Law and Morality: Reconciliating the Antagonism

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ABSTRACT

Oodles of ink has been squirted to resolve the apparent antagonism between law and morality, but the cleavage between the two does not seem to bridge. The two prominent schools of jurisprudence - the positivist school and the naturalist school have their heads locked till date despite the concessions they have made in the modern times. Starting from Bentham and Austin on one hand and Thomas Aquinas and Rousseau on the other the legacy of respective schools descended upon Hart and Kelson on one end and Finnis and Fuller on the other. The fundamental question or problem however remains as it is - does law have essential connection with morality?

This paper would be another attempt towards the conciliation of the much-heated extremes that perplexes every student of jurisprudence even today. With the advent of constitutional democracies how far these theories have managed to hold their respective bastions intact. Has the concept of constitutional morality to any extent reduced the antagonism and theoretical battle between the two? Is there any scope to befriend the two-pronged streams of jurisprudential enquiry?

It is not our claim here that we are making any philosophical innovation rather we would merely focus our attention finding a gentle plane for jurisprudential expansion which we feel has been mired in the debate of law versus morality for long enough. Excess of anything is not good. Naturalists stance has exposed to us how creepy the godliness can get and similarly the positivists invocation of law as it is, has inspired and pampered nasty regimes.

It is high time that some moderation comes in jurisprudential approach and this paper is an effort in that direction.

I. INTRODUCTION

Questions concerned with what is morally good and bad or morally right and wrong has been debated extensively since human being started to reflect upon best way to live. Gradually, the

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moral quest to fathom the ethical standard of living got assembled under the heading of ethical or moral philosophy. The origin of morality was initially located in myth and superhuman agency until the task of demystification fell upon the Greeks. Socrates rightly regarded as the greatest philosopher of ethics tried for the first time to provide a rational method of enquiry and argued that moral virtues are knowable. Aristotle and Plato premised their philosophies on the foundation laid by Socrates but often seen critical of the grand master. However, the ubiquity of importance to reason evinces their quest to provide objective tenor to morality.

The legacy of Greek ethical philosophy lost its sway with the advent of Christianity in the Roman empire. Ethical philosophy got Christianised. St. Augustine made first concerted effort towards giving out a moral philosophy based on the ethical exhortations of the new testament ‘render as to Caesar the things which are Caesar’s’. Thomas Aquinas tried (Wacks 2017) to secularize the Christian ethical philosophy with Aristotle’s help. The separation between law and morality was blurred hitherto. The semantic and conceptual content overlapped. However, the fault line became discernible as soon as religious and secular activities stared to delimit within the church and the state. Once the realms were severed the question of legitimacy surfaced. Why should law be obeyed? Where does law derive its validity from? And if law and morality are not same where does law come from?

Subsequent juristic and philosophical efforts revolved basically around the above posed questions. Jurists and philosophers who kept on putting law and morality as conjunctive elements got to be called naturalists and others flocked together under various banners like positivists, utilitarian etc. The natural school of law which maintains that law is essentially a moral concept and the positivists who are hell bent upon maintaining a conceptual apartheid between law and morals have dominated the turf of jurisprudence till date. We would be looking into their theories and claims and try to establish a concord which stems nonetheless from the latest versions of both the theoretical streams.

II. LAW, MORALITY AND THE NATURALISTS

For the Naturalists, law is not a human posited invention like a motorbike or a mobile phone. Human agency is not the progenitor of law, but law is supra human. It exists and has existed and transcends itself onto human beings through different means. In simple words, law is natural and not artificial. Plato situates law in terms of absolute value that things could emulate, regarding the epistemological access to these values he is of the view that we know these values intuitively.
Aristotle on the other hand placed the source of these values in human nature discoverable by reason. St. Thomas Aquinas (summa theologiae) gave a catalogue of four categories of law and places the man-made law that is Lex Humana at the lowest pedestal. Man-made law or positive law are in a subordinate position to higher laws namely: Divine law (revealed to man through scriptures), Natural law (participation of natural law in divine providence), Eternal law (gods plan for the universe known only to him). According to Thomas Aquinas, God has a planning for the universe that is known only to him. Natural law that is received by human beings enables them to participate in the grand planning of God. But how do we know that what are the tenets of natural law? How to identify them? Aquinas has an answer to this. We are guided toward them by our nature; they lead towards the good. Thus, we can see that the value element of good and a motivation to seek various goods is an attempt to give a theoretical context of objective moral truth that exists in absolute terms. Law and moral terms of good and bad are intertwined in naturalist legal philosophy. A claim attributed to Aquinas that tightly intwines law and morality is that a law that derides natural law is not law at all.

Another aspect ascribing natural origin to law is the quest of the naturalists to establish that it is objective; meaning, thereby, that natural law involves value analysis of statements and actions like it is bad or wrong to lie or statement like one should be honest. To determine the goodness or badness of any activity is there an objective as opposed to subjective yardstick? Naturalists have tried as discussed above to put forward an affirmative answer to this problem. Through reason, the objective truth is accessible. We may employ different methodology to get the objective standard to determine the value of human activity. This is what has been called moral objectivism or moral realism. Moral realism in the sense that just as historical or geographical statements are true or false based on facts, so are moral statements as they correspond with moral facts.

These claims of the naturalist obviously did not go unchallenged. However, from the brief account of classical naturalists take on law, it comes out that basic tenets of law (natural law) are its natural origin, its superiority over man-made law and importance of reason in discerning it. But the presupposition of definite supernatural entity had mystified natural law and the mission of degodifying or secularizing the natural law philosophy began in order to make it more rational and less abstract. Hugo de Groot or Grotius played a key role in this enterprise. He asserted that even if god would not have existed, natural law would have the same content. Even god could not have made two times two not equal to four. Another important figure is William Blackstone who tried to humanise the English law by appealing to the God-given law. Positive law cannot exist as law on its own, he held, without appealing
to the principles of natural law for securing its legitimacy. Man-made law derives its validity from natural law itself.

The naturalist monopolised the jurisprudential terrain until the scathing onslaught came from Jeremy Bentham, the English legal positivist of the eighteenth century. In a sweeping attack on naturalists Bentham declared that natural law is nothing but a mere work of fancy and a complete nonsense. And a new strand of jurisprudential approach to law and morality arrived.

**Positivists and the Law ‘as it is’**.

David Hume’s (https://brittanica.com) moral philosophy of ethical anti-rationalism wherein he claims that moral distinctions of good and bad or right and wrong are not derived from reason but rather from sentiments. He attempts to establish in his treatise the anti-rational thesis that virtue is not the same as reasonableness and vice is not contrary to reason. Moral cannot be derived from reason alone. From this argument he derived that moral evaluations lack all cognitive content. He meant to say that in moral reasoning there can be no rational solution: We cannot objectively know what is right and wrong (non-cognitivism in ethics). Hume’s moral philosophy shook the bastions of the naturalists as the attack was on the basic premise of the naturalists’ claim of objectivity and reason in morality.

Second potent blow to the naturalist came from the Luther of jurisprudence himself. Jeremy Bentham (1782) in a comprehensive assault on the naturalist’s invocations, simply but very arcuately dismissed the need of morality in the legal sphere. Law must get rid of fantasies and nonsenses to be studied, understood and properly analysed. Law and morality are neither the same nor do they share a common ground. Law ‘is’ and morality ‘ought to be’. Thus, for the purpose of analytical clarity, a value free account of law is needed and if morality resides within law it shall remain ambiguous and uncertain and a scientific analysis of law won’t be possible. Law must stand on its own and it can. Coupled with Austin the foundation of positivists school was laid down by Bentham, the premise on which subsequent positivists extended their arguments. However, how morality was treated by the subsequent positivists especially when the task of finding the root of legitimacy for law were encounter and why and how people abide by law when the element of good and bad or right or wrong do not spring from the notion (morality) they usually identify with or when the entire corpus of value has been negated what shall be the motivation that would drive them to recognise and comply the with law.

Once law was to separate from morals and meant to stand as ‘pure science’ number of theoretical, methodological, semantic clarifications and elucidation had to be made. Law and
morality had been a long-time companion but now as law has divorced morality, so it must construct its own foundation and edifice, strong and splendid.

From where does law emanate? To answer this semantic question the positivists, take a sceptical path and deny any deontological or mind independent source of law. The classical positivist like Bentham (1782) and Austin (1832) locate the source of law in a person or assemblage of persons enjoying the habitual obedience from subjects or determinate human superior receiving habitual obedience and not in a habit of obedience to a like superior. Thus, sovereignty becomes central concept in the legal philosophy of positivists. Law is the command of sovereign. Thus, the sovereign, person or body is considered as the source of political legitimacy before the classical positivist.

Why Law is obeyed? Both Bentham and Austin address this seminal question adhering to the utilitarian philosophy. Though the element of sanction (punishment and reward) is present in the theories of both Bentham and Austin, but the degree of eminence varies. Bentham formulates (1782) a complex logic of will to conceptualise the issue of compliance or fidelity to law. The fear of sanction according to him is not the sole driving force that brings about the compliance of law. On the other hand, Austin introduces a conception of sovereign whose power are seemingly illimitable and composed who is habitually obeyed by the subject and so are his commands. Once he gives a command it places a duty on the subject to obey them which they obey habitually and for the threat of sanction that looms to address the situation of disobedience.

Why law should be obeyed? From the utilitarian point of view as both Austin and Bentham are utilitarian, law ought to be (must be) obeyed because it produces the best consequence (consequentialism) possible for a given society or assemblage of persons. It tends to maximise their happiness and minimise their pain. Bentham being a hedonist espoused the instrumentality of law in promoting the overall balance of happiness over pain. The famous slogan maximum good of the maximum number precisely encapsulates the hedonistic philosophy of Bentham. Bentham even believed that his hedonistic calculus is theoretically possible and verifiable.

But to know what is good and bad would somehow involve a value analysis that the naturalist keep harping upon and here the involvement of morals in law looks imperative. But Bentham looks upon good and bad not as an ethical/moral subject but in terms of happiness and pain that they produce. Their consequence, he says, are measurable so to say with the formula of hedonistic calculus.
On the other hand, Austin is stern and a bit technical when it comes to the issue of compliance with law. Whether the law is good or bad is a separate issue that could be studied but once it is there, it must be obeyed. This signifies the imperative and obligatory conception of law with not so concrete theoretical base.

From the account of the classical positivist approach it appears that morality and law must be at least in the conceptual and in theoretical sense unintegrated. credit must be given to the subsequent positivists and the modern naturalists who made concession in each other’s favour and tried to harmonise and establish a concord between morals and law and to break the spectacle of the conceptual apartheid that had mired the jurisprudential terrain for quite long.

III. LAW AND MORALITY: TOWARDS RECONCILIATION

The insistence of positivists to maintain the dichotomy between law and morality in a bid to sanctify law from social and moral vagaries and fantasies was as could be expected frowned upon by the naturalists. It was argued by the naturalists that the value element in law makes it humane and positivist’s insistence on absolutely divesting law of any value tends to make law inhumane and harsh. Naturalists had the dreadful episode of world war and the instance of bloodbath in Nazi Germany at their disposal to accentuate their claims. Thus, law cannot and should not be so dismissive of its sole: morality. The positivists on the other hand also made considerable concessions from their original pre-occupational hard stance with command, sanction and sovereign. The changed socio-political scenario coupled with the scientific advancement impelled both the flocks to reconsider and reframe their theories. The soft positivists and soft naturalist heralded a new epoch in the jurisprudential providence wherein one can see the reconciliating tendencies in both the camps. Following declaration from HLA Hart, a positivist, amply reflects (1994) the new jurisprudential trend of the twentieth century, ‘…. however great the aura of majesty or authority which the official system may have, its demand must in the end be submitted to the moral scrutiny.’

Similarly, naturalists like Lon L fuller’s (1969) accommodative approach is reflected in his adoption of procedural natural law. He tried to secularise the natural law position by investing law with inner morality instead of buttressing the stand of classical naturalists’ advocation of the superiority of natural law.

Thus, though the modern positivists used the foundation of the classical positivists to erect the edifice of their legal theory but their theoretical architecture was more refined and accommodative than their predecessors’ H L A Hart, though a positivist (advocated the separation of law and morals at least for analytical purpose) acknowledges the core of
indisputable truth in the natural law. He does not sympathise with the coercive portrayal of law painted by Austin. He recognises that in order to sustain a society law must have the minimum content of natural law. The reason for the same, however, does not lie in the naturalist’s reverence of natural law as a higher Law rather in the fact that human beings have certain characteristics that exhibit a human condition which makes such content inevitable. The characteristics being:
Human vulnerability, approximate equality, limited altruism, limited resources, limited understanding and strength of will.
These human frailties, Hart holds, require a minimum content of natural law in the system of rules. Given the fact that he is a positivist and advocates the conceptual separation between law and morals, concedes to consider the social dimension of rules when he says that law is essentially a social phenomenon. He has liberated the positivist approach from the blemish of inhumane and soleless approach to law. Both society and morality find place in his conception of legal theory.
Hans Kelson, another important modern positivist mostly known for his pure theory of law has also contributed, though he might have denied it, in the reconciliation of law and morals. His (1967) pure theory is based on the oughts and should. The expressions that positivist thought best to keep at arms distance. His hierarchy of norms is a complex series of oughts.
The metaphysical illusions or abstraction that the naturalists create in legal theories, according to positivists, appear at the top of the hierarchy of norms that Kelson erects (1969) in form of the Grundnorm. What is Grundnorm? A juristic hypothesis, a presupposed norm that exists in juristic consciousness. Thus, the stiffness of the positivist legal theory reduced considerably as a result of the theories of Hart and Kelson.
Modern naturalists’ stance also condensed as they turned their focus away from metaphysical propositions about human nature and about the nature of good and evil. This departure in the legal philosophical approach of the naturalists brought the fundamental concepts of right and justice at the centre of their legal propositions. John Finnis in his seminal work *Natural Law and Natural Rights*, employs the methodology of analytical jurisprudence: a rational philosophical basis to consider and evaluate human choices, actions and well-being. Finnis’s conception of justice and natural rights emerge from his urge to find what is good for human persons. This value analysis of finding the good is not done in the typical naturalist manner, say, by locating the good in some abstract location. He gives his inventory of seven ‘basic forms of good’ combined with nine ‘basic requirement of practical reasonableness’. He
claims that these items constitute the universal principle of natural law. Where does these items come from? Finnis claims to have deduced them from nowhere; they are self-evident. Though Finnis has attracted lot of criticism but at least the credit of disillusioning the natural law philosophy can’t be easily denied to him.

Similarly, Lon L fuller also tried to rescue the natural law theory from the conceptual vagueness and indefiniteness when he postulates (1958) the eight ‘desiderata’ or the eight kinds of legal excellence which law must embody. Fuller tries to instil morality into law in a gentle and subtle way, that is through monitoring its procedural channels with his desiderata.

It is, however, also true that the staunch naturalists like Ronald Dworkin (1931-2013) and avowed positivists like Joseph Raz (b.1939) did not let the classical hard positivism and hard naturalism slip into oblivion.

Dworkin reiterates that law is effectively integrated with morality. But as stated above the fundamental legal concept of rights, justice and fairness is found to be at the centre of his legal philosophy. In his conception the place of value in law was more related to ensuring a unitary system of values that can promote the element of right and justice in the system. Raz is considered a ‘hard’ and ‘exclusivist’ positivist who holds in line with the classical positivists that law has no essential connection with morality neither for legality or validity nor for identifying its content. Though the writings of Raz has not generated much intense theoretical debate. The concessions that has been made by soft positivists that allows moral issues to osmose into the process of determining law has been condemned by Raz and other hard positivists. Yet the trends of reconciliation are ubiquitously been in fashion in the modern jurisprudential world.

But it is equally true to say that honest attempts of reconciliations have been made from both ends. The exhortation of H L A Hart that law must have the minimum content of natural law does not cease to resonate alleys of jurisprudence and the following passage from Sir Donald Neil MacCormick’s book Institutions of Law: An Essay In Legal Theory (p.305) is a testament to the claim,

“the fear is that…. reference to value deprived legal theory…. of any pretentions to scientific character. Were this true, law schools so far as they are anything more than trade schools teaching skills and tricks of a sometimes-questionable kind of job, would be purveyors of ideology not disseminators of knowledge and learning. was it true, law professors would be mere apologist for the established order of things, interpreting that in most attractive possible light …”?
The rise of sociologist and realist schools of jurisprudence also contributed a great deal in abating the bitterness that prevailed between the positivist and the naturalist by enlightening different alleys to approach and investigate the jurisprudential territory.

The concept of constitutional morality has indeed pushed the long drown skirmish between law and morality in the backfoot. The definiteness that it claims with regards to the origin and instrumentality of morality that too in consonance with law is brand new jurisprudential modus operandi of modern constitutional setup. Soothing as it may seem, the moral questions requiring our value judgement still come before us in various ways and still impels us to consider and reconsider our viewpoint every day.
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