Hart's Concept of Right and the Plight of the Nigerian Citizenry

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Abstract
It has been argued that H.L.A. Hart had redefined the domain of jurisprudence and established as a philosophical inquiry on the nature of the concept of law. He thought of using a new methodological approach to lucidly build a legal theory of right that would be spatially relevant in every modern municipal society – by conflating the existing dual schools, namely: naturalism and positivism. His works are seen by many social writers as considerably revolutionary, because he uses techniques associated with current analytical philosophy to resume the sort of discussion of grand themes which had been the hallmark of the late eighteen and early nineteenth centuries. The approach Hart used was a contemporary technique which aimed at defending the idea of legal law generally by accruing to it an element of moral sting, as against positivism, which was argued for by the eighteen-century utilitarian jurists – like Jeremy Bentham and John Austin. It was on this conviction that Hart built his novel idea of right. Using the critical and expository methods, the paper seeks to elucidate the nature and content of right in the Nigerian legal system not just as mere legal restriction, but as it applies to its political system.

Keywords: Right, Morals, Positivism, Utilitarianism, Jurisprudence, Liberty.

1. Introduction

Since the 1950s the relevance of the language of rights in general and human rights in particular has grown at such an incredible magnitude that today it appears the most prominent normative vocabulary in moral, political and legal discourses. Even though some writers have become sceptical about the existence of rights or the value of that vocabulary; but to say that something constitutes a right, even a human right, is becoming nothing more than to say that it is something (an interest, a value, a principle, etc) that merits consideration in practical reasoning and must be "balanced" with the relevant reflection which gives it a normative interpretation in most recent articulations.

It has been argued from different quarters that the history of rights is a complex and convoluted one. No doubt however that, from its time of splendour during the Enlightenment and classical liberal constitutionalism, the discourse of rights became seriously questioned during the 19th and 20th centuries. Perhaps, it is divulged that, (at the dawn of the 21st century) we have been living in a new "age of rights", only after the Second World War. A lot of modern legal writers believe that Hart's theory has an implicit historical progression built-in; starting with civil law, he appeared to have legally articulated the private autonomy of citizen that triumphed with classical liberal constitutionalism (Hart H. L.A., 1994, pp. 1-6). This he did by expanding the purview of his jurisprudical strand to include, firstly, the rights to social benefits so distinctive of 20th century welfarists' states (like Rawls' at some point) and, secondly, to the constitutional protection of rights (immunity rights) which seems the same with the first of Rawls' principle of Justice (Rawl J., pp. 327-9). Hart however saw the need to include in an account of the language of rights its role in articulating "individualistic" moral criticism to the law where he implores linguistic dialectics which aids in elucidating his own brand of natural right (Hart H. L.A., 1983, p. 3) .

It is based on this that this work aims at investigating world's moral and legal claims of right and its practical relevance on the face of the Nigerian Constitution in particular, which succinctly spells out the worth of every man, politically; using Hart's theory of natural and legal rights which he argues with analytical rigour and precision, that better illustrates both the strengths and limitations of 20th century analytical jurisprudence.

2. Hart on the Nature of Natural Right: A Critique of the Utilitarian.

In the late 1950s and through the 1960s when the contemporary political philosophy was re-emerging from a period of inactivity, H.L.A. Hart amongst other social writers made a laudable attempt to develop a novel perspective on jurisprudence. Hart tailored his strand of legal philosophy in a seeming complex fashion than those that preceded him. His discourse on legal and political philosophy which appears to be heavily dialectical places him on a tradition in analytic jurisprudence and logical positivism. At the methodological level he implores the use of language at the start to explain the complex idea of law that was never thought before, which is understood to be more meaningful, in both content and in style, than any social issue one can imagine. Hart introduces the tool of linguistic legal theory which clears some misguided tradition in legal philosophy and certain misconceptions in the realm of law. In other words, his starting point appears to be the key phrase to the use of language which buttresses the significance of linguistic philosophy in legal studies. Secondly, he saw the need of discussing the idea of law and morals differently, but as related concepts at some point in order that the

seeming legal obscurities that might be found at the crossroads (like penumbra aspect of law and the discretionary role of judges, etc) would lucidly be explicated. Although, Hart certainly distinguishes sharply between moral and legal obligation, nonetheless, he recognizes an intimate connectivity between them which is in itself grounded in what he construes to be the fact that both are systems of rules closely connected through a *minimal content* 'naturally' present in any plausible legal and moral system. It was on this basis he articulated his avant-garde concept of *Right* (Hart H. L.A., 1994, p. 141-7).

After Hart's work on *The Concept of Law* (1961), he painstakingly published his most influential works on *The Concept of Moral Rights* (1955, 1979) as well as legal ones (1973, 1994); but scholars have a consensus in opinion that these dual ideas by him were not fashioned in a way that allows for direct comparison (http://plato.stanford.edu/entries/legal-rights/., Retrieved on 13/03/2015). Hart's great works through the years were evidently sorted and collated, and these culminate into: *Essay on Bentham* (1982) and *Essays in Jurisprudence and Philosophy* (1983); which set out in lucid way the ideas of Legal Right that derive their source from the natural right that are admittedly inalienable – which we all possess as human beings. Although Hart delved into explaining the concept of legal right at some point, but moral right is evidently the masterpiece of his corpus on right. Perhaps, it is at this point that he brought together strands of legal and moral philosophy to build in one piece an idea of right which is normatively entwined.

Notably, Hart appears not to be comfortable with Bentham's doctrine of what he termed 'the natural pre-adamitical, antediluvian legal right and anti-legal rights of man', which are posthumously published under the title *Anarchical Fallacies* (Bentham J., p. 315). Bentham's work posits the idea that the doctrine of natural right and non-legal rights are conceptual confusion. He claims that "rights are the fruits of the law and of the law alone; there are no rights without law – no rights contrary to law – no rights anterior to the law" (Bentham, *Pannomial Fragments,* Work III, 221).[7] In some occasions, Bentham (*Economic Writings* I, 334) simply asserts that 'right and legal right are the same thing'; and that the notion of a right not created by law is a contradiction like 'round square', 'a son that never had a father', 'a species of cold heat', 'a sort of dry moisture', 'a kind of resplendent darkness' (Bentham's *Economic Writings* I, 334-5). He, however, concludes that the only case which the word *right* has 'any determinate and intelligible meaning is that in which it has the adjunct '*Political*' attached to it'(Bentham's Work III, 218). Hart nevertheless thought of J.S. Mills' strands to be the same as that of Bentham, even though he (Mills) seems to implore a different technique or approach. Both belong to the utilitarian tradition, and as such, are noticeable in aligning their major ideas.

Hart at this point resumes fiercely a criticism of the sort he launched against Austin's command theory. He retorts that:

> The wholesale condemnation of the idea of a right not created by positive law may now seem to us absurd, and it is not immediately clear how Bentham would have answered the objection that however dubious non legal natural rights may be as elements in a political theory or when invoked in opposition to law in public controversy, rights have a firmly established place in ordinary moral assessments which private individuals commonly make of each other's conduct (Hart, *Essays on Bentham*, 83).

3. Moral Rights and the Principle of Individual Liberty and Responsibility

The introduction to Hart's *Utilitarianism and Natural Rights* (1978) contain in it a laudable invocation of the famous doctrine that 'All men are created equal and possessed of the natural inalienable rights: rights to life, liberty, and the pursuit of happiness, and that it was to secure these rights that governments, deriving their just powers from the consent of the governed, were instituted among men'. It could be deduced from this assertion that, Hart sought to free the concept of right which has long been trimmed or radically reduced to mere legal concept by the utilitarian school, by striving to explicate it spatially so that it contain within it a political undertone which justifies its normativeness.

Nevertheless, Hart was bent on rejecting all forms of utilitarian antics which he claimed their days were over. He wondered that, if there were any rights at all, whether special or general, there must be at least one *natural* right: the equal right of all men to be free. He, however, went further to explain that "this right implies both negative freedom from coercion or restraint except if used to hinder coercion or restraint and positive freedom to do any action that is not coercive, restraining, or injurious to others" (Hart, *Are There Any Natural Rights?* pp. 175-91). Hart's work (p. 178) is vehement in articulating the concept of right as 'natural' which he claims all men possess equally for two cogent reasons: Firstly, all individuals have it independent of any special relationship with each other (e.g. members of the same society), and secondly, it is not created by the voluntary actions of others (as are other rights). Njoku wraps this with a rationally convincing summation to Hart's strand thus:

> There are moral rights such as right to freedom of speech or worship: although they may be recognized by a constitution or a legal system, but they do not owe their existence or authority to a constitution or a legal system. People have moral rights whether or not they are recognized by the legal system or the constitution: such rights have a

> special value as they rest on a moral conception of persons as separate individuals equal in worth, who must be treated as ends in themselves and not as a means (Hart, *Essays on Bentham,* 83).[15]

Hart (*Essay in Jurisprudence and Philosophy*, 223) observes that the concept of moral rights enables us however to *express* or make explicit the normative articulation or elaboration of the principle of individual liberty. Arguably, it plays a distinctive role only if it is deployed within the context of a moral code that ensures a proper distribution of spheres of individual liberty, such that each man possesses a sort of sovereignty, within which he/she is understood to be free from all morally unjustified interferences from others (Hart, *Are There Any Natural Rights?,*83).Hart's scheme in this sense explains the core function of right. He however noted that, the central justificatory ground for claiming rights is the capacity for freedom. Here, he argued out succinctly alongside other scholars to lucidly unearth the true function of right in a well ordered legal system using the novel conception of the *Will Theory*. They argued laudably that this is most distinctive characteristic of humans as moral agents – the core idea of accounts of right.

4. Rights and Duties

Although Hart's 1953 lecture was utterly focused on "legal rights", the analytical framework therein developed could also be extended to explain "moral rights", however, he later distant himself from the concept of '*legal rights*' in the early article originally published in 1955 under the title: *Are there any Natural Rights?* (Hart, pp. 77-90). Perhaps, he implores a seeming functional explanatory strategy completely different from Bentham's approach with the aim of introducing elements of 'morals' into the concept of 'right', which lucidly expound the idea of 'moral rights' that are rights-based political theories (Hart, *Essays on Bentham*, 14–7).

Hart assumes that, if an individual promises some services to another, this creates a *moral obligation* for the one that promised and a *right* for the one that was promised – and to complain if the promise is not forthcoming. Or, one can claim when authorized to carry an activity that, 'I have the right to do these things because he granted me permission to do them.' (Hart, *Essays on Bentham,* 83). He argues further that, "these seeming plain examples of non-legal, moral rights, and their existence seem no more problematic than the moral obligation which are qualified or exempted from by the giving of permission in the last two cases." (Njoku, *Studies in Jurisprudence,* 365).

Hart refers to these examples of rights as *moral artefacts* because he understands them to be a deliberate creation of human voluntary action which in the positive or conventional morality of society is recognized as a right-creating event, such

as one man promising another, or gives permission to him to carry an act which in general there is equally an obligation to do so (Njoku, *Studies in Jurisprudence,* 365-376).

5. The Nigerian Legal System

Hart (Hart, *Are there Natural Rights?,* p. 440) starts his argument with the claim that, "If there are any moral right at all, then there is at least one natural right, the equal right of all men to be free". Hence, modern municipal societies of the world are practicing various constitutional governments. And, Nigeria in particular, is operating federalism which is guided by a Constitution that defines every aspects of its endeavour. It is a truism that, the Nigerian legal system has tremendously been influenced by the English law through the process of legal transplant, by virtue of colonization and the attendant incidence of reception; it is patterned however according to the English common law of legal tradition (Obilade, p. 213). It is evidently clear that the structure of our legal system or the core content of the Nigeria's legal rules follow suit in suggesting a seeming normative character that expresses the ethical or moral quality of legal laws; which contain within it 'law of nature' as its basis in general, - typically, the section of the moral code that protects or spells out the inalienable right of every individual as a free or equal citizen (see Iain Mclean & Alistair Mcmillan, p. 302).

This perhaps conforms to the modern moral right that is prescribed by Hart which draws its source from the natural law where it posits dual features of individual rights and the individual freedom that is codified in a universal whole. The question posed is, how can we locate the human right of the citizens as free individuals in the face of Nigeria's Constitution as well as the declaration of the Universal Human Right in the midst of high profile abuses that are often recorded?

6. Rights and the Nigerian Experience

It has been argued that the history of human right abuses in Nigeria is as old as Nigeria itself. This is so because even the creation of the nation itself is perceived to be an "abuse of the fundamental human right of the various entities that make the Nigerian state" (Iyare, p. 290). The consent of the various groups – which were heterogeneous in many respects, and consist of multi-languages, religions, socio-political and economic formations as well as administrative styles, pluralism of social norms and personality types – were not sought before the amalgamation in 1914 (Kabuk, pp. 161-171). Admittedly, the rights that breached during the union of the South and North included those of civil and political rights, as well as those of economic and socio-cultural rights. This is evident in the 2014 Ibrahim Index of African Governance (IIAC) where Nigeria ranks 37th out of 52 countries. Documents available reveal that Nigeria

deteriorates significantly in gross human right abuse in two of the four major categories of the index which composed of, safety and rule of law, participation and human rights, sustainable economic opportunity and human development (Iyare, p. 290). Iyare (p. 290) further argues that:

> Despite the fact that the federal republic of Nigeria has a constitution, there are numerous cases of lack of rule of law and the corruption in the court of law. It is clear that under such conditions the judiciary is owned by the Nigerian elite. This, overtime, has made it difficult for poor Nigerian citizens to seek justice in any court of law when their rights are abused by the selected few. Worst enough is that most Nigerians do not know their rights consequently they do not know when their rights are being abused and how to fight for their rights to avoid further abuse even if it means seeking the help of international human right agencies.

The judiciary as legal machinery is thought to protect and enforce legal rights, nevertheless, law in principle and in practice is being plagued by some 'legal – moral' dualism; the legal – moral dualism of law in the face of its application, in the understanding of the analytical school (legal philosophers), as against the positivists, constitutes some sorts of pluralism. To the positivists, law is what the statute says it is (law as '*is*"); and the courts or lawyers must interpret and enforce it as 'it is'. And the moral or the natural school of thought extends it to explain the nature of the modern complex political society (law as it "*ought to be*"). However, the positivists doubt if the presence of a single constitution could potent some sort of pluralism in its application. Nonetheless, moral philosophers are at one that the content of law in the face of its application, especially, where we have the dual legal statutes of federal and those of states; and alongside the common law and other laws, like the Sharia and customary law which indeed produce a tripartite system of law. For instance, some seeming problems might occur within the context of application by the existence of Islamic Law (Sharia) which its administration is confined in some jurisdiction in the North as a variant of common and/or customary law (Hadfield, p. 417). This is seen to deny equal claim of 'rights of assumed free individuals' that are well spelt out by the Constitution of the Federal Republic of Nigeria. The Sharia legal codes are found not to be accruing basic rights of women proportionately to their male counterparts. Punitive measures are often severe than the crime committed, for example, amputation of any or both arms for stealing a cow, or stoning a woman to death for adultery, where in the conventional law court where the offender of the same magnitude might be jailed or given an option of fine. The Nigerian customary law on the other hand does not possess the universal qualities of legal rights since its sources and jurisdiction is limited by the cultural norms that are peculiar to a given culture.

In fact, the point here is that the greater defect of the legal arrangements here is the possibility that a litigant may, on occasion, be left without a competent court to hear his complaint due to the existing legal pluralism (Ladan, p. 290). All these, no doubt, point to the fact that our legal system is multifaceted; and the complex social structure of legal pluralism roughly arouse a hitch on the development of legal process in Nigeria as regards the moral claim of rights of 'free individual citizens'. These abuses range often from gruesome murder/extra judicial killing, torture by law enforcement agents, adoption, rape, child molestation, human trafficking, unlawful detention of citizens etc.

Indeed, Bishop Kukah, under the caption *Miscarriage of Justice* in his *Witness to Justice* (2011), highlights some instances where citizens whose guilt or innocence were never really established and the state rolled out instruments of coercion; tortured and killed during the military era – because of their growing interests in politics or for speaking loud for the masses. Here, he recounts the ordeals of Generals. Yar'adua and Obasanjo, who were indicted in a phantom coup; the annulment of Chief M.K.O. Abiola's mandate; the killings of Dele Giwa, Ken Saro-Wiwa, Bagauda Kaltho, Kudirat Abiola, Augustine Enewari etc. (Kukah, pp. 377-381) Kukah (p. 377) acknowledges that, these are merely representative of the sad tales of the era of the military rule, but there are countless others whose stories were never captured in by the media.

Some communities were ruthlessly maimed and destroyed by the military without been prosecuted either locally or by the international communities; for instance, the towns of Odi in Bayelsa State, the killing of hundreds of civilians in Zaki-Biam in Benue State in 1999 and 2001 respectively, or the destruction of a community at Aker Base in Rivers State in August 2006 (Human Rights Watch, 1999; 2002; and 2006 Reports on Nigeria). Sad enough, in the face of these fact presented, the question of a viable rights and liberty of individuals as moral beings appear to be a mirage.

7. The Way Forward

History has revealed that in Nigeria, like some of the African countries, gruesome abuse of rights of citizens have been recorded through the decades. Even in the twenty-first century these gory trends are continually carried across the nation on defenceless citizens by those who are supposed to protect them, and to scuttle this problem a lot of efforts, both human and material resources, need to be put in place to ensure human as moral agents become free, and accorded with rights that are natural to them. First, subjects like Citizenship Education or Civic Education which have been entrenched in the curriculum of the junior secondary school and other related disciplines in the tertiary level of education should be emphasized and made compulsory for the young learners so as to create an awareness of their rights as citizens.

Secondly, legal pluralism noticeable in our legal system poised a legal challenge in the country. The multifaceted nature of law create within it enormous difficulty in application. While the constitution of the federal republic which specifies rights of individuals that conforms with the universal proclamation of rights, there exists other laws such as states and local government laws, as well as Sharia law and customary legal systems. These breed multiplicities of laws where the interpretation or their applications creates legal conflicts or juridical pluralism, especially, to the judiciary. The customary and Sharia laws are characteristically variant and lack the universal qualities of legal rights since their sources are limited to the peculiar faith (Islam) and by the cultural norms of a given culture respectively. These laws should be coded in such a way that they should not create legal complexities in the face of the constitution of the federal republic which succinctly spelt out human rights.

Thirdly, rule of law should be emphasized to check human rights abuses. Human rights violators irrespective of their positions or profession should be made to answer questions, both locally and internationally.

Conclusion

Hart's project on the nature of right sought to provide an explanation on the concept using the tool of analytical philosophy in an attempt to describe, rather than to prescribe, the nature and content of individual right.

His scheme however is plausibly designed aimed at taking a middle course between the two extreme schools, the naturalists and the positivists, for he sought for a barest (minimum) content that law – as a set of legal rules – could have moral turn. This, for many of his admirers, is seen as an essential reconciliation between legal positivism and legal naturalism whose extreme accounts could not provide all embracing principles of the concept of law that reflect or address complex legal issues of any political system, especially, that of the modern municipal society such as Nigeria. It is this basic idea that Hart built his novel concept of natural right, tailored in a complex fashion that is thought to embrace all cultures, by conflating the strands of normativism with that of positivism. The aim of introducing elements of normativism in a semantic fashion is to dispel some unforeseen difficulties and confusion that may occur in the understanding and application of the idea of rights of individuals (as free moral agents). It is on this note that various constitutional arrangements found in Hart's corpus on right, the credulity of its texture or a distinctive character (that is politically inclined) required by modern liberal democracies, than other works that preceded him. To this very end, Hart is thought to have successfully reinstated, to a large extent, the (transformed) tradition of legal positivism in what might be considered a masterpiece in legal scholarship.

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