FREE WILL AND CRIMINAL RESPONSIBILITY
A HARTIAN TAKE ON LAW AS A SYSTEM OF RULES

Vishakha Agarwal, Student, Jindal Global Law School, O.P. Jindal global University, Sonipat

ABSTRACT

Free will lies at the heart of criminal law, which relies on it to justify holding someone accountable for wrongdoing and later punishing them. "This paper considers the connection between free will and criminal responsibility through the lens of H.L.A. Hart's legal positivism, as developed in The Concept of Law"[1]. Drawing on Hart's responses to previous theorists such as Bentham and Austin, and his criticisms of the American and Scandinavian Realists, this paper investigates how free will is accommodated within a system of rules based upon social practices. "It also takes Hart's debate with Patrick Devlin as an occasion to think about the moral limits of law"[2], and it brings in "Hothfield's insightful framework regarding jural relations, both illuminating why we assume the role of free will is crucial for coherently constructing legal obligations"[3]. Thus, the paper shows that Hart's rule-based approach of law offers a strong theoretical basis for interpreting and supporting legal responsibility.

Key Words: - *Free Will, Criminal Responsibility, H.L.A. Hart's Legal Positivism, Legal and Moral Obligation, Philosophy of Criminal Law.*

[1] Hart, H.L.A., The Concept of Law (2nd ed., Oxford University Press 1994)
[2] Devlin, P., *The Enforcement of Morals* (Oxford University Press 1965) (excerpts)
[3] Hart, H.L.A., 'Legal and Moral Obligation' in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983)

Introduction

One of the bare minimum assumptions for criminal law, which stands from ancient times through modernity, is human free will, which is a prerequisite to hold individuals morally and legally responsible. If there were no free will, there would be no justification for holding criminals responsible since they cannot be said to have acted of their own volition. In legal philosophy, the role of free will in law has been debated among jurisprudential philosophers for decades, all while H.L.A. Hart was offering a rule-based approach to The Concept of Law that marries aspects individual autonomy with social practices. We argue that Hart's insight provides a richer account of free will in relation to criminal responsibility and suggest it challenges early command-style and predictive models of legal obligation. It considers the consequences for criminal law of Hart's theories, investigating the free will in his system of socially practiced rules underpinning legal obligation and responsibility.

1. The Relationship Between Command Theory, Free Will and Criminal Law Critique of Hart

Hart was most directly responding to earlier theorists, particularly Bentham and Austin, and his criticism of the command theory of law (the view that law is nothing, but commands backed by threats) was fundamental. Hart believed that a view like this over-simplified the nature of legal systems and the importance of social practices in generating legal rules. By emphasizing coercion as opposed to voluntary compliance, command theory abstracted from free will, treating individuals subjectively as passive subjects within the legal system rather than active participants.

On the other side, Hart posits his own version of legal positivism, that of law as a system of rules based on mutual civil practices and common conventions, making room for free will residing comfortably under the umbrella of social order. In the way that Hart presents law as a set of rules that are social behaviorally inclined to follow, he suggests that an individual is choosing to comply with the law. In criminal law, for example, where liability is contingent on intent and whether the act was voluntary, it naturally applies here even more importantly. Hart's model does not rely on a simplistic understanding of human agency, which is one of the differences between his theory and command theory; people act by following rules because they feel they ought to do so instead of fearing retribution.

2. Legal Realism Defended: Hart on Free Will and Legal Obligation

Hart criticizes both the American and Scandinavian Realist schools and in doing so uncovers his own position on free will as well as legal obligation. Holmes and American Realists were predictive about the law, treating legal obligation as effectively the probability of judicial enforcement. Conversely, Scandinavian Realists defined a legal obligation as an internal or psychological sense of being bound to follow the rules. Giving prediction or sentiment pride of place, Hart said, is to reduce the idea of legal obligation; instead, legal rules are internalized within specific social practices that involve choice and recognition of norms.

This view is especially salient when it comes to the issue of free will in criminal responsibility. Hart stresses that when individuals experience laws, they do so through the lens of normative standardsbe they social or notand thus situate their feelings of obligation well within a set of rules practiced socially rather than as arbitrary, external compulsion, or merely as prediction of behavior. This suggests that individuals have a choice whether to stay in bounds, so we all need the possibility of free will to be responsible. In the world of criminal law, this translates into individuals being responsible not merely because they participated in behavior proscribed by a rule but because, cognizant that their conduct had violated such a rule and its expectations as to which they exhibited free will by engaging in such behavior, turn out guilty.

3. Social Practices and Rule-Following: Use Free Will as the Basis for Your Legal System

Because, as Hart imagines it, the notion of a legal system comprises a system of rules socially understood and practiced; so, some modicum of free will is presumed people understand these rules and must voluntarily attempt to conform with them (or at least try). Hart differentiates rule-following from mere obedience as it also involves a voluntary manner of acting according to norms in society. Such an understanding of rules as social practices not commands suggest that agency lies with the person conducting an action and does not necessarily exist entirely in the law.

This agency is important for criminal responsibility as it relates to criminal law. If people are breaking the law, they are not just violating a regulation but are freely transgressing an expectation that they must be assumed to know and agree with as part of a social contract. Emphasizing rule following as a social practice, Hart's theory sustains a legal order that respects

individuals' capacity for autonomous functioning and holds them responsible for their choices, thereby tethering free will to the architecture of legal liability.

4. The Boundaries of Legal Intervention: Morality and Liberty

"Another source of information on how Hart's concept of free will fits in with his legal model is the famous debate between Hart and Patrick Devlin about the moral limits of the law"[4]. "Devlin saw the necessity for legal enforcement of morality to maintain a creative society while Hart argued that the law should only be allowed to intervene in cases of civil harm following J.S. Mill´s principle of concern. This is the basis of the Harm Principle which combines the concept of being free and law; we can be free if our freedom does not harm others"[5].

This perspective within criminal law aligns with the belief that one should be able to do whatever they please if their actions do not infringe upon others around them. Hence the harm principle functions as a limit to criminal law, establishing and upholding the notion that people are responsible for actions which reflect a free choice on their part. "This view of Hart that by supporting Mill's harm principle, he is presupposing free will and therefore criminal responsibility settles this dispute"[6].

5. On the Role of Free Will as it Relates to Rights, Jural Relations and Criminal Accountability

To further elucidate Hart's opinions, "Wesley N. Hothfield's framework concerning rights and jural relations may be relevant: he identified four relational types of legal rights that are functionally opposed to each other: rights, privileges, powers, and immunities"[7]. It helps bring out the relational character of legal obligations and reinforces free will as a factor in legal accountability.

To put it differently, the obligation owed by a criminal defendant not to harm others corresponds with the right of other persons to be safe. This is a relational framework that presumes people can choose whether to honor or violate rights. "Hothfield, as we have seen, claims that the

[4] Devlin, P., *The Enforcement of Morals* (Oxford University Press 1965) (excerpts)
[5] Mill, J.S., *On Liberty* (J.W. Parker and Son 1859) (excerpts)
[6] Mill, J.S., *On Liberty* (J.W. Parker and Son 1859) (excerpts
[7]Hohfeld, W.N., 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16

criminal individual is necessarily a free actor dispensable to any legal relationship, certainly of a man with relation to things and other men"[8]. As such through this framework Hart's rule-based model will reassert, individuals are legally accountable because of free-will and the freedom to action or abstain from certain acts which lead to consequences on others' rights.

Evaluating H.L.A. Hart on free will in The Concept of Law reveals its greatest strengths and limitations concerning the subject, particularly where criminal responsibility is concerned, making this a paradox inherent to his rule-based variety of legal positivism

A particular virtue of Hart's theory is that it can rid itself of command theory and develop the idea of law as a system of rules based on social practices. This method redirects attention from force to consent, because the free will of the person being made to comply is a large part of what all legal systems function. For Hart, because rules are social constructs, the individuals who choose to abide by legal norms can be treated as rational creatures. This is especially relevant in the context of criminal law, which operates on the premise that individuals are capable of distinguishing between right and wrong and acting accordingly. This highlights Hart's own focus on rule-following as a social practice, and thus the role of individual agency – choice matters for legal order. Such a feature makes this part of Hart's theory humane and quite realistic regarding the nature of human beings, because neither we nor the law is simple enough to follow mere commands.

The only real problem with Hart's model is that it is since social rules are what give people a legal obligation to follow the law. So, while this notion does have an element of personal freedom, it also begs the question as to how many social expectations and norms may corrupt one's sense of obligation such that he/she becomes less free than before. "Hart assumes that people engage with the rules in a rational, voluntary way; but this is not always true. As an example, people might obey some laws or norms in a society to avoid peer pressure or social stigma, not because they believe in these values"[9]. Such a change might generate the sort of compliance that does not correspond to an internal exercise of freedom which will complicate moral and legal responsibility.

[8] Ibid
[9]Ratnapala, S., Jurisprudence (1st ed., Cambridge University Press 2009), 300-31

Thirdly, Hart grounds legal obligation in social practices, but such practices may not be relevant where social norms contradict personal autonomy. Criminal law and the fear of being punished for breaking criminal laws evokes a conflict in social adherence: the difference between what is right by societal standards versus what one personally believes to be right. For example, a person might be at odds with laws that reflect the dominant social morals yet conflict with his own ethical principles. This is another situation where Hart's framework leaves us with little in the way of a useful guide or even clues to think through/ignore the potential implications for his theory of criminal responsibility when societal norms meet personal autonomy and clash.

"One more important aspect of Hart's idea is his argument with Patrick Devlin concerning the moral limitations of law. Hart backs J.S. Mill's harm principle that leaves most aspects of personal liberty beyond the reach of the law, but harm can be defined broadly or narrowly"[10]. Figuring out what is called "harm" can be socially decided, which would mean that sometimes the criminal law may differ too much from social norms. Thus, Hart's embrace of the harm principle, while conceptually in favor of free will, might not consistently safeguard individual autonomy where it matters.

To sum it up, "Hart's conception of rule-based legal positivism provides a unique response to free will in the framework of criminal law by considering autonomy and rule-following"[11]. Nevertheless, the dependence on social norms and traditional conceptions of harm suggests significant deficiencies that can lead to challenges during application in practice due to the societal divergence from individual autonomy. Even with these criticisms, "Hart has made a noteworthy contribution to free will and legal responsibility that fits within the narrow confines of modern legal positivism"[12].

Conclusion

The Concept of Law- Hart provides a complex account of free will and criminal responsibility, seeing actors as rule-following agents embedded in a system of socially practiced norms. Hart's critique of command theory and realist conceptions of obligation reveals a vision of law as something that both respects and demands individual autonomy. "Hart's legal positivism,

[10] Mill, J.S., *On Liberty* (J.W. Parker and Son 1859) (excerpts)
[11]Ratnapala, S., *Jurisprudence* (1st ed., Cambridge University Press 2009), 300-31
[12]Ratnapala, S., *Jurisprudence* (1st ed., Cambridge University Press 2009), 300-31

through his compliance to Mill's harm principle and Hothfield's relational framework on rights, provides the most solid basis for determining that free will underpins our responsibility as criminals"[13]. Hart's theory strikes a healthy balance: people should be held accountable for actions that they actively choose to execute, and people should have the level of autonomy necessary for a functioning justice system.

[13]Hohfeld, W.N., 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16