

## Open Texture of Rules and the Possibility of Obtrusive Legal Interpretations

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### **Abstract**

Jurisprudential discourse is one area that attracts attention since the ancient era. There have been divergent opinions on what the concept of law is. The adherents of such divergence hold irreconcilable views about what constitutes the basic concept of law. The contemporary analytic school thought of harmonising the extreme schools – the old-age-long naturalist's doctrine and the modern legal positivism and realism – by seeking to explain the concept of law as a specie of rules that characterise a modern municipal society, built on democratic principles. The aim of the contemporary analytics is to provide a new purview for legal fecundity. Indeed, the “open texture” doctrine is one of the mechanisms introduced by the analytics to provide agility to the rigid doctrines of the positivists and the realists. This is thought of to resolve some penumbra issues in the interpretation of law by the legal actors. However, this brings to bare the “minimum content of morals” that is required to play in the discretionary role of the legal actors. Perhaps, it is at this point lawyers disagree with philosophers, for the positivists evince that the nature of law is what “is” and does not include what it “ought to be.” Given the challenges to evaluate the nature of law built from Hart's various species of social and legal rules, the work seeks to ascertain the compelling force of modern legal systems owing to the fact of their various interpretations in diverse social phenomena to determine the possibility of obtrusive legal applications.

**Key Words:** open texture, legal rules, moralism, penumbra, discretion

### **1.0 Introduction**

Reading from works written by different legal and political scholars it is factual that they hold varied views on the concept of law over the centuries. Each epoch has presented us with a trend of thought differently from others concerning the

idea. While the ancient and the medieval epochs construe law to be a moral concept that is traceable to natural law, the modern era interprets it as strictly positivistic which has no moral connection. The contemporary era on the other hand understands legal law as a system of rules which in some situations require moral sting; as a means of divulging and determining some penumbra situations. According to Probert Walter, law means a “body of official rules and regulations, generally found in constitutions, legislations, judicial opinions, and the like, that is used to govern a society and to control the behaviours of its members” (Walter, 2008). The Webster's law dictionary also defines law as “the complete body of statutes, rules, enforced customs and norms, and court decisions governing the relations of individuals and corporate entities to one another and to the state” (Wild, 2006, p. 168). Of course, the two definitions above depict the contemporary era's understanding of legal law as a system of rules, which at some point seems to be at variance with Hart's theory.

The past six decades have seen a remarkable interpretation of law and philosophy in the Anglosphere. Philosophically sophisticated works on legal theory like H.L.A. Hart's *Definition and Theory in Jurisprudence* (1953), *The Concept of Law* (1961), and John Rawls' *A Theory of Justice* (1971) have been studied with as much care by modern day lawyers and other social writers. The contemporary work in Anglo-American jurisprudence starts seemingly from *The Concept of Law*, where Hart, according to Normore, canvasses for a sophisticated legal positivism that was never thought before; which finds the source of legal authority in the acceptance by a community of a system of rules – which is grounded in a fundamental *rule of recognition* that determines what is to be included among the rules that are ordinary or common laws (Normore, 1997, p. 233). Hart's commitment was a response which sought to redirect the thought of the naturalists on one hand, and those of the positivists (the utilitarian in particular) and the Scandinavian realists on the other. These purviews, according to Hart, are not sufficient to explain what the concept of law is. In as much as the concept of law is what the positivists and the realists construe it to be, Hart thought that there is a point of intersection between the law as “is” and the law as it “ought to be.”

As the main thrust of this work, rather than anatomising the whole concept of law, the work dwells on the minutest but very important aspect of the legal science – *the open texture*, that often opens the possibility of obtrusive legal application. This is the legal opening that allows some discretionary role of the legal actors that play on some penumbra situations. It is at this point that other tendencies, although, not noticeable to legal science, appear problematic to the analytics; where the possibility of human frailty is twirled with the discretionary liberty of a legal system.

## 2.0 Strands of Modern Legal Positivism

Considering the whole idea of law closely, we might be fascinated with the basic idea that the concept of law frequently stimulates *controversies* in modern times than any social issue one can think of, and this permeates the landscape of philosophy of law with its generous frontiers. Many scholars recognize law as a vehicle for social change, but, some others doubt the central role of law in our social, political, moral, and economic life or its intrinsic nature (i.e. what law really is). This generates several questions through the few past centuries, but central to legal philosophy is profoundly three basic questions: Does law consists of a set of universal moral principles in accordance with nature? Or is it simply a collection of largely man-made, valid rules, commands, or norms? Can the law be divorced from its social context? Whatever seems to be the general disposition, there is indeed a philosophical antecedence to such beliefs. Contemporary complex normative idea of law (notably Hart's) cannot be understood without recourse to the conventional ideas of the modern positivists, starting with Hobbes, whose contractarian origin of political society becomes a prelude to the general 'command' theory of the modern positivism; in other words, the background provided by Hobbes (and perhaps his admirers) routinely needs to be clearly elucidated.

Modern legal positivism, however, manifests as a reactionary response to the old-age-long naturalists doctrine. The contemporary analytical currents indeed have their root lie in the conventional political philosophies of Hobbes, Hume, Bentham and Austin. Although, Thomas Hobbes' *Leviathan* is known basically to have been based on the natural law theory, but most profoundly, the command elements of the Hobbesian legal doctrine must have influenced other positivists' line of thought; such as Hume, Bentham, Austin, the American and the Scandinavian realism, and Kelsen. These perhaps aid in shaping subsequent contemporary legal philosophy.

Hobbes in the *Leviathan* posits the fact that under the social contract, law and government are required; if we are to ensure order and security, we must therefore surrender our natural freedom in order to create an orderly society. He acknowledges the fact that every act we perform, though ostensibly kind or altruistic, is actually self-serving. Hobbes understands that, from human self-interest and social agreement, there lies some immutable of fixed nature, in order to escape the horror of the state of nature. Peace is sought which is the first principle of nature. The second law of nature is that we divest ourselves of certain rights - so as to achieve peace. The mutual transfer of rights is a contract between members of the society, as such, it is the basis for moral duty. For such agreements to be honoured and not to be breached due to our ostensible or altruistic nature is to bind mutual selves towards obligation. This is to grant unlimited power to a political sovereign who punishes violators of such

contracts. Hobbes concludes that it is the desire to end all altruistic tendencies that motivate man to consent and establish an authority with the power of sanction in the social contract (Wacks, 2006, p. 7).

On the other hand, David Hume's idea assumes a particular legal dimension. He argues that facts about the world or human nature cannot be used to determine 'ought to be'. To him, it is misleading to think as natural lawyers do, that 'ought' can be derived from 'is'; here, Hume recognizes a division between the natural science and the moral oriented sciences. For Hume, laws were irreducibly political expression, because empirical evidences in all sciences, including those of the human artefacts are more reliable; as such, human constructs of law is more consistent than baseless natural or rational assumptions. This is for him, where legal science could be located.

There is no doubt that Hobbes and Hume's ideas must have had enormous influence on Jeremy Bentham (Bentham, 1970; &1,I) which is noticeably colossal in Austin's doctrine too (Austin, 1996, p. 14). Both followed a general positivistic trend by claiming that law is a social fact, and a command of a sovereign, who is obeyed out of habit of obedience. The sovereign is neither bound by his or any other commands, although, disobedience to him or his commands attracts a sanction. The general purview of this trend is that, the validity of law is sought in the authority that posits it. The habit of obedience was sought for by Bentham and Austin to reach a utilitarian consensus, where the total happiness of the citizenry either validates or exacerbates the valid claims of law. These fellows make 'command' to be *the key to the science of jurisprudence*.

However, such positivistic conclusion of the utilitarian, subsequently aroused so many legal thinking, especially, the American and the Scandinavian realists who restrict the idea of law to mainly what the court and the lawyers do. Notable among the American realists are Oliver Wendell Holmes and Karl Llewellyn while the Scandinavians are Axels Hagerstrom, Karl Olivecrona and Alf Ross. According to Njoku (2007, p. 91), the American realists were a reaction against the theoretical school of formalism, while that of the Scandinavian "rejects the metaphysical hand in law and accepts as meaningful that which could be proved only by empirical evidences". Kelsen claims that laws are directed only to the official to punish those who do not comply with the norms, stimulates Hart's reaction (Njoku, p. 136). Hart however uses the internal point of view to discredit such sanction-centred theories of law of both the utilitarian and the latter realists. Hart avers that, these theories are not sufficient enough to explain what law is, because they ignore some salient features that propel individuals to develop certain attitudes towards the law. For instance, the

problem of the “bad man” theories, such as the one found in Holmes' is that, they assume people are motivated to follow the law by avoiding sanctions, and not that rules require such behaviours. They defined law out of context (Njoku, p. 137).

### 3.0 Towards a Better Legal Concept

The contemporary legal analytics doubt the strength of the positivists' general disposition on the ontology of law. The nature of their argument hinges on the general fact that the idea of law or legal concepts generally is non-reducible to extra-legal facts. Hart in particular posits that, certain legal words or phrases seem ambiguous for they cannot be elucidated in just a term – they can only be explained beyond ordinary definitive terms (Austin, 1934, p. 13). The analytics believe that the concept of Law could be proved beyond empirical evidences – as against the standpoints of the positivists and the realists. It must be explicated in a deeply complex social approach that lacked a detail account in the dominant doctrines of the utilitarian and the Scandinavians.

H.L.A. Hart, the leading contemporary legal analytics, aligns partly with the positivists that, the concept of law is that “which is;” and, with the utilitarian that law is manmade; and, with the realists that the concept of law involves what the court and lawyers do. He argues that, in as much as the idea of law includes all these, it equally in some sense includes a complex social and moral approach, which loosely dispels some misconceptions and penumbra legal issues. It is indeed at this point that Hart replaces “command doctrine” with “system of rules” *to be the key science to jurisprudence* (Hart, 1994). This is where the discretionary role of the legal actors comes to play, and some difficult and ambiguous legal issues are resolved. Hart aimed at expounding the concept of law farther than utilitarian and the Scandinavians purviews, which is more objective and all embracing than the existing doctrines. Before the advent of Hart's theory, the general line of legal thought was tied to the notion of law as the “command” of the sovereign. The secular and positivistic nature of law that lies in the theory of sovereignty poses a serious attack on the naturalists' conception of law or legal rules (Idowu, 2005, p. 107); for natural law was so reduced by the modern utilitarian to nothing else than a mere statement of human impulse, because the utilitarian conceived law strictly as something characterised by empirical evidences. It is against this backdrop that Hart built the novel conception of the *minimum content of natural law*, where law and moral overlapped – the *simple version of natural law*, which is construed to be the conceptual connection between law and morals (Hart, 1994). Hart's idea has a dual connotation; he accepts that law does not require morality – as it is with the utilitarian and the realist –, but, on the other hand, he accepts that the fact of moralism is required in jurisprudence under certain extreme indeterminate

situations. This perhaps is the point where legal scientists and legal philosophers disagree.

#### 4.0 The Open Texture of Legal Rules

Hart introduces analytical stings in the legal philosophy that was never thought before which left many scholars in doubt, where he brought the tools of linguistic philosophy to bear on the central problems of legal theory. This starting point appears to be the *key phrase* to the use of language that buttresses the significance of linguistic philosophy in legal studies. The methodology here evinces the fact that the use of different words in law-related discourse implies the existence of different kinds of rules which in turn signals the existence of different social functions that the various legal and social rules perform. The methodology aims at dispelling certain misconceived and misguided tradition in the philosophy of language. Hart thought that matters of language and meaning form an essential part of legal discourse, which helps in resolving certain conceptual ambiguities; he argued further that there is indeed a fundamental aspect of legal and social rules that scholars often ignore, without which, legal discourses and law-related matters can never be complete – *the open texture of law* (Hart, 1994).

Admittedly, the submission here is on the premise that elements of critical moral philosophy are traceable to Hart's legal foundation of rules, which refutes the utilitarian and the Scandinavian's claims, but enthrone both rational arguments and evidence or proof of moral judgements. However, the origin of the concept of *open texture* is traceable to Friedrich Waismann who derived the term from his approach to Wittgenstein's philosophy, and argued on the general vagueness of the language; probably based on a constructivists' view of language. Hart purportedly adopted the doctrine in law and gave credence to it on the ground of the conviction on circumstantial gaps of human-flaws noticeable in practical perception (as in Weismann) and general social and legal rules (as in Hart). The basic assumption evinces the fact of conspicuous 'porosity' (or the open texture) in either human language or law-related matters, which might not be exactly the same as 'vagueness', but may express some indeterminate 'penumbras'; since in actual situations the application of the term may be definite. Robert Mole gives a succinct meaning of the concept of the 'open texture' that:

“The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the

applications of variable standards, do not require from them a fresh judgment from case to case even though uncertainties may break out as to the applicability of any rule ... to a concrete case. Here at the margin of rules, and in the fields left open by the theory of precedents, the courts perform a rule producing function ...”

Mole states unambiguously here that at a given margin of uncertainty Hart concluded that judges inevitably must use their discretion to make *law that are non-existent*, on the occasions where the legal rules have “*open texture*”. In exercising this discretion, the judge or official will look to the purposes or the social consequences of adopting a certain interpretation of the rule. This presupposes that the *open texture of law* implies that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case; and, such must be done within the legal trajectory.

### **5.0 Open Texture and the Possible Problems of Legal Interpretations.**

Hart is of course not unaware of the dynamism of the complex idea of law, especially, when some certain *contextual role* of rules that might be trimmed to legal situations in law court come to play. In which case, Hart is vehement that the correlation of law and morals is rather necessary than contingent (in the context of legal precedents, for moral reasoning is required); this he claims, presumably, in order to show the intimate connectivity of law with the idea of justice (Obi, 2014), especially, when law involves some complex extreme cases. Hart, like any other philosopher, believes that evaluative dispute begins after the conceptual dispute is cleared. When the concept of law is linked to the idea of justice it shows special character that is normative in nature; and, the idea of law becomes evaluative when these two concepts (law and morals – turned normative in character) are intertwined to solve legal issues that are assumed to be penumbra in nature – when law runs out in the face of application and interpretation. In such instances, a judge is allowed to apply some 'permissible' discretion within the limits or trajectory of legal application. In other words, the judge at such moments might allow his moral conviction to bear in his legal judgement within the ambit or range of law (Hart, 1994, p. 221).

However, the discretionary role of judges or the “*open texture*” appears to be an indeterminate legal opening outside the seeming legal trajectory, where numerous uncertainties become glaring due to some certain human frailties, where judges take advantage in the range of application in situations which both determinate law and legal precedence are lacking. Nonetheless, the legal scientists and lawyers would never accept that there might be an inherent logical fault that is traceable to such legal opening, since they do act that way

within the range of application. This perhaps presupposes the fact that legal positivism is concerned squarely about what the law “is”, while the analytics consider the “oughtness” of the law. These through the ages have resolutely remained irreconcilable extremism. Where elements of critical moral philosophy traceable to legal foundation come to play, human frailty glaringly features, which potents serious dangers in the range of application.

The idea of judicial discretion in legal practice is unavoidable because of some uncertain and difficult situations that often come to play in the face of legal application. It is the power under the statute or common law that requires the judge to choose between several different, but equally valid, cause of action; where some penumbra situations are resolved through moral reasoning. In as much as moral discretionary powers are construed as indispensable and permissible tool in resolving borderline cases, the *open texture* doctrine has its own peculiar challenges as a result of some human frailty that may include inconsistency and uncertainty, the use of instinct and intuition instead of reasoned decisions, perpetuation of injustices, breach of fair hearing, corruption, abuse of judicial powers, arbitrariness, bias, etc. The indexes of the possibilities of inherent human frailties in legal cases manifest in various forms, and the most common determinant is when two or more courts are faced with similar cases of same facts and circumstances, but the various courts arrive at different decisions; scientifically, both could be said to have acted *bona fide*, judicially and judiciously, but in the moral sense injustice must have meted out in either case. That is one basic fact that is often ignored by judicial officials and other legal scientist, but appears to be problematic to the analytics.

## 6.0 Conclusion

By way of conclusion, the work ushers us into a specific approach to legal analysis that attempts to understand the nature of legal phenomena by reference to the social and psychological conditions in which legal and social rules function together. The commitments of the analytics on the descriptive normative legal theory concentrate on the nature, problems and prospects which gives new approach to legal discourse generally; as against the utilitarian and realists' seeming reductionists' commitment, whose main concerns are the creation, and the relations between rules, concepts, principles, and other constructs employed by courts and lawyers when they engage in the actual practice of the law.

Admittedly, the aforementioned human frailties breed all kinds of miscarriages of justice in legal interpretation, and the judicial overturn by the appellant or any higher court is not in any way a panacea to the possible challenges of the *open texture* doctrine. In Nigeria, for instance, there exist some legal lacunas in not following certain legal procedural guide in the exercise of the judicial

discretion. The *persona facade* that genuinely makes visible the agent's *ego* that is responsible for moral reasoning among humans makes judges more often to have little or no regard to the procedural guide of the legal system generally; moral powers of determining the decision of any case is mostly seen by the agents or judges as the liberty to exercise one's will outside the legal trajectory. The legal discourse and training posits in them a positivistic line of thinking, which outrightly denies them the idea of moral powers in decision making while seeking justice in borderline cases (*reductio ad absurdum*). This is often left to the discretion of the actor based on his or her feelings and personal conviction. This undeniably breeds bias decision and outright rape of justice generally, since there are no parameters to determine whether the judges often play the role of the disinterested agents under the supposed *veil of ignorance* (as in Rawls) when it comes to the idea of justice.

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