THE 'IS-OUGHT' CONTROVERSY BETWEEN HART AND FULLER IN THE PHILOSOPHY OF LAW: IMPLICATIONS FOR JUDICIAL PROCEDURES AND THE CRIMINAL JUSTICE SYSTEM

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Abstract

In presenting the debate between Hart and Fuller, on what is considered descriptive or factual (the 'is') and what is considered prescriptive or normative, (the 'ought'), one would deem it appropriate to make some conceptual clarifications on the various dimensions of jurisprudence, in order to place issues in their proper context, and give the discussion its required focus. In this paper, there will be an attempt to explore the relationship between law and morality; the philosophical background or antecedent factors to, as well as the content, that is, the essential elements of the controversy between H. L. A. Hart[1] and Lon L. Fuller[2]

[1]"H. L. A. Hart (Herbert Lionel Adolphus Hart) (1907-1992), was an influential English-speaking legal philosopher of the twentieth century. He is the author of *The Concept of Law,* and was Professor of Jurisprudence at Oxford University. Hart developed a sophisticated theory of legal positivism within the framework of analytic philosophy. Hart also made major contributions to political philosophy." (Culled from H_ L_ A_ Hart - Wikipedia, the free encyclopedia.htm)

[2]Lon L. Fuller, who wrote after World War II, "notably emphasized that the law must meet certain formal requirements (such as being impartial and publicly knowable). To the extent that an institutional system of social control falls short of these requirements, Fuller argues, we are less inclined to recognize it as a system of law, or to give it our respect. Thus, law has an internal morality that goes beyond the social rules by which valid laws are made. Fuller and Hart were colleagues at Oxford University. One of the disagreements between Fuller, a natural lawyer, and Hart, a positivist, was whether Nazi law was so bad that it could no longer be considered law." (Retrieved from "http://en.wikipedia.org/wiki/Jurisprudence"). Although he is

on the "is" and "ought" distinction, in legal philosophy. Finally, the discussion will involve a careful ratiocinative assessment of the two contending positions, with a view to determining whether or not there is any definitive way of responding to, or resolving the interlocking issues contained in the debate, keeping in mind the intricacies of judicial procedures, in relation to the criminal justice system.

Keywords: Is-Ought controversy, H. L. A. Hart, Lon L. Fuller, Philosophy of law, Judicial procedures, Criminal justice system.

Perspectives on Jurisprudence

Some mind-boggling questions among philosophers of law are: "what is law?" and "what should it be?" The theory and philosophy of law (jurisprudence), and scholars of jurisprudence, or legal philosophers, have attempted to attain a deeper understanding of the nature of law, of legal reasoning, legal systems and of legal institutions in general. In jurisprudence one can identify three main variants, besides other subtle distinctions that one may wish to make. First, is the *natural law* position, which maintains that there are unchangeable laws of nature which govern us, and that our institutions should try to match this natural law. The natural law doctrine is very distinct in its orientation, and its homogeneity is united by some resilient core ideas. S. B. Drury identifies the most important ones as follows:

> (1) The conviction that there exists a universal justice that transcends the particular expressions of justice in any given set of positive laws; (2) that the universal principles of justice are accessible to reason and independent of human

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an outstanding defender of the natural law doctrine, Fuller however rejects its Christian version with its metaphysical leanings, likewise its 17th and 18th century rationalist accounts. He aligns himself more with the Aristotelian perspective on natural law (See Ndubuisi, 2002: 102).

> volition (i.e. they are discovered, not made by man); (3) that a positive law contrary to these universal principles is not properly speaking a law, since it lacks the moral content necessary to put us under obligation. In contrast to legal positivists, philosophers of natural law insist that commands accompanied by sanctions are not sufficient to make things legal. Law is binding not simply because it is a command backed by threat, but because of the intrinsic worth of the action commanded. A morally iniquitous law cannot be valid. To be valid, law must have moral content. Natural law theorists therefore insist that the definition of valid or true law cannot be independent of the moral content of the law in question.[3]

Second is *analytic jurisprudence,* which asks questions like, "What is law?" "What are the criteria for legal validity?" or "What is the relationship between law and morality?" and other similar questions that legal philosophers wrestle with.[4] In analytic, or 'clarificatory' jurisprudence, there is the use of a neutral point of view and descriptive language, when referring to the various aspects of legal systems. This variant of jurisprudence rejects natural law's fusing of what law is, and what ought to be. This is where legal positivism, especially of the Hart's sort, belongs. Third is *normative jurisprudence* which explores what law ought to be. It overlaps with moral and political philosophy, and involves questions of whether one ought to obey the law; the grounds on which law-breakers might properly be punished, the proper uses and limits of regulation, and how judges ought to decide cases. [5]

Lon Fuller's Theory of Jurisprudence

In his book, *The Morality of Law*, Fuller presents us with a coherent and stimulating statement of his jurisprudential philosophy. For Fuller, the analysis of law comprises "the basic rules without which an ordered

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[3] S. B. Drury, H.L.A. *Hart's Minimum Content Theory of Natural Law, Political Theory*, Vol. 9, No. 4. (Nov., 1981), pp. 533-546

[4] Retrieved from "http://en.wikipedia.org/wiki/Jurisprudence"

[5] Ibid.

society is impossible…."[6] These are the obligations which must be imposed and accepted as minimal standards of conduct. Law performs its most vital functions in specifying and enforcing such obligations. Soaring above this is the "morality of aspiration," not able to be universally specified, much less imposed on all. Agreement as to the full nature of this second morality is by definition impossible; it is the task of virtuous men to seek individual understanding of its nature and it is expected that, in the course of this search, reasonable men will disagree.

Fuller thinks that the formulation of law should be guided by moral principles which are largely derived from the morality of aspiration. In his attempt to arrive at these principles, he urges that they meet several criteria: Legal requirements should be formulated as general rules, available in advance to the population subject to them, clearly describing the specific instances to which they apply, avoiding contradictions with other legal rules, not requiring impossible conduct, having some measure of stability over time, and relating closely to the official actions aimed at their implementation. Fuller suggests that these characteristics are useful if not necessary conditions for attaining the overriding purpose of law, "subjecting human conduct to the guidance and control of general rules."[7] To the extent that they are met, Fuller feels that they tend to promote justice as well as order. Underlying Fuller's statement is the insistence that any such set of requirements must receive ultimate justification through a demonstration of their utility. In common with all other products of the morality of aspiration, this "internal morality of law" must in principle be appraised functionally. It is on this point that Fuller declares himself in fundamental opposition to the legal positivists – especially H. L. A. Hart, who in his book, *The Concept of Law*, would stress the analysis of existing legal orders before considering their product. But, oftentimes Fuller is considered as not having fully organized his work, and as one

[6] Lon L. Fuller, (1965), p. 5, quoted in Richard D. Schwartz's Reviewed Work(s): *The Morality of Law by Lon Fuller,* in *Annals of the American Academy of Political and Social Science, Vol. 359, Intergovernmental Relations in the United States.* (May, 1965), pp. 190-191.

[7] Lon L. Fuller, Op. Cit. p. 146,.

with eclectic interests which almost became eccentric.[8] One can find a wonderful description of the jurisprudential significance of Lon Fuller in the words of Robert Summers:

> Lon Fuller's position as a major figure in modern legal theory is secure. He is unquestionably the leading secular natural lawyer of the twentieth century in the English-speaking world. His work on legal processes and the principles of legality qualify him as the greatest proceduralist in the history of legal theory. He was also one of the foremost theorists of means-ends relations in legal ordering. He was a major critic not only of British and European positivism, but also of the crudities of the instrumentalist legal theory dominant in the United States, in his day.[9]

For Fuller, a healthy legal system consists of a framework of rules by which autonomous persons are left free to order their own lives in a manner that is compatible with the similar freedom of others. Thus, the function of law is not to direct the citizens towards particular ends, but to provide "guide-posts for self-directed action.[10]" He maintains that the ends we aspire to achieve are limited by the available means to such ends, thus, reinforcing the central value of reciprocity and the primacy of human dignity over expediency and legal ends.[11]

H. L. A. Hart's Theory of Jurisprudence

Hart's book, *The Concept of Law*, is a wonderful text in legal philosophy, in which he identifies the central features of legal systems in terms of which their other features may be understood, with the aim

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[8] Jamie Cassels, *Review: Lon Fuller: Liberalism and the Limits of Law, Reviewed Work(s): Lon L. Fuller by Robert S. Summers, The University of Toronto Law Journal, Vol. 36, No. 3* (Summer, 1986), pp. 318-341.

[9] A Review of *Lon L. Fuller* by Robert S. Summers, (Stanford, CA: Stanford University Press, 1984), p. 151.

[10] Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1965), p. 229.

[11] Jamie Cassels, *Op.Cit.* p.338-339

of showing the relationship between legal systems and other types of social institutions. Orders backed by threats, and predictions of behaviour, do the job of explaining what rules are. And basically, Hart's analysis of legal validity and the existence of a legal system, consists in his distinction between internal and external points of view regarding rules. [12] For a society to have a rule implies the acceptance of the rule, and this does not mean mere moral approval, or a feeling of being bound, but it must also involve, "a reflective critical attitude", that is an internal point of view regarding the conduct specified by the standard; the conduct itself being the external aspect of the rule.[13] He thinks that a society that operates simply on the basis of primary rules of obligation, is subject to three defects: First, uncertainty about the nature and scope of the rules; second: the rules may engender a static character, with the possibility of growth and decay. Third: Inefficiency in the implementation of the rules, since they will be maintained only by diffuse social pressure and there will be no final answer to the question whether or not a rule has been violated. These defects may be remedied by the introduction of secondary rules, namely: the *rule of recognition*, which specifies some characteristics in terms of which the primary rules may be authoritatively identified. Also, the *rule of change*, which provides for deliberate alteration of primary rules, by designating individuals with the authority, under certain conditions, to effect changes, and finally, the *rule of adjudication*, which authorizes individuals to determine, according to specified procedure, when a primary rule has been violated and to ensure its enforcement.[14] So, for Hart, law is *the union of primary and secondary rules*. Furthermore, he feels that the key to the science of jurisprudence consists in the recognition of the relationship between two general types of legal rules: primary rules and secondary rules. Primary rules prescribe or proscribe behaviour, while secondary rules confer the power whereby primary rules may be introduced, recognised, eliminated, changed, or applied. The most important secondary rules are those of recognition, which

[12] Martin P. Golding, *Philosophy of Law*, (New Jersey: Prentice-Hall, Inc., 1975), p.43
[13] Ibid., p. 44
[14] Ibid. p., 44

identify the primary rules of a legal system.[15] For Hart, "the ultimate rule of recognition" of a legal system is the secondary rule that provides the criteria by which all other legal rules are validated, or given their status as rules in the system.[16] In Hart's discussion of the criteria that characterise all rules of obligation, he states:

> Characteristically, rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. So, too, rules which require honesty or truth, or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group, are thought of in terms of either "obligation" or perhaps more often "duty." Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. *Hence, obligations and duties are thought of as characteristically involving sacrifice or renunciation*, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.[17]

Hart mentions two conditions needed for the existence of a legal system in society: First, obedience to the valid law by the bulk of the membership, and second: the *rules of recognition, change and adjudication* must be accepted by the officials. He thinks that the debate between natural law theorists and legal positivists, is primarily about the nature of law. What is at issue is whether law can be understood

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[15] Ibid. p. 78-79

[16] Ibid. p. 102-105

[17] H. L. A Hart, *Legal and Moral Obligations*, p. 85. Here, Hart considers the concept of moral obligation as primarily legal, extended where appropriate, to other contexts, most notably morals. He says: "I propose first to inquire into the character of legal obligation, and then to determine why in referring to certain moral situations, we naturally make use of the legally coloured concepts of obligation and duty." (Hart, p. 84). However, in his work *The Concept of Law*, Hart apparently drops this claim of legal legitimacy, but still views law as the paradigm case of a system that appropriately employs the concept of obligation, (Hart, p. 166).

independently of its content. Traditionally, legal positivists have maintained that "legal norms can have any kind of content and be valid." Therefore, law need not have a moral content to be valid. For example, as Austin put it, "the existence of law is one thing, its merit and demerit another."[18] Thus, no reference to justice or some other moral principles need enter into the definition of law, and even if a legal rule is morally iniquitous or unjust, that does not make it invalid.

Hart is of the opinion that law cannot simply have any kind of content, but must conform to the law of nature, and promote the proper end of man (i.e. his moral perfection); and in an attempt to bridge the gap between the natural law theorists, and the legal positivists, Hart has proposed a "minimum content theory of natural law. Thus, it appears that the most influential advocate of contemporary legal positivism, has recognized in natural law a "core of good sense" [19], if it is "disentangled from its altogether grandiose metaphysical setting."[20] Hart's, *minimum content theory* is derived from five truisms about man: Human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will.[21] An important issue in moral and legal philosophy is that of offering a satisfactory analysis of the concept of obligation. In ordinary language, the word "obligation", is used in several different contexts.[22] It may refer to moral obligation (e.g. "I am morally obligated to keep my promise to help my uncle with his carpentry work"), legal obligation (e.g., I am legally obligated to report as income on my tax return whatever funds I get from my employer"), political obligation (e.g. "I am politically obligated to vote"), or social obligation (e.g., I am socially obligated to write a note of thanks to my weekend hosts"). However, for philosophical purposes, there is need to delineate the concept of obligation a bit more sharply.[23]

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[18] John Austin, *The Province of Jurisprudence Defined*, (London, 1832), Lecture 5, pp. 184-185. See also J.C. Gray, The Nature and Sources of Law (New York, 1909).
[19] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961), pp. 186ff
[20] Ibid. p. 184
[21] Ibid. p. 188
[22] Webster's New International Dictionary of the English Language, 1680, (2nd Edition, 1958)
[23] H. L. A. Hart on Legal and Moral Obligation, in Michigan Law Review, Vol. 73, No. 2 (Dec., 1974), pp. 443-458

The major theme of Hart's *Concept of Law*, is that legal obligation is explained neither by John Austin's view law as a system of habitually followed coercive orders,[24] nor by moral obligation; legal obligations can be both un-coerced and amoral, or even immoral. Instead, Hart views legal and moral obligation as distinct species of the same genus. For Hart, any statement of obligation presupposes the existence of a general "social rule" that covers the particular circumstance that occasioned the obligation.[25] Thus, social rules which impose obligations, are distinguished from all other social rules by three features: First, obligation-imposing rules are supported by serious social pressure. The pressure may involve physical sanctions for deviation from the rule, or it may be entirely psychological, but whatever be its form, "what is important is that the insistence on the importance or seriousness of social pressure behind the rules, is the primary factor determining whether they are thought of as giving rise to obligations."[26]

Secondly, obligation-imposing rules are however different from social rules in the sense that "they are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it."[27] Thirdly, Hart suggests that social rules presupposed by statements of obligation, are distinguished by the fact that they "involve sacrifice or renunciation."[28] For Hart, law is the sphere in which the concept of obligation properly belongs. Thus, it is natural to speak of a duty to do whatever is specified by law, in any given legal system.[29] He is also of the opinion that all persons have a legal obligation to adhere to what the law stipulates. It thus appears that in Hart's opinion, legal obligations are subsumed under the general category of obligations.

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[24] John Austin, *The Province of Jurisprudence Determined* (1832). Austin seems to be the most influential modern exponent of the view that law is a system of habitually followed coercive orders.
[25] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 84
[26] Ibid. 84
[27] Ibid. 85
[28] Ibid. 85
[29] H. L. A. Hart, *Legal and Moral Obligations,* 79-80

The 'Is–Ought' Debate between Hart and Fuller

The "is"-"ought" controversy in the philosophy of law is an issue that has attracted a great deal of attention, discussion, and a wide range of literature. While the natural law remains the basis for making moral evaluations, and natural lawyers emphasize its role in moral questions; this is not exactly the case in legal practice. Here, the principles of natural law are oftentimes ignored or disregarded, for they are seen as similar to the axioms of mathematics, "which hold good even where it is misunderstood or undiscovered."[30] Oftentimes the legal positivists accuse the natural law theorists of conflating legal issues with moral principles. Whereas the natural lawyers maintain that there are immanent norms and values in the nature of things, the legal positivists try to eschew such considerations. Lon Fuller's conflation of "is" and "ought", is first elaborated in his work, *The Law in Quest of Itself*,[31] in which Fuller examines the opposition between legal positivism and natural law theory. He considers the central aim of the legal positivists, as the formulation of an explicit test for identifying the law that is, as distinguished from the law that ought to be, as presented by various positivist writers.[32] On the other hand, natural law theory is defined in terms of the denial of a logical separation of "is" and "ought." He then traces the implications of the two theories for the choice of institutional vehicles of legal reform, with the legislature and administrative agencies placed on one side and the judiciary on the other.[33] The natural law theory, has been used as a basis for moral justification, actions and inactions of political and economic institutions. Thus, the "is"- "ought" controversy, regarding the rationale and moral basis of positive law, as

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[30] F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, (Lagos: Foresight Press, 2002), p. 35

[31] Lon L. Fuller, *The Law in Quest of Itself* (Chicago: Foundation Press, 1940). In Fuller's attempt to expound the thought of Hans Vaihinger in 1931, he writes: "For certain purposes, it is useful to exclude the field of morality from that of law. But again, the separation must be regarded as provisional only. It must be taken for a permanent reality." Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967), p. 107

[32] Kenneth I. Winston, *Is/Ought Redux: The Pragmatic Context of Fuller's Conception of Law, Oxford Journal of Legal Studies,* Vol. 8, No. 3. (Winter, 1988), pp. 329-349.

[33] Ibid., p. 330

well as the root and sanctity of human life, is traceable to the natural law doctrine.[34] The revolutionary content of the natural law doctrine, which emphasized human equality, became more evident in the American declaration of Rights, and in the French Revolution.[35]

For Fuller, the practical meaning of the debate between positivism and natural law is that legislators may be either positivists or natural lawyers, without altering radically the proper conception of their role.[36] It was Fuller's pragmatic perspective to the concept of truth that influenced his stance on the "is" – "ought" controversy. In Fuller's essay, "American Legal Philosophy At Mid-Century, he emphasizes the relationship between his thesis on "is" and "ought," as well as the teleological aspect human affairs. For him, the dichotomy between fact and value breaks down in matters of *purposive conduct*, since a purpose is both a fact and a standard for judging facts. "To such a fact, the logic that tells us it is impossible to deduce what ought to be, from what is, becomes inapplicable.[37]"

In legal positivism, law is regarded as a factual phenomenon, not minding its metaphysical leanings, which invariably have moral overtures. In other words "…certain moral principles, representing how law ought to be, are for the legal positivists, unjustified, insofar as these ideas are not confirmable by verification, experimentation, observation or fact-situations."[38] Consequently, law is seen as free from all moral judgments and evaluations, since morality is within the category of metaphysics. Robert S. Summers offers a picturesque description of the "is" – "ought" controversy in legal philosophy, when he says:

> Legal philosophers also worry over the distinction between "is" and "ought." Two "is-ought" issues currently

[34] F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, (Lagos: Foresight Press, 2002), p. 33

[35] M.D. Freeman, (1999) Lloyd's Introduction to Jurisprudence, (London: Sweet and Maxwell), p.79. Quoted in F. N. Ndubuisi, and O. C. Nathaniel, *Issues in Jurisprudence and Principles of Human Rights*, (Lagos: Foresight Press, 2002), p. 33

[36] Ibid., p. 330.

[37] Lon L. Fuller, "American Legal Philosophy At Mid-Century", (1954), 6, *Journal of Legal Education*, 457-485. The quotation is from p. 470

[38] Ibid., p. 115

> prominent in legal philosophy are (1) whether legal rules belong to the "is" category, and (2) whether it is possible to distinguish between "the law as it is" and "the law as it ought to be." The latter is an issue which some legal philosophers have recently debated in terms of several allegedly interchangeable dichotomies, e.g. "law and morals", "positive law and natural law," "fact and value", "description and evaluation", "order and good order","is and ought."[39]

Inasmuch as it might look strange to many people that anyone could deny that "the law as it is " and "the law as it ought to be" are distinguishable, yet some legal philosophers, including Professor Lon Fuller of the Harvard 0 Law School, have recently argued that, in some contexts, the distinction simply cannot be drawn. [40] In his work *Liberalism and the limits of Law*, Fuller features as a creative and energetic legal scholar, who is difficult to confine to any particular camp of legal thought. Although he is well known for his long-standing attack on positivism, he made profound contributions to the theory of institutional design, legal method, and contract jurisprudence.

Fuller denied the possibility of a clear distinction between law and non-law, and rejected the ethical relativism of the positivists, and sought to re-establish reason in a central place in social ordering.[41] He rejected the positivist distinction between "law as it is", and "law as it ought to be," and the notion that the concept of law could be reduced simply to the authoritative pronouncement of judges or legislators. In his work *Morality of Law*, he argues that the effectiveness and existence of law and legal systems, depend on the degree to which the principles of legality are met. He presents this point with a parable he gives about "a foolish king who fails to make law because his commands are *ad hoc* and insufficiently general, or because his rules are insufficiently publicized, retrospective, unclear, contradictory, impossible to obey,

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[39] Robert S. Summers, *"Is" and "Ought" in Legal Philosophy, The Philosophical Quaterly*, Vol. 13, No. 51. (April., 1963), pp. 157-161

[40] Ibid. p. 157

[41] Jamie Cassels, *Op. Cit*. p. 320

subject to continual amendment, or eccentrically enforced."[42] In this parable he emphasized the importance of the rule of law, and considered his position as that of "procedural natural law"[43] Fuller denies the positivist argument that the legal validity of legal norms depend on their explicit adoption in legislation or judicial decision:

> There are situations in which a custom is so obviously fair and beneficial that no doubt will arise but that it would, in case of controversy, be accepted by the courts as a source of law. The outcome of litigation may be so foreseeable that litigation will not take place. In such a situation, the result of Austin's analysis is to deny the name of law to custom, precisely in those situations in which it is so plainly law, that no legal test of its rights to that designation will be likely to occur.[44]

For Fuller, the internal morality of law is concerned with the ways in which a system of rules for governing human conduct must be constructed and administered, and not with the substantive aims of legal rules, if it is to be efficacious and fulfill its purpose.[45] On the "is" – "ought" controversy, Hart argues for the separation of law from morality, and states his position in the following words:

> I should be less than candid if I did not, in conclusion, consider something which, I suspect, most troubles those who react strongly against "legal positivism." Emphasis on the distinction between law as it is, and law as it ought to be, may be taken to depend upon and to entail what are called "subjectivist" and "relativist" or "non-cognitive" theories concerning the very nature of moral judgments, moral distinctions, or "values…Surely something further or more specific must be said if disproof of "non-cognitivism"

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[42]Jamie,Cassell, *Op. Cit*. p. 320
[43] Ibid. p.321
[44] Lon. L. Fuller, *The Anatomy of Law*, (New Haven, CT: Yale University Press 1986), p. 46
[45] Jamie Cassels, *Op. Cit*., p. 325

> or kindred theories in ethics is to be relevant to the distinction between law as it is and law as it ought to be, and to lead to the abandonment at some point or some softening of this distinction. No one has done more than Professor Lon Fuller of the Harvard Law School in his various writings to make clear such a line of argument and I will end by criticizing what I take to be its central point. It is a point which again emerges when we consider not those legal rules or parts of legal rules the meanings of which are clear and excite no debate but the interpretation of rules in concrete cases where doubts are initially felt and argument develops about their meaning. In no legal system is the scope of legal rules restricted to the range of concrete instances which were present, or are believed to have been present in the minds of legislators; this indeed is one of the important differences between a legal rule and a command… Nonetheless I think (though I cannot prove) that insistence upon the distinction between law as it is and ought to be has been, under the general head of "positivism," confused with a moral theory according to which statements of what is the case ("statements of fact") belong to a category or type radically different from statements of what ought to be ("value statements"). It may therefore be well to dispel this source of confusion. [46]

It still remains an open question however, whether or not the seeming ambivalence of Hart on the question of the relationship between law and morality has any serious implications for his theory of jurisprudence in general. Although a legal positivist, he proposes a *minimum content theory* regarding the natural law, and seems to speak in terms which may create the impression that he was a mitigated legal positivist of some sort.

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46 H. L. A. Hart, "Positivism and the Separation of Law and Morals" From *Harvard Law Review*, Vol. 71 (1958), pp. 513-529

The difference between Fuller and Hart is not simply in the way they described the legal system, but at the level of epistemological and moral commitments. Fuller was committed to a view of persons, and to the ideal of freedom as necessary conditions of a legal system, in a way that a positivist like Hart would hardly accept. The kernel of Fuller's antipathy towards positivism is manifested in his commitment to the ideals of freedom. On the contrary, he sees positivism as built on a self-destructive paradox. Since the positivist movement was dedicated to the enlightenment values of freedom and rationality, they sought to liberate the power of human thought from the bonds of custom, tradition, religion, and metaphysics. In an attempt to bring reason back to earth, to harness it in the service of the best human purposes, the positivists used reason itself, powered by a scientific method and a skeptical empiricism, to sever the "oughts" of a previous age, from the "is" of today. H. L .A. Hart, who is a principal supporter of the positivist position, opposes the arguments of the natural law theorists on the morality of law, and places their argument within the framework of other analogous arguments which he considers as that sharing similar attributes. He asserts:

> There are many contemporary variants of this type of moral theory: according to some, judgments of what ought to be, or ought to be done, either are or include as essential elements expressions of "feeling," "emotion," or "attitudes" or "subjective preferences"; in others such judgments both express feelings or emotions or attitudes and enjoin others to share them. In other variants such judgments indicate that a particular case falls under a general principle or policy of action which the speaker has "chosen" or to which he is "committed" and which is itself not a recognition of what is the case but analogous to a general "imperative" or command addressed to all including the speaker himself…Common to all these variants is the insistence that judgments of what ought to be done, because they contain such "non-cognitive" elements, cannot be argued for or established by rational methods as statements of fact can be,

> and cannot be shown to follow from any statement of fact, but only from other judgments of what ought to be done in conjunction with some statement of fact… We cannot, on such a theory, demonstrate, e.g., that an action was wrong, ought not to have been done, merely by showing that it consisted of the deliberate infliction of pain solely for the gratification of the agent. We only show it to be wrong if we add to those verifiable "cognitive" statements of fact a general principle not itself verifiable or "cognitive" that the infliction of pain in such circumstances is wrong, ought not to be done…Together with this general distinction between statements of what is and what ought to be go sharp parallel distinctions between statements about means and statements of moral ends. We can rationally discover and debate what are appropriate means to given ends, but ends are not rationally discoverable or debatable; they are "fiats of the will," expressions of "emotions," "preferences," or "attitudes." Against all such views (which are of course far subtler than this crude survey can convey) others urge that all these sharp distinctions between is and ought, fact and value, means and ends, cognitive and non-cognitive, are wrong.[47]

The positivist methodology ended up undermining the very political ideals that they were supposed to uphold and defend, and for Fuller, this was a case of throwing out the baby with the bath water.[48] By and large, it is noteworthy that the pragmatic account of knowledge, which Fuller seems to support, and which has greatly influenced his theory of jurisprudence, has gained currency in contemporary philosophical discourses. Thus, Fuller's contributions in the area of legal philosophy remains an important and significant one, with the probability of a large receptive audience.

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[47] H. L. A . Hart, "*Positivism and the Separation of Law and Morals"*, 71, Harvard Law Review, 593, 618-21 (1958)
[48] Ibid. p. 330

Judicial Procedures and the Criminal Justice System

The ‘is–ought’problem, as articulated by Scottish philosopher and historian David Hume (1711–76), states that many writers make claims about what ought to be on the basis of statements about what is. Hume found that there seems to be a significant difference between positive statements (about what is) and prescriptive or normative statements (about what ought to be), and that it is not obvious how one can coherently move from descriptive statements to prescriptive ones. A similar view is defended by G. E. Moore's open-question argument, intended to refute any identification of moral properties with natural properties. This so-called naturalistic fallacy stands in contrast to the views of ethical naturalists. Wouldn't it be more efficient to have a single system that avoids the complexity and wasteful duplication of two separate and distinct systems, a single system in which condemnation and punishment (and damages) could be imposed when deserved and in which only damages could be awarded when condemnation and punishment are not deserved? And, given the great diversity of legal and societal cultures, wouldn't one expect that some societies would develop such a unitary system? Wouldn’t one expect that some legal system s would use the criminal-civil distinction while others would not?

The State or federal government brings criminal charges against parties that are accused of violating the law, and civil actions are non-criminal acts brought against those accused of violating private rights. Examples of cases considered under criminal law are: murder, kidnapping, embezzlement or theft. Examples of cases considered under civil law are: breach of contract, compensation-related cases and fraud, etc. The term criminal needs to be considered. What separates criminal from non-criminal acts, or actions that are subject to a civil or administrative process rather than a criminal process? The correct answer, albeit unsatisfying, is in the form of a tautology. A criminal act is that which has been defined by a state as a crime and subject to criminal penalties. What is and is not a crime varies across time and by country, as do the penalties associated with crime. As pointed crime and criminals are societal definitions: they are recreated, affirmed, and mobilized in the daily lives of ordinary citizens, not just those workers in the justice system. We may define the criminal justice system in this

way: a loosely coupled collection of interdependent agencies, each having bureaucratic interests, and each having specific functions (which can be in conflict with other agencies) that are subject to legal regulations, where agency workers have great discretion in making decisions when responding (or not responding) to harms defined as criminal by the state, and where value conflicts exist within and across agencies and in the general population about the meaning of justice. This is a long and complicated definition, and for brevity's sake, we shall use the shorthand phrase criminal justice system, while being mindful of the complexity and controversy associated with each term. Writing in the 1960s, when major changes were taking place in the United States criminal justice system, Packer (1968:150) observed that ―we are faced with an interesting paradox: the more we learn about the Is of the criminal process, the more we are instructed about its Ought and the greater the gulf between Is and Ought appears to become‖.

As an example of the Is and Ought, Packer pointed out that while at the time, few suspects got ― adequate legal representation‖ (the Is), a United States Supreme Court decision in the 1960s made it a requirement that everyone charged with a felony (that is, an offence punishable by more than one year of incarceration) should receive adequate legal representation (the Ought). Although the evolution of rights and protections accorded citizens accused of crime differs in the United States and Australia, Packer's discussion of different values in the criminal process is relevant to Australia. Packer depicted two value systems in the criminal process, calling them the Crime Control Model and the Due Process Model. The Crime Control model is concerned with the efficiency of the criminal process, whereas the Due Process Model is concerned with the accuracy and reliability of the decisions made. An efficient criminal justice system calls for weeding.

The most remarked upon feature of the criminal justice system is its complexity. It is not one, but many things; it announces not one, but many goals. Its overarching purposes are instrumental and symbolic: to change the person (or social conditions) that made the wrong possible and to announce that offending is wrong. The system announces goals of both individualized treatment of offenders and equal treatment of like crimes. Specifically, one imperative is to fashion responses to individuals based on their circumstances and potential for

reform (individual based, crime prevention). This is joined with a second imperative, which is to punish like offences the same and in proportion to the harm (offence-based, desert). What morally ought to be is often quite different from the actual state of affairs in the world. A thief steals, a murderer kills, and so on. People aren't actually doing what they ought to do. How can a state of affairs that ought to exist be said to be a fact when what ought to be the case is often quite different from what actually exists or happens in the world? Anti-realists see no good answers for these questions, but they think anti-realism can solve the problem by avoiding it. If there are no moral facts, then we no longer need to answer these questions. How can we know what morally ought to be the case? Hume was an empiricist, so he thought we could only know about reality through observation. What we observe isn't necessarily what ought to be. The actual state of affairs in the world can be quite different that what people morally ought to do. We do know what the case is, because we can observe it. Looking at what is the case—the actually obtaining non-moral facts—doesn't seem to tell us what ought to be the case. So, it's not obvious how we can know what morally ought to be the case assuming that it's a moral fact. Anti-realists think that we can avoid this problem entirely by becoming anti-realists and admitting there are no moral facts. Judicial procedures in different parts of the world, particularly in Nigeria, need to be more attentive to enduring challenge posed by this *"Is-Ought"* distinction, given its capacity to engender miscarriages of justice in some cases, apart from blurring the vision of legal luminaries on how law and morality synergize. It is a real scenario of the dilemma of legality and the moral limits of law, awaiting a resolution.

Concluding Reflections

The principles of natural law provide a rallying point for law and morality. They are both binding and enforced in various forms in different human societies. Thus, it is necessary that a legal system properly so-called, should contain at least the *minimum content* provided by the natural law principles. This view seems to receive a positive acceptance even from H. L. A. Hart, who is a legal positivist, for he refers to this as the "core of good sense" in the doctrine of natural

law.[49] If men are to live in society, they require rules that ensure the protection of persons and property, and guarantee a certain degree of mutual forbearance and respect for the interests of others. These rules are fundamental to the legal system, and without them, the need for other rules would be out of the question.[50]

At any rate, the relevance of the natural law doctrine, cannot be over-emphasised, either in its classical (metaphysical) form, or in its revolutionised (secular) frame. It has helped in checkmating the abuse of power (dictatorship), for emphasising fundamental human rights, the sacredness of human life, and human welfare in general. The 'is–ought' controversy discussed in this paper is essentially a treatment of the possibility of a relationship between morality and law, and what the nature of that relationship might be.

The debate is an open-ended one, without any definitive answer to the various issues involved; and depending on which side of the divide one belongs, one could argue either for, or against the possibility/reality of a successful or unsuccessful conflation of "is" with "ought." The debate between Fuller and Hart, on the "is" and "ought", or the factual and prescriptive dimensions to law, is indeed an important one, and its relevance to contemporary cases cannot be over-emphasized. But, whether or not there are persuasive or compelling arguments used to justify criminal offences in the law court, is nothing extra-ordinary. Much more important is the reality of the fact that even when a case is won, on merely technical and sophistical grounds, the victory is indeed a failure, by some other standards, since law is meant to protect and preserve the dignity of the human person, rather than diminish it through arguments that are inimical to the integrity of human life and values. Both the natural lawyers and the legal positivists have to consider seriously the question of the appropriate relationship that needs to obtain between law and morality in the society, rather than simply try to wish it away, or get into unnecessary and knotty semantic tangles with each other. Law and morality are useful, and their distinctive integrity should be preserved, such that none is relegated in place of the other.

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[49] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 189-95
[50] Martin P. Golding, *Philosophy of Law*, (New Jersey: Prentice-Hall, Inc., 1975), p.33

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