Araştırma Makelesi / Research Article

H.L.A. Hart's *"Minimum Content of Natural Law"**

H.L.A. Hart'ın *"Doğal Hukukun Minimum İçeriği"* Konsepti

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ABSTRACT

The classic work of "*The Concept of Law*" written by H.L.A Hart is widely recognized as providing the zenith of legal positivism. Hart's proposition is that the basic failure of the Austinian model is its neglect of the concept of a rule. Hart claims that for understanding the foundations of a legal system, rather than an account based on habitual obedience to the commands of an unlimited sovereign, a necessary insight will be that laws are a species of rules and ultimately the foundations of a legal system will be based on the acceptance of a fundamental rule. According to Hart, without the idea of a rule it is not possible to elucidate even the most elementary forms of law and he goes on to identify that the key to the science of jurisprudence lies in the union of what he terms "primary" and "secondary" rules. He therefore definitely disagrees with the proposition that a legal system is just a reflection of political power. This article is about H.L.A. Hart's study "*minimum content of natural law*". The article firstly explains briefly Hart's theory. His five truisms which is necessary to qualify as law is explained by making reference to examples from black letter law and a critique including the text's strengths and weaknesses is being provided.

Keywords: H.L.A. Hart, Law, Natural Law, Justice, Positivism.

ÖZ

H.L.A Hart tarafından yazılan "*The Concept of Law*", yaygın olarak pozitivizmin zirvesini sağlamasıyla kabul edilmektedir. Hart'a göre Austin'in modelinin başarısızlığının temel nedeni, kural kavramını görmezden gelmesidir. Hart, bir hukuk sisteminin temellerini anlamak için iktidarın sınırsız gücünün emirlerine alışılmış itaatine kurulu bir düzenden ziyade, yasaların bir kural türü olduğu ve nihayetinde bir hukuk sisteminin temellerinin olacağına dair gerekli bir kavrayış olacağına inanmaktadır. Çalışma, H.L.A. Hart'ın "*doğal hukukun minimum içeriği*" isimli çalışmasını konu almakta olup öncelikle teorinin kapsamı açıklanmaktadır. Hart'a

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göre bir normun kabul görmesi için sahip olması gereken beş özelliği, pozitif hukuktan örnek vererek açıklanmakta ve çalışmanın güçlü ve zayıf yönlerinin eleştirisi sunulmaktadır.

Anahtar Kelimeler: H.L.A Hart, Hukuk, Doğal Hukuk, Adalet, Pozitivizm.

Introduction

H.L.A. Hart was a British philosopher and a professor of Jurisprudence at the University of Oxford. He is one of the most influential legal theorists and a major proponent of legal positivism. One of his most significant pieces of works is "*The Concept of Law*"[1]. He is concerned with the concept of law, asserting that there is no necessary correlation between law and morality. Hart claims that it is possible to identify a core set of rules which constitute his "*minimum content of natural law*" theory, he uses this phrase to demonstrate the "*must haves*" based on human weaknesses, that any legal system must have in order to survive.

In this study, Hart's treatment of "*the minimum content of natural law*" will be examined. In the first part of the essay, Hart's text will be explained by making reference to examples from black letter law. The second part of the study, will aim to provide a critique, including the text's strengths and weaknesses, in the light of John Rawls' account of the "*original agreement*" for the principles of justice for the basic structure of society found in his book "*A Theory of Justice*"[2]. The final section will conclude the essay.

I. The Minimum Content of Natural Law

For legal positivists, law does not have to have a moral content to be valid, the mere fact that a legal rule is unjust or morally iniquitous does not make the law invalid. As John Austin once wrote: "*the existence of law is one thing, its merit and demerit is another*"[3]. In contrast to legal positivists, defenders of natural law insist that morally iniquitous law cannot be valid. H.L.A. Hart as a one of the most influential advocates of legal positivism, has recognised in law a "*core of good sense*"[4], he had proposed a minimum content theory of natural law which can be regarded as bridging the gulf between legal positivism and natural law. Hart acknowledged that there is a high degree of convergence in the rules legal systems contain, such as prohibiting acts of violence, theft and deception and this is not a coincidence. He assumed survival as an aim of human activity and noted: "*reflection on some very obvious generalizations indeed*

1 H.L.A. Hart, *The Concept of Law*, 3rd Edition, Oxford University Press, London, 2012.

2 John Rawls, *A Theory of Justice,* Cambridge, Harvard University Press, 1971, p. 11-17.

3 John Austin*, The Province of Jurisprudence Defined,* Lecture 5, London, 1832, p. 184-185.

4 Hart, p. 186.

truisms concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable"[5].

Hart notes that: "*the general form of the argument is that without such content laws and morals could not forward the minimum purpose of which man having associating with each other*"[6]. In the absence of this content man, as they are, would have no reason for obeying voluntarily any rules[7].

Hart considers that there are five truisms about man, which is necessary if it is to qualify as law properly speaking. These are; (1) Human vulnerability, (2) approximate equality, (3) limited altruism, (4) limited resources and finally (5) limited understanding and strength of will.[8] So these are certain rules of conduct indeed truisms which any society's legal system must contain if it is to be viable, these rules do constitute a common element in the law, these are also reasons why the rules are necessary. Hart concludes from these five truisms that minimum content of law is necessary, he notes: "*the rules must contain some form of restrictions on the free use of violence, theft and deception to which human beings are tempted but which they must, in general repress if they are to co-exist in close proximity to each other*"[9].

A. Human Vulnerability

To start with "*human vulnerability*", the essence of this truism is that if law is to promote human survival, it must offer certain prohibitions for restricting the use of violence in killing or inflicting bodily harm. As Hart notes "*the common requirements of law and morality consist for the most part not of active services to be rendered but of forbearances, which are usually formulated in negative form as prohibitions*"[10]. So as human beings can be harmed, it is the legal systems' duty to develop appropriate laws prohibiting one from another.

The clear examples of this can be given from black letter law in both domestic and international law context. Assaulting a person, known as common assault is prohibited in English law and is a summary offence punishable up to six months of imprisonment[11]. The House of Lords defined assault as: "*committed where the defendant intentionally or recklessly causes the victim to apprehend im-*

5 Hart, p. 192-93.
6 Hart, p. 193.
7 Hart, p. 193.
8 Hart, p. 194-197.
9 Hart, p. 89.
10 Hart, p. 194.
11 Criminal Justice Act 1988, section 39.

mediate unlawful personal violence". In *R v Ireland* case, the defendant had made a series of silent phone calls to three different women and was convicted under section 47 of the Offences Against the Person Act 1861, he appealed contending that silence cannot amount to an assault and merely psychiatric injury is not bodily harm, his conviction was up-held, it was held that spoken words can amount to an assault as silent words can[12]. Showing a gun[13], accidentally driving on the foot of somebody and remaining there[14] and stalking the victim over a prolonged period, which does not produce a fear of immediate danger but cause the victim to fear at some time[15] was held to be enough for assault. Section 20 of the Offences Against Person Act also prohibits inflicting "*wounds*" and "*grievous bodily harm*". GBH also includes psychiatric injury[16].

Protection of life of the people is one of the most fundamental human rights across the world, which almost all legal systems tries to prohibit killing, and protecting human life. The European Convention of Human Rights, which is incorporated into UK domestic law by the Human Rights Act 1998 guarantees right to life in its second article, the article read as: "*Everyone's right to life shall be protected by law*". Although the article is not absolute and allows lawful executions in certain circumstances, it is of great importance and imposes positive as well as negative obligations on member states to protect life of its citizens[17]. When the potentially lethal force had not been "*absolutely necessary*" and had not been justified by any of the exceptions permitted under Article 2, the Court is ready to find violation of Article 2[18].

B. Approximate Equality

Hart expressed his second truism, the notion of "*approximate equality*" as: "*even the strongest must sleep at times and, when asleep, loss temporarily his superiority. This fact of approximate equality more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal moral obligation*"[19].

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12 [1997] 3 WLR 534.

13 Logdon v DPP [1976] Crim LR 121.

14 Fagan v MPC [1969] 1 QB 439.

15 R v Constanza [1997] 2 Cr. App. R. 492.

16 R v Ireland [1997] 3 WLR 534.

17 Dink v Turkey App No 2668/07 (ECtHR, 14 September 2010); also see Durmuş Tezcan, Mustafa Ruhan Erdem, Oğuz Sancakdar, Murat Önok, İnsan Hakları El Kitabı, 6th Edition, Seçkin Yayıncılık, Ankara, 2016, s. 94-116.

18 Andreou v Turkey App No 456553/99 (ECtHR, 27 October 2009); also see Şeref Gözübüyük, Feyyaz Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması*, 11th Edition, Turhan Kitabevi, Ankara, 2016, p. 167-213.

19 Hart, p. 195.

Any legal system should ensure mutual abstinence from inflicting harm. A system based on mutual forbearance is mutually beneficial in prompting the survival of all. He notes that: "*This fact of approximate equality makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation*"[20]. An example can be given in the context of power imbalance between the police and citizens, although a state has more power, the legal system grants certain rights to individuals to balance the inequality.

The Police and Criminal Evidence Act 1984 is the legislative framework for police powers in England and Wales, it gives the police power to stop and search any person or vehicle for stolen or prohibited articles[21], power to arrest[22] but balances this power with some precaution that a person must not be detained for more than 24 hours without being charged[23]. It guarantees a right to access a solicitor at any time during the detention[24]. The right to legal assistance before police interrogation was not available to detainees in Scotland until the UK Supreme Court held in *Cadder v HM Advocate* that the practice violates Article 6(1) of the ECHR[25]. In the wake of this judgment, the Scottish legislature passed emergency legislation and cured the deficiency of the law[26].

There are also issues about police power in terms of "*entrapment*" that raises the issue of how far a state may go in encouraging crime in order to convict people. It is now ruled that when state agents "*causes*" a person to commit a crime by offering excessive temptations, the court needs to stay proceedings as it would be wrong to charge the defendant at all for a crime caused by the police[27]. This approach also reflects the decisions of the European Court of Human Rights on this issue[28].

C. Limited Altruism

Limited altruism reminds us that men are neither angels nor devils, they are in fact between these two extremes. If men were angels, a system of mutual forbearance would not be necessary. If they were devils bent on mutual destruc-

20 Hart, p. 195.

21 PACE 1984, s 1(2)

22 ibid. part 3.

23 ibid. s. 40.

24 Ibid. s. 58.

25 Cadder v HM Advovate[2010] UKSC 43.

26 Criminal Procedure (Scotland) Act 1995, s 15A (3), as inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

27 R v Loosely; Attorney General's Reference (No 3 of 2000) [2001] UKHL 53.

28 Teixeria de Castro v Portugal (1998) 28 EHRR 10, Ramanauskas v Lithuania (2010) 51 EHRR 11.

tion, regardless of the cost to themselves, it would be impossible, but because they are between these two extremes such a system of mutual forbearance is possible and necessary[29].

An example can be given from law of omissions in English criminal law, which is the historical approach that one cannot be punished for failing to take an action, for instance, failing to save someone's life, which means one cannot be punished for being selfish rather than altruistic[30]. A defendant is only guilty of crime as a result of his/her omission to act when he/she is under a duty to act. Such a duty can be imposed by a statute, for example, the people of the same dwelling is required to safeguard the life of a child or vulnerable adult who lives in them in it[31]. More examples can be given where a motorist refuses to give the breath samples when asked by an authorised person[32], or refusing to give information on the noticing a person of some suspicious activities which comes to his attention[33].

D. Limited Resources

Hart's next truism is based on limited resources. There are some basic human needs such as shelter, food and clothing. Unfortunately, they are not found in limitless abundance. This forms "*indispensable some minimal forms of the institution of property (though not necessarily individual property), and the distinctive kind of rules which requires respect for it*"[34]. For Hart, the simplest forms of property are to be "*seen in rules excluding persons generally other than the 'owner' from entry on, or the use of land or from taking or using material things*"[35].

To give an example from civil law, trespass in law is actionable in English courts and it is and unjustifiable intrusion by a person upon the land in the possession of another.[36] In *Ellis v Loftus Iron Co* the Court noted that: "*if the defendant place[s] a part of his foot on the claimant's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it*"[37]. In *Laiqat v Majit* it was noted that: "*… if a defendant interferes with a claimant's airspace, this amounts to trespass except this conduct would not constitute trespass if*

29 Hart, p. 196.
30 For a different approach see R v Miller [1983] 2 WLR 539.
31 Domestic Violence Crime and Victims Act 2004, s. 5.
32 Road Traffic Act 1988, s 7(6).
33 Terrorism Act 2000, s. 19.
34 Hart, p. 196.
35 Hart, p. 197.
36 Alastair Mullis, Ken Oliphant, *Torts,* 4th Edition, Palgrave Macmillan, London, 2011, p. 243.
37 [1874] L.R. 10 C.&.P. at 12.

the interference were at such great height – such as by high flying aircraft – that it does not interfere with the claimant's air space"[38]. Other examples of trespass to land include removing any part of the land in the possession of another, or any part of a building or other erection attached to the soil.[39]

The European Convention on Human Rights also creates a right to property[40], the case *Sporrong v Lonnroth* the European Court of Human Rights analysed the Protocol and interpreted "*three distinct rules*"[41], the approach interpreted in this cases also followed in subsequent cases[42].

E. Limited Understanding and Strength of Will

The last conduct Hart mentiones is limited understanding and strength of will. He draws attention to the mutual benefit of confronting rules respecting persons, property and promises and despite the fact that most men are able to accept them as short-term sacrifices some *"… are tempted at times to prefer their own immediate interests, and in the absence of a special organization for their detection and punishment, many would succumb to the temptation*"[43]. The immediate example is people, who drink and drive, or drive dangerously. This is regulated by law in the UK[44].

To summarise, Hart believes that the function of law is to allow human beings to survive. For this any society needs some basic rules and he related his primary rules to five human weaknesses[45]. For Hart sanctions are necessary and a "*guarantee*" that "*those who would voluntarily obey shall not be sacrificed that those who would not*"[46].

II. Critique

This part of the study aims to provide the strengths and weaknesses of Hart's minimum content of natural law in the light of John Rawls's account of the "*original agreement*" for the principles of justice for the basic structure of society[47].

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38 [2005] EWHC 1305 at 34.

39 Michael Jones, Anthony Dugdale, Mark Simpson, *Clerk and Lindsell on Torts,* 20th Edition, Sweet and Maxwell, London, 2010, para 19-29.

40 See Protocol 1 Article 1 ECHR.

41 (1982) 5 EHRR 35 para 61.

42 Lithgow v UK (1986) 8 EHRR 329 para 106.

43 Hart, p. 197.

44 For example, Road Traffic Act 1988, ss. 1-4.

45 Hart, p. 193.

46 Hart, p. 198.

47 Rawls, p. 11-17.

It would be merciless to undermine Hart's work, which is not only focused on self-preservation but also provides guidance on how private law institutions of society should be organized[48]. Hart prepared his work very well and it is very difficult to identify relevant and fair standards to provide a critique[49].

D'Entreves comments that Hart's Concept *"… represents a remarkable effort on the part of an avowed positivist to recognise the merits of that ancient and venerable notion*"[50]. His elegant language is combined with the balanced arguments formed a quality of the scholarship in the area of the basis for law.

Hart's work is a powerful one and in fact; one can question why he considers it as a "*minimal system*" while he includes most of the cornerstones of any legal system[51], especially when we think the theory even includes some form of property rights. It is undeniable that Hart's arguments are important in understanding not only the content of laws but also the human nature. However it is not free from criticisms. Finnis comments, "*Hart's method points out a land which is left to his readers and hearers to hazard to enter*"[52].

John Rawls generalizes Rousseau's, Locke's and Kant's natural right theories of the social contract[53]. Rawls' main idea can be explained as the principles of justice are the object of an "*original agreement*". As he wrote: "*Thus we are to imagine that those who engage in social co-operation chose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits*"[54]. This original agreement is not an actual contract but a hypothetical one, therefore he does not claim that people actually agree to a particular set of morally defensible principles of justice[55]. That hypothetical agreement would be reached by free ad equal persons in an original position, behind a veil of ignorance according to Rawls, and for him; social institutions are just "*if it is such that by this sequence of hypothetical agreements we would have contracted into the general system of rules which*

48 Richard Epstein, "The Not So Minimum Content of Natural Law", *Oxford Journal of Legal Studies*, Vol. 25, 2005, 219, p. 226, http://ojls.oxfordjournals.org/content/25/2/219.full.pdf+html (21.7.2020)

49 Robert S. Summers, "Professor H.L.A. Hart's Concept of Law*", Duke Law Journal,* Volume 1963: 629, p. 638.

50 Alessandro D'Entreves, *Natural Law,* 2nd Edition, Hutchinson University Library, London, 1970, p. 185.

51 Richard, p. 219-231.

52 John Finnis, *Philosophy of Law: Collected Essays: Volume IV,* London, 2011, p. 75.

53 Rawls, p. 11.

54 Rawls, p. 11.

55 Rawls, p. 11.

defines it"[56]. His starting point of original agreement where the principles of justice is are chosen behind the veil of ignorance in the original position of people which he notes: "*one might say, the appropriate original status quo, and thus the fundamental agreements reached in it are fair*"[57], is a powerful argument which takes the social contract idea to a higher level of abstraction. He attempted to establish a well-reasoned account of social justice through the social contract approach, holding that a society is in some sense an agreement among all those within that society. On the other hand, Hart views rules as "*natural necessity*" but these rules are subject to mans subjective interpretation of what is "*necessary*" for the regulation of people in society.

Rawls characterizes justice as the "*first virtue*" of social institutions, noting that the concept of justice designates "*a characteristic set of principles for assessing basic rights and duties for determining… the proper distribution of the benefits and burdens of social cooperation*"[58]. Justice for him becomes equivalent to the moral principles that are the basic structure. He provides two different principles of justice that people in the initial situation would choose; the first "*requires equality in the assignment of basic rights and duties*", the second is the principle that social and economic inequalities are just "*only if they result in compensating benefits for everyone, and in par the least advantaged members of society*"[59].

On the other hand, Hart's theory aims to define "*viable*" instead of a "*just*" legal system, he is not concerned with moral goodness. For Hart, justice is "*a distinct segment of morality*"[60], a moral value which the law may or may not possess, in a way he set to one side the issue of justice. The theory remains largely positivist, the fact that a legal system in the account of Hart need have no necessary moral content to be viable fails to qualify even as a most reduced version of a natural law. Rawls' theory of the "*original agreement*" embraces morals in society whereas Hart's theory presents those same morals as enforceable obligations. A viable legal system can still be unjust. Hart's theory can be criticised as far from guaranteeing a just or a good society. One can argue than even the most-wicked system can comply with Hart's minimum content of natural law.

56 Rawls, p. 13.

57 Rawls, p. 12.

58 Rawls, p. 5.

59 Rawls, p. 14-15.

60 Hart, p. 157.

Although Hart believes that some rules about property and violence are essential he adds: *"… it is plain that neither the law nor the accepted morality of societies needs to extent their minimal protections and benefits to all within their scope and have not done so*"[61]. In another words, he argues that there is no need for the law to extend its protection to all. Hart's concept does not identify people as individuals with equal opportunities, his concept of approximate equality presents Hart's view of the dissimilarity in the amount of power individuals have thereby almost undermining their importance in society. These features of Hart's theory, are to be contrasted with Rawls' principles of justice and weakens Hart's theory.

Conclusion

This study briefly examined H.L.A. Hart's minimum content of natural law; a set of rules necessary in order for any society continue to survive. Hart's defined truisms contribute to our understanding of human conduct and law but the theory is not free from criticism. Hart seeks to avoid what he perceives as the errors found in the adoption of moral criteria of legal validity, while at the same time acknowledging what he calls a "*minimum content of natural law*", which comprises necessary norms of social interaction which, while reflecting moral or natural law considerations, are necessary for any system of law to be minimally *effective as a legal system*. He states that: "… *some very obvious generalizations-indeed truisms-concerning human nature… show that as long as these hold good, there are certain rules of conduct which any social organisation must contain if it is to be viable. Such rules do in fact constitute a common element in the law and convention morality of all societies as different forms of social control*"[62]. It would be difficult to dissent very strongly from this proposition. In most, if not all, countries fundamental moral norms are enshrined in law, for example, as basic criminal taboos.

Hart suggests five "*truisms*" which underline the content of any viable set of any legal rules. The significance which Hart attributes to the satisfaction of these basic requirements is considerable. He states that "*If the system is fair and caters genuinely for the vital interests of all those from whom it demands obedience, it may… retain their allegiance… for most of the time, and will accordingly be stable. But… a narrow and exclusive system run in the interests of the dominant group… may be made continually more repressive and unstable with the latent threat of upheaval*"[63]. This is essentially a practical argument

61 Hart, p. 196.

62 Hart, p. 188.

63 Hart, p. 197.

to the effect that laws which fail to serve their basic social function(s) will ultimately cease to be viable and will, in one way or another, be displaced. In this way Hart's claim that there is a minimal content of natural law to any extent. Rather, it is what might be called an "*error theory*" for the natural law intuition that the law is to some extent essentially morally good because of the way that it contributes to human flourishing. His claim is that for a *viable* order regulating human society, certain sorts of rules are essential; it is a matter of effectiveness or viability, not moral goodness.

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