

LAW AS IDENTITY

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Abstract

Law is a direction in which a society follows as it exists, grows and develops, and as such enshrines in the community a consciousness which forms an identity as understood and demonstrated by the citizens. Thus, the concept law becomes an identity of the people as these form their lived experience. The complex orientation of law is beyond the reductionist approach of some jurisprudence scholars in their varied conceptions of law. The crises of identity as a result of some social political space and interest post a great challenge on law. The method of hermeneutic analysis is used to determine and understand the legal system text as a lived experience of the community as it engraved in the community consciousness. Law as identity is the ordered form of life born out of law as formative and dialectical in orientation as the dynamism which characterized the Society unfolds. It closes the gap created by the reductionist approaches of some scholars but shows a comprehensive articulation of the concept law in a wide scenario which embraces the dynamism of human existence.

Keywords: Law, Identity, Consciousness, Society, Jurisprudence

Introduction

To begin, consider the notion that de factor legality is unavoidable, -really intrinsic and the hallmark of social contract. It is not a concept merely but as such, because of the interdependency and relatedness of co-existence of the human agent. Recall that John Locke, to live is to have an Identity, not just living but as Socrates observed an unexamined life is not worth living. Thus, living well underscore Identity, as things are ordered and organized. Hence, we have the law, an argument for this obligation is dependent on the conflict of interest and space, divergent worldviews and orientations as well as modus operandi in the Society. When there is crises of Identity every things and procedures fall back to the situation akin to John Locke and Thomas Hobbes States of Nature. As is becoming of the Nigeria State, insurgency, banditry and life becoming brutish and short says Hobbes. These crises of identity notwithstanding, Ubi societas, ibi ius (Wherever there is society, there is law) and thus; law has evolved through the dialectics of phenomenon in legal systems, with varied meanings, range of application and obdurate sufficiency to out lived their legislators, adjudicators and those who observed them as well as its identification by the pedigree test, but the nitty gritty, meaning and interpretation of law is associated with varied conceptions. However, this articles views the positivist conceptions of law in its varied conceptions, showing the variations in thoughts and differences in idea of the concept law. It advances that Law as identity is the overarching principle that synergized the juristic variance of the

concept law. Philosophy of law is the “rational and critical totalisation of the phenomenon of law”.¹

The imperative concept of law in the thought of John Austin is a sequence of command and habitual obedience, law is postulated as duty imposing- where the individual has the obligation to obey the law or face the penal and power conferring – to act or legislate or be beneficiary of the law as in the case of a will.² This falls short of the dialectics in law, it shows an indoctrinated conception of law, limited in both the nature and essence of law. Han Kelsen conception of law engages on normative strength of law (with basic norm – Grundnorm in German) that is devoid of any moral accent in rightfully telling Judges what they ought to do, but law as such is not reducible to duty imposing, a peculiarity to the official only. Law is a relational activity of the legal system in the Society. HLA Hart articulates law as conventional practices of Judges set as rule which has been promulgated from the Rule of Recognition. The Rule of Recognition is the fundamental rule pivotal in any legal system that underscores the pedigree test for legal validity within that system. But do law lacks merit if the said conventional practices become outdated? Is law a matter of convention? Looking at law as conventional practices underscores law as a momentary ascription, but law is more a relational activity that underscores consciousness, intrinsic nature and obdurate capacity. In his view, Ronald Dworkin advanced the conception that moral considerations is evident in determining what the law is and what becomes of the best “constructive interpretation” of the source-based norms of the legal system (such as legislative enactments and prior court decisions) constitutes the law of the system.

This article shows that Law as identity is the bridge that is required to leverage on the diverse conceptual analysis of the concept law. It is the overarching principle that underscores a comprehensive conception of law that is not reducible to duty-imposing or power-conferring, rather a relational dialectical process deposited in consciousness. It is observed that, “every regimen of law is comprised of two parts--what may be called the adjudicative and the educative, or the coercive and the persuasive. Every legal regime necessarily undertakes, not only to order human life, but also to shape human thought. It is possible, in the short term, for a legal hierarchy to impose itself by sheer brute force, in *terrorem*. But to maintain stability and continuity over the long term, the public must be taught the benefits of legal rule; they must be instilled with the habit of compliance. It is in the combining of these elements, the judicial and the educational, that a complete legal culture is formed.”³ In the light of this, a legal consciousness is build, an essential sort of qualitative character which is not limited to sensory states but is typically taken to be present as an aspect of experiential states in general, such as experienced thoughts. Recall that phenomenal structure of experience is richly intentional and involves not only sensory ideas and qualities but complex representations of time, space, cause, body, self, world and the organized structure of lived reality in all its conceptual and nonconceptual forms. Thus, consciousness is the matrix of law as identity.

The scope of this article is within the space of philosophy of law, using philosophical pedagogies to inquire of legal thoughts and considerations in the bent of legal positivism “it requires an intercategorical perspective, a “totalisation” which results in making relevant

1. Jesús Vega, 'Legal philosophy as practical philosophy', *Revus* [Online], 34 | 2018, Online since 25 September 2017, connection on 24 May 2019.
URL : <http://journals.openedition.org/revus/3859> ; DOI : 10.4000/revus.3859

2. Postema Gerald, May 2014 'Law's System: The Necessity of System in Common Law' *The University of North Carolina at Chapel Hill*, Vol 1 p 8

3. Garske JP, January 2020 'Anglophone and Civilian Convergence: Law, Values, Culture, and Learning in the Global Age' *Academicus International Scientific Journal*, pp21-21

connections between the legal category and other categories. This is the path followed by the postpositivistic philosophy of law. But this totalisation can only occur in terms of ideas and theories that must necessarily be drawn from a general philosophical conception, and this means that all legal philosophy (including positivistic legal philosophy) is the “application” of philosophemes”³, *Ubi ius, ibi philosophia* (where the right, where philosophy).

What is Identity?

It is an internal, reflexive perspective of a detailed and substantial attributes of the subject that is persistence. In this regard, persistence underscores existence across time. But existence as such is not created in a vacuum rather in an orderly intended manner with guidance and effort. These in *sum informs an Identity. Identity spring forth from an orderly lived experience that imprints on consciousness. For ones live to be meaningful, then it must be guided and without life, there is no identity and without law also, there is no order and life becomes a state of nature.*

Recall that from the outset of the *Treatise of Human Nature*, David Hume has argued that all our *ideas* are derived from our *impressions*: Hume asserts that since nobody has any distinct impression of the self as something independent of an array of perceptions, nobody can have any idea of 'self'. In this regard, legal perceptions are the impressions of the legal system. But John Locke intuitive strength championed Identity as a matter of *psychological continuity*. Recall that in this view, in order for a person X to survive a particular adventure, it is necessary and sufficient that there exists, at a time after the adventure, a person Y who psychologically evolved out of X. This idea is typically cashed out in terms of overlapping chains of direct psychological connections, as those causal and cognitive connections between beliefs, desires, intentions, experiential memories, character traits, and so forth.

Law as Identity

Law as identity is the relation in dialectical interpretation of legal concepts and propositions within the legal system. It is a relation because of its non-static nature, for it borders on a wider horizon of legal consciousness marked by a continuous interaction and understanding of the reality and knowledge of the legal system. Thus,

The most common manifestation of this goes beyond the fact that each legislative or judicial decision entails a holistic *regressus* to the entire “legal system” as a whole (Dworkin's “integrity” for instance). Furthermore, this systematisation cannot merely be logical or formal. The legal system is not a “logical system” but a “practical system”, one that is doctrinal, prudential or justificatory (although, of course, its justifications cannot avoid logic). And this means that rather than being a “closed” category by application of its very internal conceptual and theoretical methodology (as would be the case if it were a scientific category), it is a methodology that presupposes the essentially “open” nature of legal practice. In other words, its “closure” can only occur by incorporating elements from

4. Jesús Vega, 'Legal philosophy as practical philosophy', *Revus* [Online], 34 | 2018, Online since 25 September 2017, connection on 24 May 2019. URL : <http://journals.openedition.org/revus/3859> ; DOI : 10.4000/revus.3859

other categories. Given that the law is a second-order system, these elements cannot be anything other than the overarching purposes and values that the legal system strives to materialise in the first-order social practices, purposes and values that the law itself does not create but rather recreates and shapes in practical terms. Thus, substantive conceptions that are necessarily political-moral (and therefore “philosophical” in the sense noted) and which legal practice necessarily merges with.⁵

In this regard, law must be intelligible to those who are subject to it; it must make practical sense to them at least to the extent that they can, across a wide range of application, grasp what kind of behavior the law calls for and how it's doing so might give them some reason for complying”.⁶ Recall that [René Descartes](#) urged that consciousness is essential to thought. This underscores the concept of law as identity for it bring to clarity the legal thought in the obdurate capacity of law as identifiable without equivocation irrespective of the span of postulation in the legal system. Shyamkrisha Balgenesh observed “fidelity to an identified legislative policy was therefore the overarching ideal of the Legal Process approach to interpretation. Quite naturally, this also meant ignoring any principles enmeshed in the substantive content of the law, when in conflict with such policy.”⁷ A clear systematic relation is expedient and underscores identity in law domain even though:

All of law depends on vast concepts that stretch across time, space, causation, and agency. Far-reaching concepts make law possible from legislation and interpretation to enforcement and adjudication; from weighing evidence to establishing motive and intent; and from imposing fines or sentences to awarding compensation. But all of human thought and memory is just here and now. The vast dependencies of time, space, causation, and agency must exist in individual brains. How we manage to use here-and-now mental processes to produce legal concepts that stretch very broadly over vast expanses of our lives, institutions, and worlds.⁸

Therefore, law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.⁹ Hence, judges should apply statutes and common law doctrines in ways that subserve their purposes, as well as the general purposes of the law.¹⁰ This is the crux of law as identity. It underscores a philosophical inquiry of law that is cognitive and affective in a legal system, by synergizing legal propositions from its variant focal concepts: statutes, judicial precedent, civil and criminal laws. It presents a dialectical legal consciousness from the shades of influence of jurisprudential reception and judicial consent within the given jurisdiction which give verdict to the interpretation of law devoid of propositional altitude in articulating the proposition of law as they figure in or follow from principle of *stare decisis*, the principles of justice, and procedural due process, which provide the utmost dialectical interpretation of the community's legal practice. Thus,

this is obviously related to the fact that the law as a social institution is primarily charged with being “the last resort” *ultima ratio* and has

5. Ibid

6. Postema Gerald, May 2014 'Law's System: The Necessity of System in Common Law' *The University of North Carolina at Chapel Hill*, Vol 1 p 8

7. Balgenesh Shyamkrisha, May 2019 'Private Law Statutory' *Southern California Law Review*, Volume 92, Number 4, pp 2-6,

8. Mccubbins M. D and Turner M, March 2013.'Concepts of Law' *Southern California Law Review*, Volume 86, Number 1, pp 517-519.

9. Young A Ernest, Aug. 2010 'The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey' *California Law Review*, Volume 98, pp 130-1371

10. Ibid

a coercive monopoly on conflict resolution and the enlisting of cooperation and coordination on a collective scale. However, precisely because of this, its norms and decisions are the outcome of a “syntax” or composition of essential plural or heterogeneous parts or elements which are in constant conflict and imbalance. There is no need to belabour the fact that this is also true of both producing laws (legislative, constitutional) and applying them (judicial, administrative). The logical construction of kinds or types of action and the individualisation and specification of the particular practical situations arising from them are a form of totalisation, and the same holds true of the finalistic reasoning (composition of interests and objectives) and balancing deliberation (composition of values) from which legal norms and decisions result.¹¹

Practically, without an overarching concept, legal scholars cannot have an adequate understanding of the myriad of meanings associated with the term law, because philosophy of law scholars bind together the characteristics and credentials that result in the question what is law? Thus a clear comprehension of law as identity demands that we expand beyond reductionist view of law and explore practically in the legal system the wider attributing factors that characterized law, “the practical social space within which law-subjects act is relatively continuous and open-ended, rather than divided into discrete, small modules sealed off from other such modules. So, law-subjects will need to consider how whole sets or combinations of rules or standards mean to guide their conduct. They must face the requirements or opportunities that the law utters more or less as a whole and not discretely one directive at a time.”¹² In this regards, Fuller's contention ties into his general theory of law, according to which legal systems are not constituted by the mere existence of officials who share an internal perspective on what counts as a valid set of laws, but rather by an orientation-shared by officials and legal subjects alike towards governing their interactions with one another in a manner that displays fidelity to the principles of legality, or, as Fuller sometimes called it, to the internal morality of law.¹³ This fidelity as opines by Fuller underscores legal consciousness in which law as identity is demonstrated.

Interpretation as Legal Consciousness

I am not oblivious of the vast legal thoughts of scholars on the concept of law in the jurisprudential bent, John Austin tried to address this problem by abandoning the assumption that all law making acts must be legally authorised: according to him, the law making acts of the sovereign are grounded in the facts of power, not in any authorising law.¹⁴ This response to the problem sounds promising but proves, in the end, not to be very successful.¹⁵

The most important feature of law as identity is its uniqueness. This uniqueness stems from the combination of various specifically identifying characteristics of legal propositions, for

11. Jesús Vega, 'Legal philosophy as practical philosophy', *Revus* [Online], 34 | 2018, Online since 25 September 2017, connection on 24 May 2019.
URL : <http://journals.openedition.org/revus/3859> ; DOI : 10.4000/revus.3859

12. Young A Ernest, Aug. 2010 'The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey' *California Law Review*, Volume 98, pp 130-1371

13. Rehaag, Sean. Winter 2010 "The Hart-Fuller Debate in the Twenty-First Century, by Peter Cane (ed). *Osgoode Hall Law Journal*, Volume 48. Number 3/4, pp 691-693.

14. Simmonds NE, Feb, 2011.' The Nature of Law: Three Problems with One Solution' *German Law Journal*, Volume 12, Number 2, pp 601-606.

15. *Ibid*

law intrinsically “possess” a few things about its meaning, such as rule, principle, judicial precedent, authority, command and social control of behaviors. None of these by themselves, however, constitute law as identity. They are ascriptions and characteristics: often unique and always inherent in the conception of law. But law as identity is the overarching principle that articulates these unique and inherent attributes in a holistic pattern. It is dialectic for the different points of view about the concept of law is summited through law as identity, for its bridged the gap created by reductionist ideas about the concept of law presented in the works of different philosophers of law by resolving this conflict in law as identity. It represents the focal meaning of the concept of law in jurisprudential enquiries.

Law as identity shows that dialectical interpretation is an assignment of meaning to various concepts within the legal system. A form of qualitative findings which makes use of the method of dialectic, striving to discover beyond reasonable doubt the focal meaning of legal concepts and propositions through the analysis of competing ideas and perspectives. Law as Identity thus, advances an analytic comprehensive articulation of law in the thoughts of the positivist- HLA Hart and Ronald Dworkin.

Crises of Legal Identity

Law as Identity inheres in legal consciousness, it is the overarching stream of interpretation, the crux of the convex-concave relationship that underscores the myriad of conceptual schemes in philosophy of law. Crises of legal identity debates impinges on legal consciousness and is challenged by certain social- political and economic spaces of an interested group. Recall the instant situation affirmed by Sahara Reporter of the killing of the abducted Christian Association Chairman (CAN) Reverend Lawan Andimi in Adamawa State by the Boko Haran Sect. Or the killing of the Seminarian Michael Nnadi of Sokoto Diocese and other barbaric situations in the Country. Indeed, life has become brutish and short affirmed by Hobbes.

Recall the Recall that such challenging social-political and economic spaces is pivotal to the debates between HLA Hart and Lon Fuller on the Nazi German Law.

It will be recalled that one of the issues at stake in the Hart-Fuller debate was how the post-Nazi German legal system should respond to heinous acts committed during the Nazi period and purportedly authorized by Nazi law. Hart argued that because these acts, however reprehensible, were lawful at the time they were committed, the only way that their perpetrators could be lawfully punished was through retrospective criminal legislation. Any other approach-especially reasoning suggesting that Nazi laws were not valid laws because they were morally odious-would, according to Hart, confuse what the law is with what the law ought to be. Hart argued that maintaining this distinction was not only intellectually sound, but also might encourage individuals to question, and perhaps to refuse to obey, immoral laws. For Hart, encouraging individuals not to blindly adhere to law is important because laws may be used for immoral ends-a point that relates to his larger theory of law, according to which a norm is considered a law when it is

understood to be valid by officials who enforce it. In other words, rather than locating the validity of laws in the perspectives of individuals who are actually subject to them, Hart resorted instead to the internal perspective of officials responsible for enforcing laws, pointing out that there is no reason why the mere fact that such officials recognize a norm as legally valid should mean that the norm is morally sound.¹⁶

Legal consciousness is obdurate and has a dynamic relation, forming a unified whole. In the hit of these debates, it is permeable over the influences of popular culture and as a dialectical agent, it repositions the fundamentals that informs its basis.

Fuller, by contrast, argued that Hart had too quickly concede that the heinous acts in question were lawful. It is important to note that Fuller did not argue, in natural law terms that Nazi dictates had immoral ends and that such immoral ends simply could not be accomplished through law properly so-called. Rather, Fuller argued that fidelity to legality-i.e., to ensuring that laws are public, clear, non-contradictory, proscriptive, reliable, possible to comply with, and applied as articulated-is an essential feature of legal systems that allows human beings to govern their interactions with one another with reference to rules. Fuller contended that the systemic procedural irregularities in which Nazi dictates were embedded departed so seriously from the principles of legality that at least some Nazi dictates could not reasonably be characterized as legal. These irregularities included extensive use of legislation to retroactively render criminal acts (including mass murder) lawful, secret regulations and legislation, and political interference with the judiciary such that the interpretation and application of laws became subject to executive whims.¹⁷

The phenomenon of crises of legal identity in jurisprudential consideration is akin to convention and convention in the instance situation is not a catastrophic extermination in the Nazi German law but, rather a gradual assimilation in the social order of rule of engagement that is gaining acceptance in the Society without legal enforcement, determinant of the court or promulgation by legislators which often bridges theoretical disagreement on the validity of law as assimilated by Judges who considered social fact as the only underpinning of the validity of law. Proponents in this regard varies, nevertheless, law as identity is non stastic and a dialectical orientation which bridges the gap of theoretical disagreement, for it underscores that law as identity is not discrete but an encompassing whole. It shows that legal consciousness is a wide stream of over following connectivity of internalized norms and legal propositions and statutes which characterized an internal point of view in the legal system.

16. Rehaag, Sean. Winter 2010 "The Hart-Fuller Debate in the Twenty-First Century, by Peter Cane (ed). *Osgoode Hall Law Journal*, Volume 48. Number 3/4, pp 691-693.

17. Ibid

Thus:

the internal point of view, which is the perspective of a person who participates in some practice or activity or institution. Such a person seeks to uphold the duty-imposing norms of the practice or activity or institution, by adopting a critical reflective attitude in relation to them. Hart explained that that critical reflective attitude manifests itself as a triad of behavioral dispositions: a general disposition to comply with the requirements of some duty-imposing norm(s) insofar as they are applicable to one's conduct; a general disposition to object to contraventions of those requirements by other people; and a general disposition to acknowledge the appropriateness of censure that is directed against one's own contraventions of those requirements. Somebody who has adopted the critical reflective attitude in relation to some duty-imposing norm N is thereby accepting N and displaying a commitment to N. However, the stance of commitment need not be based on any perception of N as morally worthy. A person can adopt the critical reflective attitude toward N for moral reasons, of course, but her embrace of such a stance might alternatively be grounded on self-interested considerations or some other factors.¹⁸

In this regard, law as identity is expedient and is an encompassing outflow of streams of internalized mode of being cultivated through the legal system.

Conclusion.

The phenomenon of a legal system is a dynamic process, yet it retains the fundamentals in which such a system thrives. To present a solipsist concept of legal phenomenon like law will unbalance the diverse ambient and dynamism which characterizes social coexistence of the human agency, in which the domain of law has become necessary. The reductionism of law as articulated in the thoughts of Kelsen, Hart and Dworkin shows perspectives and viewpoints that is enriching epistemologically but equivocating in a pragmatic sense of the concept law, for law is more encompassing and relational as demonstrated in this article.

The concept of law as identity, annex to consciousness is the stream in legal interpretation, an overarching principle of an internalized norm and standard sheared and understood among the Citizens, Judges and the legal system, for the matrix of the concept of law as identity is consciousness which underscores the unique embrace of awareness of internal and external existence of reality reference to the legal phenomena (propositions, precedents and norms).

The conception of law as identity galvanizes the homogeneity inherent in the community collective life, for community develops and grows only if there exists, among the members, a

18. Kramer H.M, March 2019, The Legal Positivism of HLA Hart 'University of Cambridge Faculty of law Legal Studies' *Legal Studies Research Paper Series*, paper Number 11/2019, pp11-40

sufficient degree of homogeneity by fixing in the community consciousness from the beginning the essential similarities that collective life demands. This homogeneity makes distinct and clear the vagueness associated with propositional attitude in legal practices. Thus, this article shows that law as identity bridges the gap created by the semantics in language and jurisprudential zigzag of philosophy of law scholars.

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