Hart on Law and Morality Complementarity: Implications for International Law

By

Ngozi Chukwuemeka Aja Ph.D
Department of Philosophy
University of Port Harcourt
E-mail Address: ngozi.aja@uniport.edu.ng
Phone Number: 08035439733

Abstract

This study examines the implications of H.L.A. Hart's law and morality complementarity thesis for international law. Employing the philosophical method of hermeneutics, this paper sifts the complementarity thesis from Hart's conception of law. An application of the thesis done in this study shows that it has significant impact on the conception and operations of international law. A reflection on the implications of Hart's thesis shows that the thesis aligns international laws with shared moral principles, fostering legitimacy, compliance, and effective cooperation on a global scale. Some case studies examined showcase the thesis as indispensable for the flexibility of international law as it grapples with unprecedented challenges facing the world today. Thus, despite the critique's argument depicting. Hart's thesis of incapable of sufficiently addressing the legitimacy of international law where diverse moral perspectives exist, this study maintains that the thesis offers a basis for adhesion between parties to international treaties and covenants. Therefore, this paper recommends an understanding of the operations of international law from this Hartian perspective.

Key Words: Complimentarity, International, Law, Morality.

1. Introduction

Herbert Lionel Adolphus Hart, popularly known as H. L. A. Hart, (1907- 1992), was an English philosopher, teacher, and author who was the foremost legal philosopher and one of the leading political philosophers of the 20th century. His most famous work is *The Concept of Law*, published in 1961. The book presents Harts theory of legal positivism, the view that laws are rules made by humans and that there is no inherent or necessary connection between law and morality, within the framework of analytic philosophy. Hart sought to provide a theory of descriptive sociology and analytical jurisprudence.

Hart proposes the concept of law and morality complementarity according to which he argues that though law and morality are distinct, they interact and complement each other within a legal system. While law can exist independently of morality, he argued that the effectiveness and legitimacy of a legal system are enhanced when it aligns with societal moral principles. Hart emphasizes the importance of understanding the internal perspective of law, considering the rules as social practices and acknowledging the role of shared values in legal acceptance and enforcement (Starr 1984:88). The aim of this study is explore Hart's concept of law and morality and to its implications for international law.

The paper is divided into five sections and the ongoing introductory section is section one. Section two will take an overview of Hart's legal Philosophy. In section three, his law and morality complementarity will be considered. The implication of the law and morality complementarity for international law will be examined in section four. This will be followed by section five, the conclusion.

2. Overview of Hart's Legal Philosophy

Hart is clearly the leading contemporary legal positivist in Anglo-American jurisprudence. He believes that there are two different types of rules which comprise the 'essence' of law, namely, primary rules and secondary rules. Hart describes their relationship saying that, "law may most illuminatingly be characterized as a union of primary rules of obligation with such secondary

rules."(1961:I). He describes this union as the 'heart' of the legal system. Primary rules are 'duty imposing' rules. They impose certain specific duties upon the citizens of a state to act in a certain manner. or they may be subject to certain legal sanctions. Hart characterizes primary rules as 'basic' rules. They tell the citizen what one can and cannot do under the law. Examples of primary rules include, laws setting speed limits, laws prohibiting trespassing or laws prohibiting corporations from requiring their employees to make contributions to political campaigns are all examples of primary rules. Primary rules are generally what the ordinary citizen means when he refers to something as 'the law'.

Primary rules stand in contrast to secondary rules. Hart explains the difference between the two types of rules thus:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are require to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private (78-79).

Secondary rules are not duty-imposing rules. They are what Hart calls power-conferring rules. They state the manner in which primary rules may be recognized, changed and adjudicated. An example is the practice in the United states where certain category of rules grant the Congress the power to legislate and private citizens the right to vote. They state the procedure one must follow in order to make a legal will. Secondary rules are, as Hart puts it, 'rules about primary rules'. Hart explains that:

> Secondary rules may all be said to be on a different level 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 ways in which the primary rules

> may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined. (92).

Secondary rules are necessary in any reasonably complex society. There must be procedures to discover just what the primary rules are and how they can be changed or challenged. This task falls to secondary rules. This union of primary and secondary rules captures for Hart the essence of a legal system.

Hart categorizes secondary rules as either rules of recognition, rules of change, or rules of adjudication. Rules of recognition provide a mechanism for discovering just what is or is not a legitimate primary rule. In a semi-developed legal system, these rules of recognition may be simply a reference to an authoritative text or standard for properly identifying the primary rules that have thus far been established. As a society becomes more complex, the criteria used to identify primary rules will also become more complex. In his words:

> The criteria so provided may, . . . take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases" (97).

Another type of secondary rules consists of rules of change. These are necessary to efficiently allow primary rules to be amended. They specify how primary rules may be changed.

The third type of secondary rules are made up of rules of adjudication. These rules are essential to a legal system of a complex society and are intended to remedy the inefficiency of a legal system with just primary rules. Rules of adjudication set criteria for determining when a primary rule has been broken and what procedure is to be followed when the primary violation has been established. Judges, commissions, and regulatory agencies are given authority when the occasion is appropriate to apply secondary rules of

adjudication. The great advantage of having secondary rules in a given legal system, complementing the primary rules, is that certain specific criteria are available to determine just what primary rules are in effect, how they can be changed, and that the appropriate sanction is when a given violation of a primary rule occurs. As Hart states, "These secondary rules provide the centralized official 'sanctions' of the system" (95). This is the case since secondary rules of adjudication confer power upon the judge to officially sanction the legal disobedient in a manner in accordance with his or her authorized power. Primary rules impose duties upon the citizen not to violate the particular legal rules at issue. This model of law, involving a union of primary and secondary rules, is for Hart, the essence of a legal system.

However, Hart recognizes that there also has to be an ultimate rule to unite the legal system into a coherent whole. He believes that the last court of appeal serves this purpose by deciding whether a rule is part of a given legal system. Accordingly, he calls this rule the 'ultimate rule of recognition'. Hart explained that:

> The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an ultimate rule: and where, as is usual. there are several criteria ranked in order of relative subordination and one of them is supreme..102).

The idea here is that in a legal system one rule will govern when the legal validity of a law is called into question.

3. Law and Morality Complementarity

Hart proposes the possibility of law and morality complementarity by arguing that the effectiveness and legitimacy of a legal system are enhanced when it aligns with societal moral principles. He does not assert that laws are simply a product of sovereign command or that moral judgments cannot be established as statements of facts by rational argument, evidence or proof. He does not maintain that a legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone. (Singer, 1963). It

should be noted that Hart does take morality seriously. Hart states that law and morality are very close, though not necessarily related. Therefore, he is deeply sympathetic to what he calls 'the core of good sense of natural law' and believes that law should continually be subject to moral scrutiny. Impartiality in rule application is a moral standard which, according to Hart, is necessary in a legal system. Thus any judge applying a particular legal rule is expected to do so uninfluenced by "prejudice, interest, or caprice" (202). In explaining the close relationship between law and morality Hart emphasizes that:

> The law of every modem state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature. its legislation may yet no less scrupulously conform to justice or morality. The further ways in which law mirrors morality are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be tilled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fair- ness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility. No "positivist" could deny that these are facts, or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connexion of law and morals, its existence should be conceded. (199-200).

Hart argues for the interplay between legal and moral systems through his concept of the Internal perspective" and the idea of a rule of recognition.

Furthermore, Hart emphasizes understanding lawfrom the internal point of view, where individuals within a legal system recognize and accept legal rules as guiding their behaviours. This internal perspective involves recognizing, legal rules not just as external commands but as part of a shared social practice. Also, Hart introduces the 'rule of recognition'. a fundamental rule that legal officials use to identify and validate other legal rules. This rule often incorporates societal moral principles reflecting a connection between law and morality. The rule of recognition serves as a focal point for legal actors to determine what constitutes valid law within a particular legal system.

Hart argues that legal systems are social practices with their own internal logic and efficacy, separate from moral considerations. However, he acknowledged that for a legal system to function effectively, it must resonate with the moral values of the community it serves. The acceptance and operation of Hart secondary rules, which provide a framework for modifying, applying and acknowledging primary legal rules, can be influenced by moral considerations, contributing to the interplay between law and morality.

4 Implications for International Law

Han applies his general concept of law to the international legal system. He conveys an archetypical theory of municipal law on the international level, focusing on the distinction between primary and secondary rules in a legal system. Hart's view of international law is ambivalent. While he acknowledges the legal validity of international law, he also points out its deficiencies, particularly the lack of secondary rules, which are essential for a modern developed legal system. He characterizes international law as primitive or incomplete law, which led to questions about its legal character. Hart's critique raised crucial questions about the nature of international law, emphasizing the need to understand the phenomenon to advance moral and political arguments about it (Murphy 2009:165-169).

Harts rule of recognition is a fundamental concept in his legal theory, which he applies to international law. The rule of recognition is a principle that provides authoritative criteria for identifying primary rules in a legal system.

In the context of international law, Hart is not convinced that there is a rule of recognition within the international law system. He finds the arguments of Hans Kelsen and others about the existence of such a rule unpersuasive (Lesser, 2014:1123-1124). Legal scholars, including Hart faced difficulties in formulating a rule of recognition for both municipal and international legal systems. These problems were due to the lack of a shared acceptance of the rule of recognition by public officials as a common and general standard of legality. This deficiency made it not law in a modern developed sense but in a simple or primitive one.

However, Hart's idea of law and morality complementarity, internal perspectives, and the rule of recognition can be relevant on a global scale. In terms of recognition of International Legal Rules, the rule of recognition could manifest through agreements, treaties, or conventions that nations acknowledge as authoritative sources. The acceptance of these rules may be influenced by shared moral values among nations, aligning with Hart's emphasis on the internal perspective.

Again, in terms of separation of law and morality, Hart's separation thesis suggests that the existence of international law does not necessarily depend on shared moral values among nations. However, the effectiveness and acceptance of international legal norms may be enhanced when they align with widely shared moral principles on a global scale.

In addition, Hart's position on internal and external points of view fosters effective workings of international law. International legal systems, like domestic ones, may face both internal and external perspectives. Nations may internally accept certain legal norms based on social practices, while external criticism could come from moral viewpoints. Secondary rules in international law, such as those governing treaty-making or dispute resolution, can reflect a combination of legal and moral considerations. The acceptance of these secondary rules may be influenced by a shared understanding of moral principles among nations. Thus, the effectiveness of international law may depend on how well it resonates with the moral values and expectations of the global community.

Instances of international cooperation and compliance may be more successful when legal norms align with widely accepted moral standards. International law can be seen as a global social practice, with its own internal logic and rules. Hart's emphasis on the internal perspective suggests that adherence to international legal norms could be driven by a sense of obligation within the global community.

Hart's complementarity thesis, emphasizing the interaction between law and morality, significantly influences the understanding of legal frameworks on a global scale in several ways which include:

1. **Legitimacy and Acceptance:** Legal frameworks gain legitimacy and acceptance when they align with shared moral values globally. The complementarity thesis suggests that the effectiveness of international legal systems is enhanced when their rules resonate with the moral expectations of diverse nations.
2. **Internalization of Legal Norms**: Hart's emphasis on the internal perspective suggests that the cffectiveness of global legal frameworks relies on the internalization of legal norms by nations. Nations may be more inclined to comply with international legal norms when they are percived as aligning with their internal moral values.
3. **Harmonization of Legal Systems:** The complementarity thesis encourages the harmonization of legal systems across nations by recognizing the importance of shared moral principles. Efforts to create common legal standards or norms at the global level may be more successful when they acknowledge and integrate widely accepted moral values.
4. **Mitigation of Moral Criticism:** Legal frameworks that actively consider moral principles may mitigate external moral criticism from the international community. The complementarity thesis suggests that legal systems are stronger when they address not only legal but also moral concerns on a global scale.
5. **Enhanced Cooperation and Compliance:** Legal frameworks that respect and reflect shared moral values may foster increased cooperation and compliance among nations. The complementarity thesis implies that the convergence of legal and moral considerations strengthens the commitment of nations to adhere to global legal standards.

In essence, Hart's complementarity thesis contributes to a nuanced understanding of legal frameworks on a global scale by recognizing the intertwined nature of law, and morality. It suggests that the effectiveness, acceptance, and legitimacy of international legal systems are heightened when they complement and align with widely shared moral principles across diverse nations.

A good example of case study illustrating Hart's law and morality complementarity in international law, is application of the Universal Declaration of Human Rights (UDITR). The UDIIR serves as a case study where international legal norms, as articulated in the declaration, reflect a convergence of legal and moral principles. The recognition of fundamental human rights demonstrates how global legal standards incorporate widely shared moral values. International Criminal Court (ICC): The establishment and functioning of the ICC provide a case study in which international law seeks to address moral concerns related to accountability for genocide, crimes against humanity, and war crimes. The court's jurisdiction reflects an attempt to codify moral imperatives within the framework of international law (Shaw 2003:50-51). Another example is the Paris Agreement on Climate Change. The Paris Agreement exemplifies the intersection of legal and moral considerations in addressing a global challenge.

Nations come together under legal commitments, reflecting a shared moral responsibility to combat climate change and protect the environment. A third example is the Convention on the Rights of the Child (CRC). The CRC is a case study where international law articulates specific rights for children, reflecting a moral consensus on the need to protect and prioritize the well-being of the youngest members of society (Harris 2004:661-663). Yet another example is the Responsibility to protect which represents a case where the international community acknowledges a moral responsibility to intervene in cases of mass atrocities, emphasizing a legal basis for humanitarian intervention. The doctrine illustrates how legal frameworks can be shaped by moral imperatives. Also, the Nuremberg Trials present a good example of Hart's law and morality complementarity thesis. The Nuremberg Trials after World War II demonstrate the intersection of morality and international law in holding

individuals accountable for war crimes and crimes against humanity. The trials contributed to the development of principles that are now foundational in international criminal law. South Africa's Truth and Reconciliation Commission presents an example of a domestic effort with international significance, where legal processes incorporate moral elements to address historical injustices. It reflects a case where legal mechanisms seek not only punitive measures but also moral reconciliation. These case studies showcase instances where international legal frameworks embody or grapple with moral considerations. They provide insights into how Hart's complementarity thesis may be observed in the development, implementation and enforcement of international law on a diverse range of issues.

Critics of Hart's thesis in the context of international law argue that, overemphasis on separation may oversimplify the relationship between law and morality, downplaying the intricate ways in which moral considerations influence legal systems. Some argue that Hart's theory, by focusing on the internal perspective and shared values, may not adequately account for the diversity of moral beliefs across cultures, potentially neglecting the pluralistic nature of legal systems. It is argued from the point of view of inadequate treatment of external criticism, that Hart's theory might not sufficiently address how external moral criticisms impact the legitimacy of legal systems, especially in the context of international law where diverse moral perspectives exist. Critics also contend that Hart's theory does not sufficiently address the dynamic nature of morality and how evolving moral values may influence legal systems over time, Some maintain that Hart's theory places too much emphasis on the rule of recognition as the primary link between law and morality, overlooking the potential moral dimensions in other secondary rules governing legal systems. Legal realists critique Hart's theory for not fully accommodating the pragmatic and sociological aspects of law, which they argue are essential for understanding how law operates in practice.

Alternatives views to Hart's law and morality complementarity thesis have come from various reflections of the nature of law with respect to its ultimate function of

ensuring justice. Dworkin challenges Hart by proposing a moral reading of law, suggesting that moral principles are integral to the interpretation and development of legal rules (Dworkin 1977:22-25). His position partly adduces to the natural law position. Other positions come from outsider jurisprudence, such as feminism, Critical Legal Studies (CLS), and others. Feminist legal scholars criticize Hart's theory for not adequately addressing gender perspectives and argue for the incorporation of feminist legal theories that consider power dynamics and social justice. CLS challenges the neutrality of law and posit that legal systems often serve the interests of dominant groups, calling for a more critical examination of the socio-political dimensions of law. However, these criticisms do not override the relevance of Hart's thesis to international law as they manifest in enhanced legitimacy, aligning international legal frameworks with shared moral values.

Conclusion

H.L.A. Hart's concept of law and morality complementarity has left an indelible mark on legal philosophy, offering insights that resonate across domestic and international spheres. A reflection on the implications of his theory in the realm of international law, has seen several key themes emerge. The dynamic interplay between legal norms and moral values, as articulated by Hart remains a cornerstone for understanding the complexities of global legal frameworks. The practical ramifications underscore the significance of aligning international laws with shared moral principles, fostering legitimacy, compliance, and effective cooperation on a global scale.

The examined case studies reveal the tangible application of Hart's complementarity thesis in diverse contexts, from human rights protection to environmental justice. These cases showcase the relationship between law and morality, illustrating how legal frameworks can embody moral imperatives to address pressing global issues.

In a contemporary context, the relevance of Hart's theory becomes particularly evident as the world grapples with unprecedented challenges. Ranging from

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technological advancements to global health crises, the complementarity thesis guides the ongoing evolution of international laws, ensuring they navigate the intricate balance between legal effectiveness and moral legitimacy. Thus, as we navigate an ever-changing global landscape, this concept remains a valuable guide, challenging us to craft legal systems that not only stand the test of legality but also embody the principles of justice and morality that underpin a harmonious and cooperative world order.

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