality some role in determining what constitutes valid law. However, it might be argued that his account of the connection between law and morality remains too weak.

History acts as an essential guide for a student of law, and the Nuremberg Trials showed us an actual tussle between the different ideologies of law. Applied the Hague Convention of 1905, Geneva Convention of 1927 with regard to the trial of Nazi personnel after the Second World War; however the said convention did not provided for any penalties. Therefore there came into invention the category of “ crimes against humanity” which would be used to. Churchill argued for summary executions, on positivist grounds. Twelve prominent Nazis were sentenced to death. Most of the defendants admitted to the crimes of which they were accused, although most claimed

that they were simply following the orders of a higher authority. In this instance, it may be argued that Nazi law was being followed because it was 'the law', an elected parliament had amended and/or repealed parts of the constitution in such a manner, and had adhered to such policies, that the citizens had no other option but to follow them. On the other hand it can be so argued that Nazi laws were void because they lacked the inner morality being so evil and vexatious in nature.

Fuller's inner morality of law has its advantages; it provides a platform for all laws, regardless of their nature, to be adjudged as right or wrong. However, there is an inherent problem with the inner morality concept, how do we define 'morality'? In a world riddled with relativities, how can we know that what is 'moral' for one person is not 'immoral' for another?

If we take the example of Pakistan, say that there is ought to be an inner morality of law based on the concept that the country is an Islamic state. They are to follow the teachings of the Quran and such laws which do not conform to such teaching are null and void. There would be a million interpretations of the words of the Quran, each one to suit a specific purpose. Similar problems might also arise when would attempt at interpreting the Bible or the Torah to find the inner morality of a society which can thus emancipate as the inner morality of law.

Therefore, Fuller's inner morality of law is not a preferable alternate to positivism as it can breed extremism in the name of morality, as that seen in Afghanistan under the Taliban. Laws ought to be moral, no doubt, but to say that morality has to judge the basis for law-making is also not entirely

correct. There has to be struck a balance between the two; a common ground found on the principle that laws ought to conform to a standard of humanity. Inhumane laws, such as those of the Nazi, are different from ‘immoral’ laws, the latter being much less evil in nature and effect than the former.