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From Legal Positivism to Neo-Liberal Scientism: A Metaphysical Defence of Moral Law and the Inseparability Thesis

Kizito Michael George

ORCID ID: <https://orcid.org/0000-0002-4398-1991>

Department of Religious Studies and Philosophy, Kyambogo University, Uganda

Abstract

Despite decades of contentions between moral legalists and legal positivists about the place of morality in law, moral law has vehemently stood out as the end of history. The scientific experiment has despondently failed to logically evict the moral law from the jurisprudential discourse. This research article posits that moral law is the End of History as far jurisprudential evolution is concerned. It argues that the mechanization of law through the positivistic experiment is a moral debacle dented with logical inconsistencies and insurmountable fallacies. It thus uses the inseparability thesis to demonstrate the *pivotality* of moral law in every positive jurisprudence superstructure. It contends that law appeals to our moral sensibilities because it pre-supposes a conscience in the law giver, the law enforcer and the citizen who is supposed to abide by the law. This Ought necessity therefore makes the trio morally credible to legislate, enforce the law and be legally bound by the principles and precincts established by the law.

Keywords: Inseparability thesis, Legal positivism, Metaphysics, Moral Law, Neo-liberalism, Scientism.

Introduction

The magnanimous achievements of the physical and biological sciences in the 19th century especially as evidenced by the technological advancements in medicine, engineering and transportation lured many scholars into speculating that these sciences were special and superior to other disciplines (Chalmers, 2004, p.2). The natural sciences were thought to be superior because of their emphasis of the positive methodology. Science was thought to be based on facts derived from the unprejudiced use of senses unlike metaphysics and religion which are based on speculation and dogma. Consequently, several branches wanted to associate themselves with science. These included: creation science, library science, administrative science, speech science (Chalmers, 2004, p.3), economics and law. This obsession with science rendered Development Economics an authoritative science of development. Similarly, the association of law with science led to the emergence of a school of thought known as legal positivism. This school of thought defended the factuality of law by arguing that law is a result of social convention or social practice and is separate from morality (separability thesis) (Alexy, 2008, p. 285).

The neo-liberalisation of economies *scienticised* the developmental state and hence reinforced legal positivism. For instance, in neo-liberal economies, a number of positivist judges have been reluctant to pronounce themselves on the violation of economic and social rights such as: the right to water, right to food, right to adequate housing and right to health. This is because this might impinge on the operations of the market which is believed to be a scientific process that steers states towards economic development.

A Metaphysical situation of moral law

Moral law or natural law or natural moral law refers to the ought necessity or inner voice or conscience¹ that directs our actions towards an ethical orientation. This ought necessity is not deterministic like natural physical law (e.g. the law of gravity) in the sense that human beings are free to rebel against it or act contrary to it. Kant argues in his *Metaphysics of Morals* that rebellion against this ought necessity leads to moral guilt (Kant, 1797, p.399). According to Kant, conscience is an inner court of judgment which comprises the accuser, defender and judge. Kant opines that, "conscience is practical reason holding the human being's duty before him for his acquittal or condemnation in every case that comes under a law" (Kant, 1797, p.400).

The ought necessity makes us moral beings and not amoral beings because we have the freedom to choose or not to choose alternatives suggested by the moral law. Animals like our so-called close relatives the monkeys and apes do not have this moral law in them. They simply act basing on instinctual automatism. This is the reason why they are not legally culpable under law. This also explains why they travel in the cargo area of the aircraft as we humans sit in the cabin. The moral law has a deontological foundation because it looks at human actions as they in themselves and not according to their consequences. For example, rape and defilement are wrong in themselves because sex pre-supposes consent between the parties involved. Murder of an innocent person and slavery are also wrong because they violate the inherent dignity of the human person and the sanctity of human life.

Michael Bertram Crowe, describes natural law as "an unwritten law, which is superior to and is the measure of man-made law" (Wallin, 2012, p.60). It constitutes, "the unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed" (Wallin, 2012, p.16). Daniel Chernilo (2013, p.74) on the other hand defines natural law as "a general framework that centers on the ways in which peoples have imagined, and sought to foster, a sense of common human identity and belonging that includes all human beings." He avers that, natural law is "a universal set of laws that are valid irrespective of place, time or culture" (Chernilo, 2013, p.74).

According to John Finnis, natural moral law refers to "the set of principles of practical reasonableness in ordering human life and human community (Finnis, 2011, p.280)". He argues that first principles are those basic reasons which identify the basic human goods as ultimate reasons for choice and action (Finnis, 2011, p.280). Boyle on the other hand opines that "natural law is believed to be a rational foundation for moral judgment" (Boyle, 1992, p.4). It refers to a set of universal prescriptions whose prescriptive force is a function of the rationality which all human beings share by virtue of their common humanity (Wallin, 2012, p.62). He further opines that these principles constitute the fundamental ground for moral life and judgment (Wallin, 2012, p.62).

Moral Law and the Dialectics of Socialization

Humans are social by nature and this sociality can temporarily condition the moral law. In society, humans undergo primary socialization which takes place at home and is done by parents, siblings, uncles, aunts, grandparents and close relatives and secondary socialization which is controlled by other power centers outside the home such as: schools, social clubs, churches, mosques and social media. These kinds of socialisation can confuse and sometimes perplex the moral law or conscience, but this does not mean that it lacks the capacity to re-discover its true self. For example, a notorious Ugandan rebel leader Joseph Kony used child soldiers between 5-8 years to kill fellow children and adults. A child or adult who was trying to escape from captivity once caught would be killed by decapitation by these children. A number of these children were born into captivity and socialized into killing from a young age. The children themselves confessed that what they did was wrong and are so traumatized by such evil acts. The aim of centers set up to rehabilitate these children is to help them re-discover the true moral law that has not been corrupted by socialisation. It must be noted that sometimes, socialisation reinforces the ethical orientations of the moral law because it is itself founded on the moral law. However, in several incidences it negates the moral law.

¹ The moral law or ought necessity is also called the voice of God.

Human sociality and the moral law

Plato and Aristotle argued that human beings are social by nature because they need each other to fulfil themselves. They are certain existential needs that human beings cannot provide for themselves without society. The possession of a language is indicative of the fact that human beings are naturally social moral agents. The sociality of human beings does not mean that they lack individuality. Human beings have an individuality that is limited because of the individuality of the other human beings in society.

The limitation of the communicative nature of individual persons invokes the necessity of duty in the fulfilment of our existential ends. Human beings have rights as individuals but also duties towards society. These duties include: the duty to obey the law, the duty to respect the rights of others, the duty to respect the inherent dignity of others and the duty to respect the personness, humanity, and equality of others. The natural moral law in individuals makes these *pro-tanto* duties explicit and self-evident.

The conscience in human persons orients them to their need of others if they are to realize themselves as free dignified persons. It is not positive law that orients persons to their social dimensions. The purpose of positive law is to lay down clear penalties and sanctions against those who exaggerate their individuality at the expense of social intercourse. Positive law also comes in to harmonize the sociality and individuality of human persons. For instance, having a duty to pay taxes which run the affairs of the state does not mean that I should unnecessarily be overtaxed.

Legal positivism and the confusion between morality and ethics

Legal positivists argue that there is "no necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other" (Alexy, 2008, p.285). Joseph Raz opines that "what is law is a matter of social fact, and the identification of law involves no moral argument, it follows that conformity to moral values or ideals is in no way a condition for anything being a law or legally binding. Hence, the law's conformity to moral values and ideals is not necessary. It is contingent on the particular circumstances of its creation or application" (Raz, 2009, p.38).

Legal positivists seem to be unclear about the distinction between morality and ethics. This explains the logical error in their assertion that law is separate from morality. Morality simply means *DOs* and *DONTs* in society. The *DOs* include: respect the others, share with others, be empathetic and sympathetic towards others and love others as you love yourself. The *DONTs* include: do not commit adultery, do not commit incest, do not murder, do not steal, do not lie, and do not have sex with a beast or animal. These *DOs* and *DONTs* are what H.L.A. Hart has called primary rules. Their morality stems from the fact they are intended for free moral agents and not amoral beings such as animals, birds, and insects.

Ethics on the other hand is a critical reflection of morality and that is why it is called reflective morality or moral philosophy. There is a need for a critical reflection on morality to make it in tandem with moral law. Morality might contain privations of the moral law such as: slavery, apartheid, tribalism, sexism and racism. Ethics therefore rationalizes morality so that it is par with natural moral law. Morality sometimes derives from the moral law because socialisation of the conscience sometimes perverts and perplexes this ought necessity. Therefore, rational reflection is an attempt by human beings to re-discover their true moral law situated self. Secondly, as already intimated, human beings can reject the orientation of the moral law. This definitely brings about privations of the ought necessity.

The Medieval inquisition against science and moral law scepticism

The medieval era was characterized by persecution of anti-Catholic philosophical reason and scientific reason. During the over 1000 years of the medieval Dark Age, both philosophy and science stagnated greatly due to epistemological authoritarianism. In this epoch, the Catholic Church became both a religious and political authority. The Catholic Church superimposed a THEO on the Greek Cosmos and hence created a new authority on knowledge called FAITH.

St. Augustine for instance, argued that the world cries out that it was created and even cries out louder that it did not create itself. In his doctrine of *The Two Cities*, he argues that the city of God should superintend over all the affairs in the city of man. By this he meant that the church which was an authority on divine affairs should mediate over all the intellectual, social, legal and political affairs of the state. According to St. Augustine, "that which is not just seems to be no law at all. Hence the force of a law depends on the extent of its justice. ... Every human law has just so much of the nature of law as it is derived

from the law of nature. But if in any point it departs from that law of nature, it is no longer a law but a perversion of law (Dominicans Order of Preachers" (n.d).

Galileo Galilei was almost killed by the Catholic Church for trying to create a 'Copernican' revolution in science. He used his telescope to challenge the geocentric perspective of the church. According to this perspective the sun moves around the earth. Galileo proved that it is earth that moves around the sun. His heliocentric view was greatly persecuted by the Catholic Church. Also, several protestant intellectuals were killed or imprisoned for translating the bible into different versions. One of the fundamental contributions of medieval philosophers was the defence and articulation of moral law. St. Thomas Aquinas for instance defined law as; an ordinance of reason for the common good promulgated by one entrusted with the care of society. According to him, law is an order not a suggestion or request, it must be reasonable, it is for the good of all and must derive from a legitimate authority (Finnis, 2005).

St. Thomas Aquinas categorically argued that law is inseparable from morality. He contended that human law should not contradict eternal law, divine law and natural law. Aquinas also argues that laws are unjust by being contrary to the human good and by being opposed to the divine good. Laws that are contrary to the human good come about when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity [avarice, greed] or vainglory (Dominicans Order of Preachers, n.d)).

Rene Descartes who was situated at the fringes between the renaissance and modern philosophical epoch came up with a methodic doubt approach to derive a new authority on knowledge. He doubted everything including his own existence until he concluded that he could not doubt that he was the one doubting hence the dictum; *cogito ergo sum* (I think therefore I'm) (Gathogo, 2008). He arrived at this conclusion through reason. Hence reason became the new authority on knowledge in the modern period.

The modern period was characterized by the growth of scientific reason and a rejection of religious dogmatism and moralism. It was also characterized by the rise of positivism and skepticism against the moral law. The positivist Karl Marx for example argued that society was evolving dialectically (due to scientific blind forces) from primitive communalism, to slavery, feudalism, capitalism, socialism and communism. According to his theory of dialectical materialism, law is the interest of the dominant class. For instance, in the feudalism epoch law is in the interest of the landlords and in the capitalist era, law is in the interest of the bourgeoisie. Marx's analysis evicted morality and the moral law from law making. He vehemently referred to religion as the opium of the people.

Karl Marx contradicts his deterministic scientific theory by arguing that at one time the proletariat or working class will become conscious of their exploitation by capitalism and they will revolt against capitalism. As a result, capitalism will break its neck and a socialist era will arise. Marx contradiction is indicative of the indispensability of moral law in jurisprudence. Marx implicitly admits the facticity of freedom of conscience or the moral law in the revolution against capitalism. He tacitly admits that human beings are free moral agents and not robots controlled by blind, deterministic scientific forces.

Legal Positivism is premised on the intellectual paranoia that tends to associate morality and ethics with medieval church authoritarianism. The overthrow of medieval dictatorship by science has created a positivist epistemological authoritarianism that has *scientifically* disciplines such as: arts, humanities and social studies like law, political science and economics. Positivism is therefore a political project that aims at undermining religion, morality and ethics. It is similar to the politics of patriarchy. Despite the exposition of the logical incredulities of patriarchy, patriarchal authoritarianism has persistently continued to dominate academic theories and discourses as well as political, economic and cultural spaces. Critical discourse analysts have argued that dominant forces achieve their interests by imposing their oppressive views on the world to control the thinking of the oppressed (Smith & Bell, 2007, p.78-100).

From the Magna Carta of 1215 to The American Declaration of Independence of 1776

The Magna Carta (Great Charter) was the earliest legislative effort to recognize the equality and justice for all humanity irrespective of social status. The Charter categorically stated that everyone, including the king is subject to the law. The charter guaranteed the right of individuals to justice and a fair trial. Although the charter can be criticized for giving the barons and the king more privileges and guarantees, it was a moral defence for the equality and common humanity of mankind. The charter came up during the medieval Dark Age and was banned by Pope Innocent III.

The American Declaration of Independence of 1776 was a clear and robust articulation of moral law and the inherent dignity of common humanity. The Declaration categorically stated that:

We hold these truths to be self-evident, that all men are **created equal**, that they are endowed by their Creator with certain **unalienable Rights** that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The declaration echoes God as the author of moral law which comprises of self-evident truths such as: equality of humanity, unalienable rights and government by consent. Any government that violates the moral law lacks the legitimacy to exist and thus should be overthrown and replaced by one that is founded on the moral law. The declaration is an explicit critique of slavery and colonialism as moral vices which impinge on the liberty and pursuit of happiness of a people because they do not arise from the consent of the people.

The Civil Rights Movement as a Negation of Legal Positivism

The Civil rights movement in the US in the 1950s and 1960s was an affront against positivistic legislation that negated the moral law enshrined in the American Declaration of Independence. These legislations included the Jim Crow laws which mandated separation of whites and African Americans. Jim Crow legislations included the Florida Constitution of 1885 that mandated a separate education system and laws in Texas that required separate restrooms, fountains, and waiting rooms in railway stations. In Georgia also, separate restaurants were required for each race and well as separate cemeteries (De León & Calvert, 2021) and the Louisiana Separate Car Act of 1890 required separate accommodations for blacks and whites on railroads and railway cars.

Other diabolical positivistic laws were the miscegenation state laws which prohibited interracial marriage and interracial sex. Hannah Arendt argued that miscegenation laws were a deeper injustice than racial segregation in public schools. She reiterated that the free choice of a spouse is fundamental to political rights like the right to vote because it is related to the inalienable right to life, liberty and pursuit of happiness which are proclaimed in the Declaration of independence (Arendt, n.d). Despite her controversial analysis of the Little Rock saga, Arendt's above perspective points to the inseparability of positive law from moral law which protects the inherent dignity of all human persons irrespective of colour, race, gender and social status.

The Separate but Equal constitutional law doctrine in the United States was premised on the contradictory argument that racial segregation did not necessarily violate the right to equal protection under the law for all people enshrined in the Fourteenth Amendment to the United States Constitution (Patterson, n.d). The doctrine states that as long the facilities provided to each race were equal, states and local governments could require that services, facilities, public accommodations, housing, medical care, education, employment and transportation be segregated by race (Patterson, n.d). The doctrine was confirmed in the *Plessy v. Ferguson* 1896 case² and declared unconstitutional in the *Brown v. Board of Education* 1954 case.³

The Civil Rights Act of 1964 invoked the moral law principles enshrined in the Declaration of Independence by outlawing discrimination based on race, colour, religion, sex and national origin (Back, 2020). It also prohibited racial segregation in schools, employment and public accommodations. The Act also guaranteed the right to vote for all Americans by prohibiting unequal application of voter registration requirements (Back, 2020). The Act

² Plessy v. Ferguson, 163 U.S. 537 (1896).

³ Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

entrenches the moral law doctrines promoted by the Declaration of Independence that had been hijacked by ethics-less positive law legalism.

Are slavery, colonialism, racism, apartheid and patriarchy mere amoral social facts?

The above five fallacies have been supported and reinforced by ethics-less legal positivism. According to legal positivism, the evils of colonialism, slavery, racism, apartheid and patriarchy are mere social conventions that cannot be characterized as good or bad, moral or immoral, right or wrong. Today, there is an intellectual consensus that these five fallacies are vices that violate the inherent dignity and human persons. They are therefore illegal according to the moral law and ought to be illegalised by positive law.

The United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) invokes the moral law in its affirmation that all the peoples of the World are entitled to fundamental rights as well as dignity and worth of the human person.⁴ This morally binding or soft law instrument categorically states that all peoples have an inalienable right to complete freedom and the exercise of their sovereignty and integrity of their national territory.⁵

Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) also categorically states that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous."⁶ This legally binding or hard law instrument further argues that "... there is no justification for racial discrimination, in theory or in practice any where."⁷ Article 1 of The United Nations Declaration on Race and Racial Prejudice (1978) also states that, "All human beings belong to a single species and are descended from a common stock. They are born equal in dignity and rights and all form an integral part of humanity." The article further declares that the diversity of lifestyles and the rights to be different should not be used as pretext for racial prejudice in law or practice and should not provide a ground for the policy of apartheid, which is the extreme form of racism.

Positivism is responsible for the legalisation of vices, such as slavery, apartheid and racism. It is a nihilistic philosophy that assumes that killing of God by science has led to the emergency of a superman who is an amoral legislator. Legal moralists persistently argue that God infinitely reigns in the conscience of human persons and can never die or become irrelevant because of the upsurge of science. They thus advocate for virtuous legislation such as Equality and equity laws, Social justice laws, Anti-patriarchy, Anti-racism, Anti-slavery, Anti-apartheid and Anti-colonial legislation.

Positivism is a philosophy that aims at hiding injustices, vices and crimes against humanity under the so-called determinism of science. It tends to justify injustices and crimes against humanity as mere unavoidable evolutionary necessities. This means that the lowest stage of human evolution inevitably leads to the propagation of vices such as: racism, apartheid, slavery and colonialism. Thus, the slavery, colonialism, racism and apartheid that blacks have suffered are necessary as human beings evolve to better and superior minds.

Nazism, Eugenics, and the Emergence of Moral Law in International Human Rights Law

The crimes against humanity committed by the Nazis in the 1930s and 1940s and the diabolical violation of human rights and human dignity espoused by the scientific experiments on human beings and the genocide against the Jews was indicative of the dangers of ethics-less science and legalism. Using their science of Eugenics, the Nazis

⁴ P.1 *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960).

⁵ Para 11 *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960).

⁶ Para 6 *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).

⁷ Para 6 *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).

postulated that some people are inferior by nature and others are superior by nature. Only the superior had the right to survive.

The inferior persons such as: Jews, gypsies and blacks, disabled person and persons with hearing and learning impairments were a burden to the state and had to be gotten rid of. The Nazis made laws that led to the sterilisation of inferior persons and enforced these laws with impunity. The Nuremberg trials against the Nazis were a re-affirmation of the need to promote and protect the sanctity of moral law and moral rights which are also called fundamental rights. In his book *Mein Kampf* (1934), Adolf Hitler made reference to American eugenics. He argued that everything including genocide should be done to produce a superior Aryan race. In the USA, eugenics had started as far as the 19th century. For example, in 1896, Connecticut made it illegal for persons with epilepsy and the feeble minded to marry (History.com, n.d). Furthermore, from 1909 to 1979, about 20,000 sterilizations occurred in California's mental Institutions under the pretext of protecting society from people with mental illness. In 1927, the US Supreme Court ruled that forced sterilisation of the handicapped does not violate the US Constitution (Lombardo, n.d). Supreme Court Justice Judge Oliver Wendal Holmes, a prominent legal positivist retorted that "... three generations of imbeciles are enough". The above ruling was overturned in 1942 after thousands of people had been sterilised (History.com, n.d).

Gustav Radbruch attributed German subservience to Nazi law to legal positivism. He opined that many Germans held that "law is law," and a law is a valid law even if morally terrible. According to him, therefore many Germans were willing to comply with Nazi legislation. Gustav's "... considered reflections led him to the doctrine that the fundamental principles of humanitarian morality were part of the very concept of Recht or legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality" (Simon, 2000, p.2).

More so, a prosecutor for the Allies at the Nuremberg trials, Robert Jackson argued that Nazi war criminals should be tried and punished, not simply because of violations of positive law, but also because of the immorality of their actions. According to him:

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. ... When I say that we do not ask for conviction unless we prove crime, I do not mean mere technical or incidental transgression of international conventions. We charge guilt on planned and intended conduct that involves **moral as well as legal wrong**. The refuge of the defendants can be only their hope that International Law will lag so far behind the **moral sense** of mankind that conduct which is crime in the **moral sense** must be regarded as innocent in law (Larry & Jeff, 2010, p.435).

The defeat of the Nazis in the Second World War lured states to form the United Nations (UN) Organization as a global entity mandated to promote international peace and international human rights for all human beings without discrimination. The 1945 United Nations Charter clearly echoes these fundamental objectives in its preamble. In 1948, the United Nations promulgated the Universal Declaration of Human Rights(UDHR) which demonstrates a clear paradigm shift to moral law. Paragraph eight of the preamble calls the UDHR a universal standard of achievement for all peoples and all nations in the world. The first paragraph of the preamble of the UDHR categorically promotes and protects the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. Paragraphs 1 and 2 of the ICCPR and UDHR also re-affirm that human rights derive from the inherent dignity of the persons and also recognizes the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. Article 1 of the UDHR states that: "All human beings are born free and equal in dignity and rights. They are endowed with **reason** and **conscience** and should act towards each other in a spirit of brother hood."

The nuances: conscience, inherent dignity and inalienable rights clearly affirm the fundamentality of natural moral law in promotion and protection of international human rights. The trio are indicative of a tacit rejection of the legal positivism

espoused by the Nazis, eugenicists and other legal conventionalists. They also portray a situation of moral law as the foundation of all international human rights. In 1966, two legally binding (hard law) human rights instruments were derived from the morally binding (soft law) UDHR. These instruments are known as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social and Cultural Rights (ICESCR).

A number of states with dualistic legal systems have not only stopped at ratification of these instruments but have also rendered these two hard law instruments justiciable by enacting enabling laws to domesticate the various provisions of these legal instruments. The functionality of natural moral law in International Human Rights Law logically benchmarks it as the end of the evolution of the jurisprudence. This is attested by the fact that even positive international human rights instruments such as the ICCPR and the ICESCR are founded on moral law.

The inalienability of fundamental rights

Fundamental human rights are called fundamental because they lie at the foundation of our being. Without them, our humanity and personages are in jeopardy. These rights include: right to life, freedom from slavery, freedom from torture and degrading treatment and punishment, freedom of expression, freedom of opinion, freedom from discrimination, right to be treated as a person before the law, right to privacy and freedom of movement among others. Article 20 of the 1995 Uganda constitution states that fundamental rights and freedoms of the individual are inherent and not granted by the state. These rights are given by God who is the author of the moral law. The moral law which is inherent in human persons helps them to know these rights through the faculty of reason and requires all human beings to respect and protect these rights. Fundamental or moral rights are inalienable because they cannot be completely violated and annihilated by the state or other individuals in society. This is because even if the state imprisons an individual for holding to a certain opinion, the individual stays in prison with his opinion and even if this individual is killed for holding that opinion, the same individual dies with that opinion and goes to the world of immortals with his opinion. Therefore moral rights are inalienable.

The inseparability of moral law from positive law

Legal positivists like Hart used the separability thesis to argue that law is separate from morality. They have also averred that law is a result of social convention or practice and not social morality. In his book; *The Province of Jurisprudence determined* (1932), Austin aims at making jurisprudence scientific and hence descriptive. He opined that only genuine laws are the proper subject for a science of jurisprudence. According to him the existence of law is one thing; its merit or demerit is another (Austin, 1954, p. 184). John Austin elucidates the ethics-less nature of law by defining it as a series of commands issued by the sovereign and backed by sanctions. For Austin, a sovereign is an entity that is habitually obeyed by most of the population and that itself does not obey any other (earthly) entity. His theory of law has come to be called the Command Theory of Law. He compares law to a legal gun man who threatens to use violence if his commands are not obeyed. Austin's definition implies that the commands issued by Adolf Hitler to exterminate the Jews were not only legal but also lawful although they entailed a violation of the moral law. According Austin, Law is descriptive (IS) and absolutely has no OUGHT⁸ or normative dimension. He discomfort with the moral law is evident in his reiteration that:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment (Austin, 1954, p.53).

Austin seems to echo David Hume's perspective that we cannot derive the OUGHT from the IS without indulging into subjective moral sentiments (Morris, 2001). According to David Hume, the "IS" is objective whereas the OUGHT is biased and subjective. Hume argues that: "...when you pronounce any action or character to be vicious, you mean nothing, but that from

⁸ In philosophy, Ought implies can, "the principle according to which an agent has a moral obligation to perform a certain action only if it is possible for him to perform it."

the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it(Hume, 1739)". Hume did not anticipate the objective moral law which is the foundation normative judgments. The term positivism comes from the Latin words *pono-ponere* which mean to lay down or put down. Positive law therefore refers to law that has been laid down by the state or sovereign authority. Positive law aims at overcoming the abstractness, ambiguity and arbitrariness of moral law. It therefore aims at laying the law down so that it is understandable using sense experience or knowledge. Positive law manifests itself in legal instruments such as: national constitutions, statutes, law of torts, civil procedure, criminal procedure and international human rights law instruments. Habermas (1986) rejects the idea that positive law can maintain its autonomy based merely on the doctrinal compliments of a faithful judiciary. He opines that:

Moral argumentation penetrates into the core of positive law, which does not mean that morality completely merges with law. Morality that is not only complementary to but at the same time ingrained in law is of a procedural nature; it has rid itself of all specific normative contents and has been sublimated into a procedure for the justification of possible normative contents. Thus a procedural law and a proceduralized morality can mutually check one another (Habermas, 1986, p.247).

Positive law is inseparable from moral law (Alexy, 2002, p.3) because it pre-supposes that the legislator, enforcer and subject of the law are moral agents who have the capacity to perform right actions and thus can be held responsible for the moral evils of omission and commission. A moral evil of omission is committed when one knows the right thing to do but goes ahead to do the wrong thing. On the other hand, a moral evil of commission is done when one deliberately participates in doing the wrong thing. The moral law or conscience is responsible for making us moral agents with the credibility to legislate, adjudicate, abide by and reform positive law. This means that all positive judicial decisions presupposed a conscience driven rational moral agent.

H. L. A Hart and the daunting challenge of moral Law

In his famous publication; *The Concept of Law* (1961), the positivist Herbert Lionel Adolphus Hart opines that there is no necessary logical connection between the content of law and morality. According to him, the existence of legal rights and duties may be devoid of any moral justification (Hart, 1994, p.268). Hart opines that law *is* law, even if it is morally terrible. This implies that it's being morally terrible does not undermine its status as law. However, this does not mean that one is obligated to obey it, no matter what. In other words, legal obligation is always *prima facie* and never absolute. Therefore a principle can count as a valid law, and yet be morally horrible; and if it's morally horrible, then one has no obligation, moral or non-moral, to obey it. He defines law as a union of primary and secondary rules. Primary rules tells us what we should do and not do. Examples of primary rules are: do not kill, do not steal and do not commit adultery. Secondary rules on their hand reinforce primary rules by conferring power related to those rules. Secondary rules are: rules of recognition (mechanism of identifying primary rules), rules of change (provide mechanism for introducing new rules and changing old or outdated rules), rules of adjudication (confer powers on judicial officials to enforce the law).

Hart implies that the primary and secondary rules are descriptive however it is impossible for rational moral agents to do something or to avoid doing something without a WHY? Which is essentially normative. Even if the WHY? Perspective is provided by the individual or the society, it remains an indispensable normative question. Hart seems to *roboticise* individuals in societies with only primary rules in the sense that they lack a normative dimension as to why they come out with these primary rules and WHY they should be bound by these primary rules. Thus, he desolately fails to surmount the indispensability of moral law in rule making. Rules are made by rational free moral agents and changed by the same agents no matter how primitive they might be. All societies for instance have a primary rule against playing sex in the presence and full sight of the public because this violates human dignity and human reason which are the essence of moral law.

Hart's rules of adjudication are premised on the dictum that the adjudicators are free moral agents with a conscience. A mad judge is not a credible adjudicator because his/her actions are amoral and thus have nothing to do with morality or ethics. Therefore rules of adjudication are inextricably linked to morality and ethics (reflective morality). Hart's separability and Social conventionalism theses are thus premised on error. Hart himself describes his own viewpoint as a "soft positivism," because he admits that rules of recognition may consider the compatibility or incompatibility of a rule with moral values as a criterion of the rule's legal validity (Hart, 1994, p.250).

In his book, *Law's Empire* (1986) Ronald Dworkin, avers that every legal action has a moral dimension. He rejects the concept of law as acceptance of conventional patterns of recognition. According to him, law is not merely as a descriptive concept but as an interpretive concept which has moral ramifications. He argues that legal theory may advance from the "pre-interpretive stage" (in which rules of conduct are identified) to the "interpretive stage" (in which the justification for these rules is decided upon) to the "post-interpretive stage" (in which the rules of conduct are re-evaluated based on what has been found to justify them). The state of rule justification is thus inseparable from morality (Dworkin, 1986, p.66).

Natural Law theorists insist that a putative norm cannot become legally valid unless it passes a certain threshold of morality. Thus, morality acts as a threshold device for the approval of new law. According to them, the moral content of a law, not just its social origins, determine its legal validity (Wischnik, 2002). In his work, *The Morality of law*(1964), Lon Fuller, succinctly challenges Hart's theory of law by arguing that if even we agree that the content of law has no relationship to morality, we cannot ignore the fact that the principles or procedures on which the law is based are moral (Bix, 1996, p.232). This paper posits that laws are changed because they violate or promote certain moral standards. These standards include: gender equality and equity, non-discrimination, justice, accountability, transparency, ethics and human rights.

John Finnis, a contemporary philosopher and natural law theorist, argues that there really is nothing at stake between legal positivism and natural law theory. He opines that there is nothing in legal positivism with which natural law theory disagrees. According to him the difference between Legal Positivism (LP) and Natural Law Theory (NLT) is only that LP is incomplete in the sense that it fails to address the question about the normativity of law that NLT tackles head-on (Finnis, 2020).

The Inextricability of Moral rights from Positive Rights

Law is a mechanism for claiming rights. Moral law is the mechanism for claiming fundamental rights and positive law is the mechanism for claiming positive rights. Positive rights are rights granted by the state and include: copy rights, patent rights, right to smoke, right to booze, right to die, animals rights, right to be gay, right to abort, right to marry a person of the same sex, right to marry an animal or beast, right to make a beast your heir, right to sell or donate your internal body organs among others. Positive rights are ambiguous and nonsensical if not subjected to the lens of moral law. In order to be meaningful, they must be supported by logical moral reasons. For example, human persons are entitled to rights because they have the freedom and capacity to perform right actions and hence be morally responsible for wrong doing. Animal rights are nonsensical because beasts are amoral beings that cannot perform right or wrong actions.

Secondly, a right pre-supposes a duty because where my right ends is exactly where some other person's right begins. Animals cannot be subjected to duties because they are not free moral agents. Similarly, a human being has no right to marry an animal because that beast lacks the rational capacity and freedom to consent to the marriage and the sex that consummates this marriage. In addition, the right to smoke and the right to booze are pseudo rights that definitely impinge on the right to life.

More so, another example that demonstrates the inseparability of moral rights from positive rights is the fact that the positive international human rights instruments that have been put down by the United Nations (UN) and ratified by a number of states constitute moral law paradigms such as: human dignity, conscience and inalienable rights. These positive law instruments like the ICCPR promote and protect moral rights such as; life (Article 6), freedom from torture (Article 7) freedom from slavery (article 8), right to privacy (Article 16) and freedom of thought and expression (Articles 18 & 19).

The ICCPR also promotes and protects positive rights such as; protection against ex-post facto laws, protection against imprisonment on the ground of inability to fulfil a contractual obligation (Article 11) and a child's right to a nationality (Article 24(3)). This is a clear demonstration of the inseparability of positive rights from moral rights. Moral rights have been laid down in positive law in order to make them definite, clear and easily enforceable.

The 20th century genocides and moral legalism

The past century has witnessed two major genocides that have been characterized by gross human rights violations and the inhumanity of human beings to fellow human beings. These genocides are: the Rwanda genocide among the Tutsi, Twa and Hutu ethnic groups and the Bosnian genocide. These genocides were an infringement of human dignity and the sanctity of

human life which are basic tenets of the moral law. Almost one million people lost their lives in the Rwanda Genocide and almost 100,000 people lost their lives in the Bosnian genocide.

The Rwanda genocide pricked the consciences of world leaders such as former president Bill Clinton who has apologized for not doing enough to stop the genocide and Pope Francis who has apologized for the sins of the Catholic Church during the genocide. These double genocides have lured the United Nations to institute the Rome Statute that establishes the International Criminal Court (ICC). The ICC prosecutes individuals for the crime of genocide, crimes against humanity, war crimes, and the crime of aggression⁹. The United Nations also established the International Tribunal for Rwanda and the International Tribunal for Former Yugoslavia to prosecute and bring to account war criminals and genociders. The Rome statute is premised on the recognition that millions of children, men and women have been victims of unimaginable atrocities that deeply shock the **conscience** of humanity¹⁰. This implies that moral law within human beings regards the crimes against humanity that are punishable under the Rome Statute such as: murder, torture, extermination, enslavement, apartheid, rape, sexual slavery, forced pregnancy and enforced sterilization as abominations.¹¹

World Leaders under the banner of the United Nations anticipated genocidal crimes in the future after the sad lesson from the Nazi genocide against the Jews. Even before the promulgation of the morally binding UDHR on 10th December, 1948, the UN promulgated legally binding Convention on the Prevention and Punishment of the Crime of Genocide on 9th December, 1948. Genocide according to the convention is against the aims and principles of the United Nations (UN). These principles are basically moral principles enshrined in the United Nations (UN) Charter of 1945. They are: the promotion and protection of inherent human dignity and human rights and fundamental freedoms.

Article 2 of the above hard law instrument defines genocide as any act committed with the intent to destroy, in whole or in part, a national, ethnic, racial and religious group. Genocidal acts include: killing, causing bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part, imposing measures intended to prevent birth within a group and forcibly transferring children of the group to another group. Due to the gross violations of human rights that were experienced in the Rwanda and Bosnia genocides, the United Nations has come up with a new global norm called Responsibility to Protect (R2P). This norm was developed to curtail the legality of absolute state sovereignty in the upsurge of genocide and war crimes. According to the billiard ball theory of international relations, states were envisaged to be opaque entities whose interactions only affected the external affairs of states and not internal affairs. This theory was used by a number of states as a defence against external interference.

The norm of R2P gives the International Community the mandate to enter a certain state jurisdiction in order to protect people from gross violations of human rights such as: ethnic cleansing, genocide and crimes against humanity in case of failure of the state. According to the principle of R2P, the state has the primary responsibility to protect individuals within its jurisdiction from gross violation of human rights. If the state fails to protect individuals from gross human rights violations, it should seek the assistance of the international community. When the state fails in its responsibility and does not seek international assistance, the international community will have no choice but to intervene in order to protect the people from gross human rights violations.

Even, the African Union, which was a staunch supporter of absolute state sovereignty, has enacted the Constitutive Act of 2000 in order to curtail immoralities manifested in the Rwanda Genocide. Article 4 section(h) of this law mandates the African Union to intervene in the domestic jurisdiction of a member state of the African Union in order to protect people from gross violations of human rights. The purpose of the above Act is to enforce the moral duty of Responsibility to Protect(R2P). Therefore both soft and hard law instruments against genocide and crimes against humanity are not mere positivist legislation laid down for the sake social convention. They are conscientious moral legislation that have been put in place to protect

⁹ A 5 Rome Statute of the International Criminal Court(1998).

¹⁰ Para 2 Rome Statute of the International Criminal Court(1998).

¹¹ A 7 Rome Statute of the International Criminal Court(1998).

humanity from specific moral vices. Thus, the morality or ethicality of these instrumentals is the reason why they have been *positivised* or laid down.

Neo-liberal positivism and the Justiciability of Social and Economic Rights

In the late 1980s and early 1990s, a number of countries in Sub-Saharan Africa were lured by the International Monetary Fund (IMF) and World Bank to implement neo-liberalism through embracing Structural Adjustment Programmes (SAPS) such as: cost sharing, retrenchment of workers, recruitment bans in the public service, privatization and currency de-regulation. According to the ideology of neo-liberalism, states are failing to realize sufficient economic development which is defined as economic growth because of their interference with the market. The market according to neo-liberalists is a scientific process that distributes opportunities for well-being with in different states. Economic development is therefore a scientific process that is governed by blind market forces.

Neo-liberal scientism therefore advocates for a weak intervention state that facilitates the proper functioning of markets and a strong regulatory state to curtail any interference with blind market forces. From the onset, neo-liberalism stands out as a pseudo science. If markets are regulated by blind determinist scientific forces, how can the actions of free moral agents in a state offset such a determined scientific process? Secondly, Why would blind scientific market forces need the regulatory intervention of free moral agents with in a state to achieve their purpose?

The pseudo science known as neo-liberalism has been used as an excuse to prevent states from making painstaking interventions aimed at realizing social and economic rights enshrined in the ICESCR such as: the right to health, the right to water, right to food, right to employment, right to social security, right to adequate housing and right to an adequate standard of living. According to the neo-liberal ideology, the justiciability of the above rights will interfere with functioning of blind scientific market forces hence hindering economic growth and consequently economic development. Neo-liberalists argue that the above are not genuine rights but mere aspirations that individuals will enjoy or be entitled to progressively as states realize adequate or sufficient economic growth. Neo-liberalism is premised on greed is good, greed is right and greed works as the three fundamental dictum. Accordingly, greed and selfishness are the producers of economic development however immoral and unjust they might be. This is presumed to be a scientific law.

Neo-liberalism has permeated not only the economic sector of society but also the political and legal structures of society. Accordingly, politicians and policy makers are reluctant to make and implement social welfare and human development policies on adequate sanitation and housing, water affordability, health affordability, electricity affordability and food accessibility and affordability because this might paralyze the proper functioning of scientific market forces. This neo-liberal trend has led to the upsurge of poverty and under-development in a number of Sub-Saharan African countries. Despite the improvement of economic growth indicators, human development indicators are incredibly dwindling.

Due to neo-liberalism, a number of positivistic judges are very reluctant to make certain legal rulings that might impinge on the proper functioning of the science of the market. For example although the land law in Uganda protects *bonafide* tenants from being evicted from the land by land lords, judges have increasingly made rulings that support the eviction of *bonafide* land occupants. The neo-liberal rationale behind this is the promotion of development induced displacements of the poor so that the rich can use the land to start business ventures such as commercial agriculture which will enhance economic growth within a state which is synonymous with economic development.

The contradictions of legal positivism and neo-liberal scientism reveal themselves very clearly here. If the market is really scientific, this implies that it is deterministic. If it is deterministic why should a judge be bothered about offsetting the direction of this market? Secondly, why would a positivistic judge bother about positivistic legal decisions infringing on the determined blind market forces? This therefore makes the postulates of neo-liberal positivism fundamentally false. Contrary to the postulates of neo-liberalism; judges are free law enforcing moral agents and not mechanized law enforcement robots. They must thus be held accountable by society for violating the moral law by legalizing moral vices against society under the pretext of science so called.

In Uganda, the state has been very reluctant to implement social and economic rights. Although the government ratified the ICESCR in 1987, the state did not submit any report to the Committee on Economic, Social and Cultural Rights until after over 24 years i.e. in 2012. Surprisingly, the government has quite consistently written state reports under the ICCPR. Judges also have been very skeptical about the enforcement of social and economic rights because this might militate on the

proper operations of the science of the market which promotes development in the state. For example, in *Centre for Health, Human Rights and Development & Others v Nakaseke District Local Administration*,¹² It was alleged by the plaintiffs that the deceased had an obstructed labour condition but did not receive the appropriate medical care and attention due to the absence of a doctor assigned to her. It was held that the deceased's right to basic medical care was violated. The defendant was found to have violated article 33(3) of the Constitution, which obliges the state to "protect women and their rights, taking into account their unique status and natural maternal functions in society."

However, in *Centre for Health, Human Rights Development & Others v Attorney General*,¹³ the Constitutional Court exhibited a rigid neo-liberal legalistic positivist stance towards the right to health in particular. In this case, the petitioners petitioned the Constitutional Court seeking declarations to the effect that the non-provision of essential maternal health commodities in public health facilities and the unethical conduct and behaviour of health workers towards expectant mothers are inconsistent with the Constitution and are a violation of their right to health and other related rights namely, women's human rights, and the right to life. The court however upheld the preliminary objection raised by the state attorney in objection to the petition stating as follows:

Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is ... reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies of government, for inter alia, the good governance of Uganda ... This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and let on, their implementation. If this Court determines the issues raised in the petition, it will be substituting its discretion for that of the Executive granted by law.¹⁴

The court relied on the margin of appreciation doctrine (a.k.a political doctrine) which states that the judiciary cannot question the policies and their implementation by the executive because this impinges on principle of separation of powers between the judiciary, executive and legislature. The ruling of the Court is a threat to the justiciability of socio-economic rights in Uganda. By arguing that it cannot entertain claims involving political questions, the Court has denied citizens' access to justice in respect of certain executive or legislative acts or omissions that contravene socio-economic rights, such as the right to health.

It must be emphasized that at the regional level, the African Charter on Human and Peoples Rights guarantees the right to the best attainable state of physical and mental health,¹⁵ and obliges state parties to take measures to protect the health of their people and to ensure that they receive medical attention when they are sick.¹⁶ The African charter on rights and welfare of the child also guarantees every child the right to enjoy the best attainable state of physical, mental and spiritual health.¹⁷ The right to health is however not expressly provided for in the bill of rights of the Ugandan Constitution due to neo-liberal reasons however, the national objectives and directive principles of state policy principle XIV¹⁸ provides that the state shall endeavor to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall in particular ensure that all Ugandans enjoy rights, opportunities and access to education, health services, clean and safe water, food security among others. Furthermore, the national objectives and directive principles of state policy¹⁹ provide that the state shall take all practical measures to ensure the provision of basic medical services to the population.

However, the National Objectives and Directive Principles of State Policy (NODPSP) in the Constitution are not justiciable since they do not appear in the main body of the Constitution, especially the Bill of Rights in chapter 4. In *Tinyefuza v Attorney-General*,²⁰ although Justice Egonda Ntende observed that the NODPSP should guide all organs of the state including the judiciary in the interpretation of the Constitution, he failed to categorically state that these objectives and directives are

¹² The Center for Health, Human Rights and Development & Ors. v Nakaseke District (Civil Suit No. 111 of 2012)

¹³ Centre for Health Human Rights & Development & 3 Ors v Attorney General (Constitutional Petition-2011/16) [2012] UGSC 48 (05 June 2012).

¹⁴ Centre for Health Human Rights & Development & 3 Ors v Attorney General (Constitutional Petition-2011/16) [2012] UGSC 48 (05 June 2012)

¹⁵ A 16(1) Constitution of the Republic of Uganda, 1995

¹⁶ A 16(2). Constitution of the Republic of Uganda, 1995

¹⁷ A 41(1). Constitution of the Republic of Uganda, 1995

¹⁸P XIV Constitution of the Republic of Uganda, 1995

¹⁹ P XX Constitution of the Republic of Uganda, 1995

²⁰ Major General David Tinyefuza v Attorney General (Constitutional Petition-1996/1) [1997] UGCC 3 (25 April 1997)

by themselves legally binding. In *Zachary Olum & Another v Attorney-General*,²¹ the court observed that although the NODPSP form an important part of the Constitution and are crucial canons in the interpretation of the Constitution, they are not justiciable.

Conclusion

This research article has contended that moral law is the end of history as far as jurisprudential evolution is concerned. It has argued that legal positivism is a political project imbued with logical inconsistencies, metaphysical contradictions and *implausibilities*. Legal Positivists have used the hegemony of the scientific discourse to entrench epistemological authoritarianism over society. This positivist project fails to perceive the normative dimension of descriptive and analytic jurisprudence and is largely responsible for the upsurge of moral evils such as: genocide, eugenics, colonialism, racism, apartheid and slavery. Legal positivists have failed to articulate logically credible arguments to justify why the above vices should be condoned and not condemned after all, 'law is just law'. The United Nations has laid down International human rights law instruments such as: the UDHR, ICCPR and the ICESCR in order re-situate the moral law as the epitome of jurisprudence. Neo-liberalism as a scientific project that reinforces legal positivism is a threat to International Human Rights enshrined in the above instruments. Law is inseparable from morality because the legislator, adjudicator and subject of the law must be free moral agents and not amoral entities. If the source of law is moral, the content of law must also be moral. In view of this, law and morality are inseparable.

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²¹ Zachary Olum and Anor v Attorney General (Constitutional Petition-1999/6) [2000] UGCC 3 (06 June 2000).

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