THE EXISTENTIALIST FOUNDATIONS OF LAW

BY

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DECLARATION

This thesis is my original work and has not been presented for a degree in any other University.

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DEDICATION

Dedicated to my late mother Teriki for her inspiration and encouragement in my pursuit of higher education. I will always be grateful to her.

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ABSTRACT

This thesis is a multi-disciplinary research study that encompasses existentialism as a recent branch of philosophy and law and adopts a theoretical framework from biological sciences. It aims at the possibility of discovering, if any, the existential foundations of law. It is further premised that as law and it co-variants have their core function as mechanisms whereby justice may be realized and since law depends on immutable and eternal basis for its promulgation and appropriation. There is a great need to examine and appraise the possibility of establishing a logically enduring, humanly based and a uniquely responsive foundation upon which to base it. The intellectual appeal of the general theme of existentialism justifies the endeavor of examining the possibility of founding law on such grounds.The symbiotic-utilitarian-autopoiesic theory has been adopted as the theoretical framework of the thesis. This is a three-in-one theory which encompassing symbiosis and autopoiesis theories from biological science and utilitarianism from philosophy. Symbiosis is a form of coexistence between organisms whereby both mutually benefit from each other. Autopoiesis describes the self-referential, self-replicating qualities of the typical biological system. On the other hand, utilitarianism refers to the moral theory that there is one and only one basic principle of utility that asserts that moral agents in all circumstances ought to produce the greatest possible balance of value over disvalue for all persons affected. That is, utilitarianism, gauges the worth of actions by their consequences.The thesis lastly concludes by showing that indeed, it is logically possible to discover existential foundations of law courtesy of the symbiotic-utilitarian and autopoiesic theory. The thesis shows the potential held by applying and studying existentialism as a new paradigm shift to social structures and systems.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Existentialism was the most fashionable philosophy in Europe during the period immediately following Second World. It was "unquestionably one of the outstanding intellectual movements of the twentieth century and continues to remain a significant element in contemporary thinking" (Magee; 1998, 208). It is a philosophical movement, which holds that 'existence' precedes 'essence' which implies that human beings lack the meaning or purpose or the end of their very own existence (Kraftman; 2000, 84). This is why, man, as a rational being, must attempt to discover the reason, end or purpose of his existence. When viewed from this 'Existentialists' perspective', if at all law is intended to be the instrument or the medium of realizing an end, then there arises a need to explore its very foundations within the context of Existentialism.

This chapter discusses the concepts of jurisprudence and law, which are invariably difficult to differentiate.

Jurisprudence is sometimes used merely as an imposing synonym for law. Jurisprudence is however, a particular method of study not of the law of one country but of the general notion of law itself (Paton; 1964, 17). It is a scientific interpretation of the social principles of law.

The common understanding of law is the execution of the command of the sovereign. When law is construed in this perspective it implies a general rule of conduct which is laid down by a political superior to a political inferior (Paton; 1964, 22). The notion of command requires that there must be a determinate person to issue the command and an implied threat of a sanction if

the command is not obeyed. This is what separates law sharply from social rules such as customs and morality. The emphasis on command achieves this end because a definite person does not lay down the rules of etiquette. If the law of each country is based on the commands of the sovereign person (or body of persons) in that country, then, on what grounds will the systematic study and critical analysis of such a law be based? As each sovereign command is what he wishes, what if any, is the element of transcendental and encompassing identity pervading all legal systems?

1.2 Statement of the Problem

The Greeks, though comparatively uninterested in the technical development of law, were much concerned with exploring its philosophical foundations (Teubner; 1990, 74) and in doing so they evolved many fundamental concepts on which the theory of natural law relied. In the classical period, however, little attention was paid to the idea of universality of law, though by then, law was practiced in each city-state (Teubner; 1990, 78).

Plato, in his idealist philosophy, laid philosophical foundation for much of subsequent speculation on themes of natural law. He however, did not allude to the sense of natural law as normative and overriding system of rules. The *Republic* according to his thoughts was based on the substitution for law of the philosopher-king, who could attain absolute justice by consulting the mystery, locked in his own heart, which partook of the divine wisdom but remained incommunicable to lesser mortals (Teubner; 1990, 84). It was until the era of the stoics that "nature" had meant "the order of things" and was identified with man's reason. They believed that these precepts of reason had universal force (Teubner; 1990, 105) which the existentialists later emphasized as being the foundation of the universalizing criterion for moral and ethical

order. These were perhaps the same precepts of reason that could hold the key to the possibility of existential foundations of law. Law however, as a form of legislated morality arises from freedom that consequently arises from reason.

Morality according to Immanuel Kant, arises and can mainly arise from freedom (Raz; 1996, 118). Freedom does not only make morality possible, but also determines it. In this way, Kant believed that he was able to answer the central questions about natural law. The thesis of Kant deals with the following questions: how is freedom possible and while exercising freedom, how ought I to act? This is why Kant admitted that human beings do not always act according to the moral principles lacking what he calls, 'holy will' (Raz; 1996, 118). Since morality and freedom are one and the same, it follows that the law is in conformity with morality. One can moreover be forced to obey law without forfeiting freedom.

The contention of freedom of the will is emphasized in the social contract ideologies associated with Thomas Hobbes, (Hobbes; 1651, 78) John Locke (Locke; 1689, 101) and Jean Jacques Rousseau (Rousseau; 1762, 89) which date back to the sixteenth-century. This theory contends that consent is necessary to explain how a free individual can become a subject of a legitimate state (Raz; 1996, 118). But, jurisprudence bases itself on the task to study the nature of law, legal institutions and processes, the development of both law and legal institutions, and their relationship to society (Waldron; 1995, 10).

The passion of existentialist ideas that arose in the 1940's and 1950's was in fact a result of the reaction against dishonorable experience about Nazi domination and occupation in Europe (Krafton; 200, 109). This anti-Nazi feeling in Europe made existentialist thinkers re-evaluate the

essence of the rule of (unjust) law. This included the legal and political institutions, and more so, the very basis of the values expounded by law. It is the blatant abuse of law and the tribulations occasioned by the Nazi domination that sparked the rise of existential thought as a new trend in the jurisprudence that explores and discovers the essence between man and law. Since then, the development of existentialism has principally influenced a great deal the concern of exploring possibility of existential foundations of law.

An attempt is made to answer the following questions: Is law and existentialism intertwined, if yes, how and to what extent and what does it imply? What are the existential values that law is promoting in the contemporary society?

1.3 General concept of the law in Kenya

Section 3 of the Judicature Act provides for the laws that are applicable in Kenya and lists them as follows:

The Constitution; written law (statutes); doctrine of equity and the statutes of general application in force in England as from the 12th August, 1897 *which are to apply only if the circumstances and the people of Kenya permit; and customary law: that the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties is subjected to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law*. This part of law is a reproduction of the hierarchy first enacted by the colonial authorities in 1897, while the position of the African Customary Law is at the bottom of the hierarchy and its juridical weight was addressed by the Court of Appeal.

The Constitution of Kenya (27th August, 2010) provides under *Article 2* that, "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government". The following subsections explain the sources of law in Kenya:

> (4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
> (5) The general rules of international law shall form part of the law of Kenya.
> (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

In reference to the above quotation, law is used in two principal senses. In one sense "law" is merely the expression for uniformity of action which is observed: as when we speak of laws of gravity, or say that crystals are formed according to certain laws: the law follows the uniformity principle. In the other, the law produces uniformity, which is a rule of action as in the law of nature. It is the idea of uniformity of action.

In its widest sense, law is an aggregate of rules enforceable by judicial means in a given country. We speak for example, of the law of Kenya as opposed to the law of Rwanda. This is territorial, domestic or municipal law and is distinct from international law.

Lord Earl Jowitt, Lord High Chancellor of Great Britain (1945 – 1951) wrote in his book: *Common Law and Equity*:

> Law is either public or private. Public law is that part of the law which deals with the State, either by itself or in its relations with individuals, and is called constitutional, when it regulates the relations between the various divisions of the sovereign power; and administrative, when it regulates the business which the State has to do; the most important branches of the latter class are the criminal law and the law for the prevention of crimes; the law relating to education, public health, the poor, etcetra; ecclesiastical law; and

> the law of judicial procedure (courts of law, evidence) (Lord Earl Jowitt, 1951 1064).

Private (or civil) law deals with relations between individuals with which the State is not directly concerned. It deals with relations between husband and wife, parent and child and includes; property, contracts, torts, trusts, testacy and the rights recognized by the rules of admiralty law. In these cases, the courts take cognizance of the indirect effects of private conduct on the community in general. The courts accordingly refuse to sanction contracts which are immoral or against public policy.

The Benthamite school of thought divides law into *substantive* and *adjective* forms. Substantive law creates rights and obligations, while adjective law or procedural law provides a method or procedure of enforcing and protecting them. It is the law that defines procedures.

At the Common Law of England, law is sometimes used as opposed to the doctrine of Equity. It follows that, law comprises the principles adopted by Common Law courts in contradistinction to those which were administered only in courts of Equity. The courts take cognizance of both legal and equitable rights at Common Law.

There has never been any consensus about the essence of the conventional law among the many scholars of jurisprudence. Austin (2001) for instance perceived law as a rule of conduct imposed and enforced by the sovereign. Thomas Hobbes (Hobbes; 1994, 102) saw it as the commands of him or them that have coercive power. The law is, according to Sir John William Salmond (1907, 55) the body of principles recognized and applied by the state in the administration of justice. Karl Von Savigny (1831,) attributed no sacredness to the meaning of law; because the

law was itself subject to evolution and thus did not represent the arbitrary expression of the will of the lawgiver. Rodolf Von Jhering, (1914) considered the purpose of law as a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things. De Montmorency considered law as being the rules, which bind humans together in society in their struggle against the natural environment. In his words; "coercion is a weapon of law which law has forged, but it is not the basis of law" (Paton; 1964, 17).

The general understanding of the essence of conventional law today focuses on rights, duties, powers and immunities. The powers are mainly related to public authorities in their dispensation of their legal rights in so far as they are legal persons entitled to rights and duties defining the inter-personal relationship amongst them. These are expressed, *ipso facto*, in a variety of forms, such as contracts, torts, trusts and family.

A comparative study of a given legal system exposes a wide variety of the contents of the rule, classification and technical elements and language (Koleh; 1998, 139). These general principles, notions, and essences are transcendental and are encompassed in legal systems in a manner that would permit a systematic, coherent and acceptable approach that can elevate the universal nature of law. Some notions are universal because it is impossible to coherently construct a legal system without making reference to fundamental concepts especially in such terms as duty, obligation, authority, ideology, legitimacy, punishment, and redress (Teubner; 1990, 74).

The analysis of these utility-laden notions reveals that they have a close proximity with the reality of existence of the people. When examining a variety of legal systems, it appears that

there are no similarities in the universal underpinning principles of law despite the existence of universal concepts.

Aristotle acknowledges this fact by saying: "The things which are just by virtue of convention and expediency are like measures; for wine and corn measures are not everywhere equal… similarly, the things which are just not by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere by nature the best" (Aristotle; 1969, 140).

When faced by the above problem, the solution is to confine the analysis to universal terms in order to investigate the possibility of existential foundations of law. The genealogical assumption of jurisprudence by studying universal rules of law, notions, and principles, is that, in all communities a machinery known as law emerges after achieving a certain level of human development by virtue of the promulgation of reason. The institution of law exposes an existential embodiment of a transcendental desire for man to order his life which is envisaged as an ingredient of the essence of man.

1.4 Objectives

The Primary objective of this thesis is to examine the existentialist foundations of law. This is enforced by Secondary objectives in order to establish the possibilities of existentialist foundation of law as follows:

(a) To critically examine the relevant principles of existentialism upon which law can be founded,

(b) To explore the basic nature and principles of law,

(c) To demonstrate the nature of linkages between existentialism and law,

(d) To critically explore the theoretical and practical ramifications basing law on existentialism.

1.5 Justifications and Significance of the study

Academic perfectionists consider multi-disciplinary research in philosophy as redundant. Twining justifies multi-disciplinary research by asserting that:

> It is proper for examination of precepts, ideas and techniques of law in the light derived from present knowledge in disciplines other than law. It is an attempt of showing the rational connection between facts and the frame of the universe. To be a master of any branch of knowledge, you must master those, which lie next to it. Reason ventures forth from the law of garner what one or more neighboring disciplines have to offer while respecting questions of a general nature that have been thrown up in the legal contexts. This will bring the ideas, techniques, and insights of other disciplines and integrate or assimilate them into the intellectual milieu of the law (2000, 84).

Law establishes the rights and duties of human society. The utility of law and its related paradigms ensures the adherence of fair and just principles of distribution of goods and burdens according to merit and the fixation of a recompense for a wronged party. The principal purpose of law, in this light, is to maintain order and promote equity within the society. Law and its co-variants have their core functions as mechanisms whereby justice may be realized. Since law depends on an immutable, external basis for its promulgation and appropriation, there is great need to examine and appraise the possibility of establishing an enduring, humanly-based and uniquely responsive foundation upon which it exists.

Existentialism has become an indispensable tool in the current ideological thought and as such its relevance in law cannot be overemphasized. It sanctifies freedom as the hallmark of individual

identity in a society symbolized by order which is guaranteed by rule of law. The existential foundation of law, individual identity, is an integral part of social order. The principles of law by implication will be submerged in existential foundations while the intellectual appeal of the general theme of existentialism also justifies the present endeavor of examining the possibility of founding law on such grounds.

This thesis is a core source of reference for students, policy makers and all those interested in the topic. The study's findings are intended to clarify, enhance and foster a clear understanding of the application, ramifications, purpose and extent of the possibility of existential foundations of law.

1.6 Literature Review

The greatest concern for legal philosophers is to determine the basis of the values expounded by law. Hans Kelsen (2001, 278) considers law or the legal order as a system of norms which constitute a unity, a system, an order, where validity can be traced back to its final source in a single norm. This basic norm constitutes the unity in diversity of all the norms, which make up the system. The norm that belongs to a particular order is determined by tracking back its validity to the basic norm constituting the order. The sovereign principle of validity, according to the nature of the basic norm distinguishes two different kinds of orders, or normative systems. In the first such system, the norms are valid by virtue of their content, which has a directly evident quality compelling recognition. These contextual qualities of the norms, received by descent from a basic particular norm, are related to the universal norm. For example, the norms

of morals are of this character. Thus, the norms thou shall not lie, thou shall not deceive, thou shall keep promise, derives from the basic norm of honesty, good faith, and reasonableness among others (Kelsen; 2001, 299).

The natural law theory, according to St. Thomas Aquinas (1997, 30) states that "law is a rule or measure of action in virtue of which one is led to perform certain actions and restrained from performance of others. He notes the power of reason in law by observing that "reason has power to move to action from the will … we must be regulated by reason when it commands". Aquinas in his treatise *Summa Theologica* identifies four types of laws: Natural, Eternal, Human and Divine. The eternal law is equated to divine law, which arises from divine reason while natural law arises when rational creatures participate in the eternal law. Natural law is the human participation in the eternal law and is discovered by reason. St Thomas Aquinas notes that, human reason has to proceed from "precepts of the natural law, that is, from certain common and indemonstrable principles, to other more particular dispositions. Such particular dispositions arrived at by an effort of reason, are called human laws." He then concludes that, "law is nothing else than a rational ordering of things which concern the common good; promulgated by whoever is charged with care for the community" (Aquinas; 197, 48). John Finnis (2001,809) attempts to tie law, reason and existential freedom when he asserts: "there is the basic good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's character. This negatively, involves one as a measure of effective freedom that seeks to bring an intelligent and reasonable order into one's own actions, habits and practical attitudes" He offers a multi-faceted conception of law that has been reflectively constructed by tracing the implications of certain

requirements of practical reasons, giving certain basic values and empirical features of persons and their communities.

Finnis, an Australian law scholar, offers a definition of law as:

> Rules made in accordance with regulative legal rules, by a determinate and effective authority for a "complete" community, and buttressed by actions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems for the common good of that community, according to a manner and from itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities (Finnis; 2001, 108).

Austin (2001, 1422) argues that every law is a positive law, if it is put or set by its individual or collective author. He explicates that there are two classes of human law. The first class comprises the laws which are enacted by men as political superiors, or by men as private persons pursuant to legal rights. The second class comprises laws which belong to two types of law and morality. The distinction between the first and second classes of law is that the first is simply law whereas the second is morality. Austin's theory holds that positive law must be distinguished from "the law of God or divine law". It is for this purpose of distinguishing both classes of law from the law of God that leads to the qualification of law and morality. Austin refers to the first class as "positive law" and the second class as "positive morality". Both classes must flow from human sources as the positive epithet.

Justice Bob Maurice (1998,12) made it clear, in a court room, that there is a close link between the idea of law and existentialism; and that law is subsumed in existentialism. He declared: "law being a promulgation of reason emanates from the people. The realization of each and every

individual's weakness in a pre-civilized society must be explored as the sole basis for the enactment of a regulatory medium that not only assumes all of its subject to be adequately informed of its existence, nature and fundamental principles of its *modus operandi*, but that this very reality is a non-negotiable, unbending and a societal endowment, total aspiration, expectation and cumulative wills that the courts are mandated to protect, promote, regulate and direct at all times" (Maurice; 1998, 12). While ignoring the genealogical foundations of societal realities, the contention of the above argument underscores the argument that the reality of law comes not only from man but also from both man and his existence. So to speak, the idea of man necessarily evokes the idea of law and vice versa. In other words, there is no meaningful discussion of man that can exist without the idea of law and vice versa. Man and law necessarily appear as the sides of the same coin throughout and one explains the other (Maurice, 1998, 19).

The invitation to ignore the genealogical foundations of law, or the stories that propound the coming into reality of a given phenomenon in society brings a strong disagreement between rationalists and empiricists, as explained by Dawbaunchsky (Dawbaunchsky; 1996, 3). The origin of law, according to the rationalists contends that, if law is a product of reason, then it means it must have existed simultaneously in a manner that one does not precede the other. That is to say, time and man are the same in respect of time and space. There is nothing outside man's rational faculties that is required in order for the idea of law to exist. Therefore, law and man are the same with respect to time and occurrence.

The empiricists hold the view that man needed time to learn and realize the shortcomings that his existence in a society entails. 'Experience' in such a manner, places man ahead of law in respect

of occurrence. Man as such, precedes law. “Technical rationalists”, in the theory of law, dismiss the empiricists’ stand by claiming that in-as-much as it may sound right to place man before law chronologically, it ought to accept that reason is the central factor to be considered. They object to all sorts of intervening factors like duration for acquisition of experience by demonstrating the shortcoming of man without law in society. Technical rationalists consider man and reason as inextricably and intimately intertwined phenomena.

The conflict about the predication of reason and law as explicated and exemplified by rationalists and empiricists is highly lessened by existentialists’ pivotal contention that what is central to their movement is the realization that ‘existence precedes essence’. This contention in and by itself underscores the pre-eminent centrality of reason. Donvosky (1996, 60) in his argument replies to the existentialist argument by saying that existentialism is both a rationalist’s and empiricist’s movement.

Sussy Williams (2001, 129) argues that the best question to ask is whether law has a beginning and if yes, what are its foundations? “Nothing exists without a cause but when we ponder about law, the concern is raised a notch higher when one thinks of its real basis in society phenomenologically” (Williams; 2001, 129). There are succinct words found in all judges’ rulings according to this Indian that pointedly direct the origin of law to existentialism. The very nature and principles, manifestations and congruence of law are all vital appendages that have their very basic roots in the context of phenomenological approach to law. Any successful study, understanding, practice and evolution of law, must be directed towards exposing the existential

tenets that under-pin the basis of mere existence of humans in society. For Williams, it is the sole responsibility of law to evolve in tandem with social realities in order for it to be relevant.

Williams refutes the idea that society evolves into higher complexities and law responds in turn to the societal dynamism, by saying, 'this is only true when one observes particular cases and forms a general hypothesis. It is the problem of induction because there is tandem dynamism in law and society from time immemorial. But the weight with which the existentialists contend man as an end in himself, underscores the inherent efforts with which he develops the various mechanisms to realize his ends where, predominantly, law is one of them. Man invented, atoned and shaped law into such a medium through which he can realize his purpose or essence and explain his existence.

There is no possibility of any fruitful discussion central to this research study without frequent reference to 'ethics' as a closely intertwined field upon which the concept of law is related. This basically underscores the justified legal and ethical claim that there is a corresponding degree of moral and legal responsibility for the action that man undertakes (Teubner; 1990, 197).

The central concern in philosophy of law, is inquiring into the nature of law. This general question presupposes that law is a unique social-political phenomenon, with universal characteristics that can be discerned through philosophical analysis. Law possesses certain features by its very nature or essence. There are universal characteristics of law, however; the reasons for a philosophical interest in them are varied. First, is the sheer intellectual interest in understanding such a complex social phenomenon, which is after all, one of the most intricate

aspects of human culture. Law, as a normative social practice purports to guide human behavior, giving rise to reason for action. An attempt to explain this normative, reason-giving aspect of law is one of the main challenges of general jurisprudence. These two sources of interest in the nature of law are closely linked because law is not only a normative domain in our culture but also morality, religion, social conventions, and etiquette. It guides human conduct in many ways that are similar to law. Part of what is involved in the understanding of the nature of law consists of an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on such other normative orders, like morality or social conventions (Raz, 1996, 205).

The critical factor that exemplifies the centrality of law in human reality is that each and every one is held responsible for his or her actions. The same applies to morality. Law and morality bestow on an individual a sense of obligation to obey their dictates. This brings about the problem of ascribing authority and legitimacy and the requirements that man has to follow them. This is so because it is only man who is endowed with the faculty of intellect. It is only 'man' who is a rational animal while other lower animals are merely prompted to action by their sensory appetites obeying, thereby, the law of their own nature (instinct)' (Nyasani; 2001, 155). The mere possession of rational faculties frees a human being and guides his actions as existentialists demonstrate. This forms the ontological background for existentialist ethics. Human existence, for the existentialist is nothing other than freedom. It is a 'pure factual necessity' (Kariuki; 1981, 2). The human reality cannot hold without the experience of freedom. Human existence requires freedom of conscience, while human reality is so free to an extent that it has to be its own nothingness (Kariuki; 1981, 2). It is completely outside of the deterministic

causal chain of natural events. This is because nothing external to the human consciousness can necessarily determine or motivate the human reality to perform any particular act.

Determinism as a philosophical doctrine stipulates that all events in the universe, including human action, are determined or controlled by causes that are patently external to the human history absolutely dependent upon and conditioned by their causes. It may also be psychologically understood as the doctrine which teaches that the human will is fettered or encumbered and determined by either psychical and physical conditions or laws. This is why there is no human being that is free to decide on a course of action. Such an action is pre-determined by forces external to him (Nyasani; 2001, 154). If we were to equate these external forces with the controlling power of God, then determinism would not be too different from fatalism which states that all human activities are predetermined by God. These two theories negate the capacity of the freedom of the will in its ability to make a choice between two or more alternatives without a predetermined coercion. Determinism and fatalism present an insurmountable problem in law with regard to legal responsibility. They constrict the capacity of ascribing responsibility to the agent. This is so because, 'law is concerned with the application of causal ideas, embodied in the language of statutes and decisions, to particular situations' (Stapleton; 1988, 123-156).

The word 'cause' is often used when rules of law attributing responsibility for harm caused are formulated in statutes, regulation and judicial decisions. The notion that causal connection between agency and harm must be established is however often implied even when the word is not used. "Cause' implies a causal relation between an agency and harm done. The notion of

cause is central in the legal inquiry to establish responsibility, which shows that the harm done or brought about by the agency and the law treats as a potential basis for the existence or extent of their liability' (Murphy and Coleman; 1984, 206).

The relationship between causing harm and legal responsibility is however complex. 'The concern is on the incidence of responsibility, the grounds of responsibility, the items between which casual connection must be demonstrated, and the variety of relationships that can in some sense be regarded as causal' (Stapleton; 1988, 105). Human actions are necessarily founded on causal reality because no action can exist without a causal reason. This is the reason why human actions presume an inherent obligation to be carried out, while their authority and legitimacy is grounded on their preconceived consequences. If human existence is nothing but freedom, then it is interesting to explore "how law comes about in regulating human actions and as an existential reality" (Beidonofr; 1996, 48).

In discussing the existential foundations of law it is imperative to explain existence and distinguish it from essence even though there may be a curious symbiosis of complementarities between the two when trying to offer an explanation on the reality of human individuals. "Essence according to existentialists must necessarily follow existence" (Dawbaunchsky; 1996). Existence is prior to essence and any consideration of existence should in the end reveal essence. Essence as far as existentialists are concerned, is (that by which a thing is that what it is) is the posterior reality. Since it does not necessarily have to postulate existence, existence must postulate an essence. It is in this regard that the scholastics are compelled to regard essence as a truly separate reality from existence" (Nyasani; 2001, 185).

Sartre's-slogan – 'existence precedes essence' – may serve to introduce what is most distinctive about existentialism, namely, the idea that; no general, non-formal account of what it means to be human can be given, since the meaning is decided in and through existing itself. Existence is 'self-making-in-a-situation' (Raz; 1996, 37).

In contrast to other entities, whose essential properties are fixed by the kind of nature they are, what is essential to a human being makes him/ her who he/she is and this is not fixed by her type but by what she makes of herself. The fundamental contribution of existential thought lies in the idea that one's identity is constituted neither by nature nor by culture. And, to 'exist' is precisely to constitute such an identity. It is in the light of this idea that key existential notions such as factuality, transcendence (or project), alienation and authenticity must be understood.

> Traditionally, philosophers have connected the concept of existence with essence in such a way that the former signifies merely the substantiation of the latter. If 'essence' designates what a thing is, and 'existence' that what it is, it follows that what is intelligible about any given thing, what can be thought about it, will belong to its essence. It is from this that ancient philosophy drew its prescription for an individual's way of life, its estimation of the meaning and value of existence. The idea of having an essence means that human beings can be placed within a larger whole, a cosmos that provides the standard for human flourishing. Modern philosophy retains this framework even as it abandons the idea of a 'natural place' for man in the face of scientific picture of an infinite universe. In what looks like a pro-existential move, Réné Descartes, (a French philosopher,) rejected the traditional essential

definitions of man in favor of a radical, first-person reflection on his own existence in his famous expression "I think therefore I am" – (*cogito ergo sum*). He quickly nevertheless, reinstated the old model by characterizing his existence as that of a substance determined by essential proper "thinking." In contrast, Heidegger, a German philosopher proposes that, 'I am' is an entity whose what (essence) is precisely to be and nothing but to be' (Heidegger; 1982, 110). Such an entity's existing cannot therefore be thought of as the instantiations of an essence and consequently what it means to be such an entity cannot be determined by appeal to pre-given frameworks or systems – whether scientific, historical, or philosophical. This idea brought about the emergence of phenomenology as a new and more promising way of studying human reality.

The existence of law presupposes a purpose for which it was enacted to achieve, conversely a community within which it operates. It is implicit in the notion of community that the existence of that society depends on the acceptance of a set of values dealing with the fundamental issues. Law may be defined in terms of legal order tacitly or formally and expressly accepted by a community. It consists of the body of rules which are seen to operate as binding rules in that community. It is backed by some mechanism accepted by the community by means of which sufficient compliance with the rules may be secured, to enable the system or set of rules to continue to be as binding in nature. Law is never ideal justice, but human justice is defined by those who control the machinery of law. The purposes of law, is a question for legal historians and legal philosophers. In order to prepare the groundwork for the consideration of the above questions, the research aims at, exploring the possibility of discovering the existential foundations of law.

1.7 Scope and Limitations

This thesis concerns itself with conventional or positive law in contradistinction to other types of law. This is because "every order of positive law or positive morality ought always to be subjected to the critical judgment of an enlightened ideology like the one provided by existentialism" (Kelsen; 2001, 240). The humanistic or atheistic existentialism have been applied in this research as expounded by Jean-Paul Sartre. Since this is a multi-disciplinary study, there is a limited and deliberate choice of application of ideas from various sources. The study lacks the variety of critical works although this has no effect on quality of the research.

1.8 Theoretical Framework

The symbiotic-utilitarian autopoeisic theory applies to living beings. Plato described the basic elements of vegetative soul and compared the society to a living being and law. According to him, law in a way is part of the rational soul of society.

The Bergonian intuitionism, as well as Husserl's phenomenology belongs to the theoretical framework of this thesis. Existentialism in its post-Kiekergaadian development stresses the importance of the uniqueness of every individual or situation. This is why the symbiotic-utilitarian-autopoietic theory has been adopted as for this thesis. The study employs a three –in-one-theory, which encompasses symbiosis and autopoiesis from biology and utilitarianism from philosophy.

Symbiosis is a form of co-existence between organisms whereby both mutually benefit from each other in contradistinction to parasitism whereby only one organism benefits while the other loses from such a co-existence.

Autopoiesis describes the self-referential, self-replicating qualities of a typical biological system. In most biological systems, the initial properties of a member of one generation are controlled by properties of members of the preceding generation. Since an autopoietic system can only use its own elements, it constitutes the aspects of which it consists (Maturana et al; 1990, 102). Such a system is operationally closed because all operations always reproduce the same system. The parts that constitute the system contain in themselves inherently symbiotic properties and elements that they need in order to fit and function in an autopoietic system; properties and elements without which these parts cannot constitute an autopoietic system.

On the other hand, utilitarianism refers to the moral theory that there is one and only one basic principle of utility which asserts that moral agents in all circumstances ought to produce the greatest possible balance of value over disvalue for all persons affected (or at least possible balance of disvalue if only evil results can be brought about). Utilitarianism as enunciated by its founders David Hume, Jeremy Bentham, and John Stuart Mill, gauge the worth of actions by their consequences (Bentham 2001, 102). When the utilitarian principle is applied to the parties of a symbiotic – autopoietic system, the observation is that all the parts are expected to harmoniously co-exit, mutually reinforce and benefit each other, be eternally dependent and their co-existence to be super-structured from their foundations and origin (Stapleton; 1988, 123-156).

When law is consequently construed as an exegesis of an existential system, it forms a composition of symbiotic-utilitarian-autopoietic elements and properties. It is this unique everlasting property, just as in any other biological system, that point to its origin, nature, identity and continuous change of law; albeit at the same time exhibiting static nature that explains its transcendental existence. This constituent ability of a symbiotic-utilitarian-autopoietic system enables law to avail structural coupling. This forms simultaneous relations and provides a continuous influx of disorder against which the system maintains its structures without affecting the superstructures.

Law in itself constitutes the three distinct powers of symbiosis, utilitarianism and autopoiesis. This is confirmed when "through law", individuals are expected to live, contribute to, and enjoy the benefits of the State. It is noted that, (in enjoying your liberty do not infringe on the enjoyment of the liberty of others but you are obliged to contribute by omission or commission to their liberty). This form of civil symbiosis emphasizes that one's actions should maximize social good and minimize social evil: this is civil utilitarianism. Civil autopoiesis states that each and every state should strive for recognition through self-propagation of its own identity (Maturana; 1990, 38).

1.9 Hypothesis

The theoretical framework is guided by the hypothesis that it is possible to establish existential foundations of law. One's actions should maximize social good and each and every state should strive for recognition through self-propagation.

1.10 Methodology

The philosophical methodology approach is employed in this academic discipline of studying the fundamental questions of knowledge, existence and reality. Philosophical methodology is the study of how to do philosophy. Philosophy is distinguished from other realms of study because philosophers apply distinct methods in addressing philosophical questions and problems. This study utilizes the methodic doubt which is a systematic process of being skeptical about the beliefs or assertions held as common truth. The distinctive philosophical methods utilized in this study involve thesis and synthesis, critical and consistent speculative reasoning, deductive and inductive coherent analysis, systematic explication and intensive critical examination and assessment of arguments, concepts and cognate material issues and ultimately interpreting them with a philosophical bias. The study also uses the dialect method that evolves the presentation of the solutions and arguments for criticisms and counter criticism. This is solely a library-based thesis focusing on secondary sources of data related to the topic, extracted from journals, text-books and magazines and, therefore, does not involve statistical-empirical methods that are employed in empirical sciences. Phenomenological and existentialist approaches are further used to analyze facts of law.

1.11 Definition of Terms

The following two terms have been used in this thesis.

Existential Foundation

This means the themes originating from and relating to the idea of existentialism and forming a consistent and permanent underlying basis for law.

Law

This is a system of enforceable rules promulgated by reason for governing social relation and legislated by a political system for the administration of justice.

1.12 Conclusions and observations

This chapter has presented a background of the study and has determined man to be a rational being who must attempt to discover the reason or purpose of his existence. The chapter has also presented a statement of the problem where the principal concern is exploring the possibility of existential foundations of law. The chapter has elucidated on the research goals and objectives, justified the study and laid out the scope and its limitations. The assumptions of the study as well as the research methodology, theoretical framework, literature review and definition of terms has also been explained. The next chapter will discuss the nature and origin of Existentialism as an emerging branch of legal philosophy.

CHAPTER TWO

EXISTENTIALISM

2.1 Introduction

The objective of this chapter is to outline the nature and origin of existentialism as a branch of philosophy. First, it shows how existence as a philosophical problem underlines the foundation upon which law can be based. This is possible by interrogating the nature and themes that inform existentialism as a branch of philosophical study.

The second objective is to show why 'existence precedes essence' is the pillar that singly holds the key to discovering the existential foundations of law. The third objective of this chapter is to explain the contradictory nature that sets to rise when one discusses law. This on the one hand, explains the 'restrictive nature' of law and on the other, existentialism, denies 'pre-determined constrains' on being.

The fourth and last objective of this chapter is to discuss how choice as an individual experience, translates into a source of value-setting of universal social reality that informs the process of law making. The overall objective of the chapter is however to set the precedence and the foundational discussion upon which the subsequent chapter is based. The chapter will show why and how foundations of law can be traced in existentialism philosophy.

It will again explore the emergence of existence as a philosophical problem paying special attention to Sartre's slogan 'existence precedes essence' as the basis of the law. A short discussion on how freedom and value will outline the autonomy against which law faces also follows. The fourth part discusses the social, political and historical aspects of 'existence'. The theme here is that the choice an individual makes constitutes a social reality that underlies a collective identity akin to law.

2.2 The Elements of Existentialism

Existentialism, according to Jean – Paul Sartre, is a doctrine which makes human life possible. In addition, it declares that every truth and every action implies a human setting and subjectivity (Sartre; 1994, 57). Existentialists are concerned with resolving a range of philosophical questions about the nature of human beings and our relationship to the world. They are interested in such fundamental questions as the nature of human existence, the purpose of our existence, and the ways in which we might best live our lives.

In other words, existentialists address questions which while having a lot of theoretical philosophical importance, are also very important and practical matters for non-philosophers. The Danish philosopher, Kierkegaard, the French philosopher Jean Paul Sartre and Simone De Beauvoir are the key persons associated with existentialism. (Oliver; 2000, 38). Jean-Paul Sartre adopted existentialism as a self-description term. The wide dissemination of the post war literary and philosophical output of Sartre and his associates, most notably de Beauvoir, Merleau-Ponty and Camus, existentialism became identified with a cultural movement that flourished in Europe

in the 1940s and 1950s. The nineteenth century philosopher, (Kierkegaard 1971,…) and Fredrick Nietzsche (1969…), came to be seen as precursors of the movement. Existentialism was as much a literary phenomenon as a philosophical one. In the nineteenth, and twentieth, centuries, the cultural image of existentialism had been popularized by many films and books. For example, Sartre's own ideas were and are better known through his fictional works such as "*Nausea*" and "*No Exit*" than his more philosophical ones such as "*Being and Nothingness"* and '*Critique' of Dialectical Reason* (Shestov; 1969, 273).

What makes existentialism a unique and distinct inquiry is not its concern with 'Existence' in general, but rather the claim that thinking about 'human beings requires new categories which are not found in the conceptual repertoire of ancient or modern thought. Human beings can consequently be understood neither as substances with fixed properties, nor as atomic subjects primarily interacting with a world of objects.

The existential view in understanding what a human being is, is neither paramount to adding the categories drawn from moral theory nor from science. This is what makes Kaufmann (1968) observe that "neither scientific nor moral inquiry can fully capture what is that makes me myself, my "own most" self. 'Existentialism' may be defined as the philosophical theory which holds that a further set of categories, governed by the norm of "authenticity", is necessary to grasp human existence. It emphasizes the validity of scientific categories (governed by the norm of truth) or moral categories (governed by the norms of the good and the right). Existentialism as a protest movement against academic philosophy is the search for new categories with which to understand human being, its flight from the 'iron cage' of reason, its denial that philosophy

cannot be practiced in the disinterested manner of an objective science and that the central themes of existentialism find meaning in the search for a new categorical framework. The concepts, dread, boredom, alienation, the absurd, freedom, commitment, nothingness and trembling find meaning and philosophical significance in the context of authenticity as a new categorical framework.

2.3 Existence as a Philosophical Problem

Existentialism, which is the precursor of phenomenology is credited to Edmund Husserl (Pearson; 1999, 23) while the philosophical roots of existentialism are found in the existential version of phenomenology. In the early twentieth century, Husserl's work was to establish a descriptive science of consciousness. In this way, he understood not the objects of the natural science of psychology but the 'transcendental' field of intentionality; that whereas our experience is meaningful, an experience of something as something. The Husserlian concept of intentionality was seen by existentialists as the refutation of centuries old body – mind dualism or, Cartesian doctrine according to which consciousness relates immediately only to its own representations, ideas and sensations. For Husserl, consciousness is our direct openness to the world, which is governed categorically rather than causally. Intentionality is the categorical framework in which mind and world become intelligible but not a property of the individual mind (Maturana; 1990, 102).

A phenomenology of consciousness explores the constitution of the meaning of the metaphysical composition and the causal genesis of things. Husserl employed the phenomenological method to clarify the experience of human nature. Martin Heidegger however criticizes Husserl by

arguing that the latter failed to raise the critical question; that is, the question of 'meaning of being' as such. In examining the question of 'to be' phenomenologically, Heidegger insists that this question should be based "concretely" (Bentham; 2001, 102). This is not just a theoretical concern but a serious issue of life itself; the question "what it means for me to be". When raising the general question of the meaning of being, which involves first becoming clear about one's own being as an inquirer, the critical importance of the existential themes becomes clearer.

The problem of existence was first raised by Kierkegaard and Nietzsche (Maturana; 1990, 38). Heidegger however posits that the categories found in the traditional philosophy of understanding a being who can question his being are insufficient. Inspired by the philosophical works of Kierkegaard and Fredrick Nietzsche, he originally attempted to draw the phenomenological categories that can explain our 'being-in-the-world' and by so doing he became the father of existentialism.

2.4 The Problem of the Existential Essence of Man

Existentialists regard freedom as the very core identifying factor of our being. Freedom in man is not a natural *a priori* element dictated by common essence although all human beings must as a necessity experience it. This means that, each and every individual has a consciousness of freedom.

Freedom denotes an individual's awareness of the human capacity of self-determination. This means that there is nothing external to the human consciousness that can out of necessity

determine the human beings to perform any particular act. This capacity for the human being to perform any particular act means that agents' freedom has no essence. This is because it is the prior existence of the human beings as a consciousness of freedom which commands, that is, precedes the essence of the human reality. It is the free and responsible choice of being that constitutes its genuine self. The acts of a being, which is conscious of its freedom as a free and responsible agent, are referred to as intentional.

Intentional acts point towards a conscious project which by itself is directed toward a transcendent or future goal. The human reality is the permanent possibility of being its own future. Human reality is a consciousness of temporality. This means that the human being or human reality is the permanent possibility of being its own future. This is what is called to a transcendent mode of being and cannot be determined by anything else external to the human consciousness. The self-awareness of the complete freedom or autonomy or capacity for self-determination in respect to values, actions and desires and human passion is what existentialists call 'the capacity for anguish'. The element of anguish is the awareness or the consciousness that freedom bestows the foundation of values. The paramouncy of the experience of anguish is that the free individual is obliged at every moment to perform exemplary acts of free choice to form the basis of a universal criterion. It points towards the capacity for the comparability of law to assume existential foundations. The individual is condemned to be free but is simultaneously condemned to the anguish of choosing not only for himself but for the whole of mankind.

Man, through his rational faculties sets out to enact law, not for himself alone but for the whole of mankind. It is safe to argue that law attains a universal status by the fact that by its very own

nature it is universal in character. Man's fundamental relation to others leads him to be making himself for others. This means that there is nothing that can be absolutely desirable or good for us without taking into consideration our relation to others. Sartre in this regard asserts that "to choose to be this or that is to affirm at the same time the value of what we choose, because we can never choose evil. We always choose the good, and nothing can be good for us without being good for all. In choosing the right way for himself, the moral agent chooses the right way for others, and in this way he should regard himself as a lawmaker." Based on this possibility of universal legislation, it is possible to pass an objectively valid universal judgment on human conduct.

This Sartian conception of human freedom amply exemplifies the logical possibility of laws as they are conceived presently to emanate from an existential base. This is because man must have crafted law as a guide or a structure within which all others endowed with the same faculties of reason can identify with. It is a common precept of law that all will observe it, and perhaps this is why it is said, "ignorance of the law is no defence." Law thrusts itself upon man by disregarding any given peculiarity on anyone and lays down its demands in such a manner that is universal. No society exists without laws however basic they are, even primitive societies have laws. The precepts' of law are almost similar in all societies because they point towards the universal existence of law.

2.5 Freedom as the Foundation of Human Existence

Human existence is defined by pure freedom which implies that the existence of human reality is an experience of freedom. Man is continuously conscious of freedom hence human existence is defined by consciousness of freedom despite the fact that man is a contingent being.

Sartre posits in "Being and Nothingness" that 'there is at least one being in whom existence precedes essence, a being who exists before he can be defined by any concept, and that this being is man or as Heidegger calls man, *Dasein*, human reality. The concept that existence precedes essence means that man exists, turns up, appears on the scene, and only afterwards, defines himself. Man is indefinable because at first, he is nothing. It is only afterwards that he will be something and he himself will have made what he will be. There is thus no human nature. Not only is man what he conceives himself to be, but he is also only that he wills himself to be, after this thrust towards existence. Such is the first principle of existentialism.

This freedom that defines human existence means that there is nothing external to the human consciousness that can necessarily direct human reality to perform any particular act. Human consciousness is the only determinant for any given act. Human consciousness is nothing but the consciousness or awareness of freedom that defines human reality. Since man is free in his actions then he is himself freedom, he has self-bestowed freedom or is condemned to be free. He cannot help but make choices because refusing to make a choice is itself a choice. Man as a free being, whenever he is bound to act, he does so freely. This means human existence is nothing but a continuity of free choice. To live as if one is not free, to refuse to recognize one's freedom, is to lead an inauthentic existence which is tantamount to living in 'Bad Faith.' Man is necessarily bound to choose freely. Authentic existence thus requires man's acceptance of the

fact that he is a free being that is open to many future possibilities. This means that human existence is pure action. The concept of choice defines the type of action that one makes in order to arrive at a desired purpose. The desire for ultimate ends is determined by action which itself is also determined by action. The concept of human reality being determined by pure action implies the necessity of its own autonomy.

Man is nothing else but what he makes of himself. If existence precedes essence, every man is made aware of what he is and that the full responsibility of his existence rests on him. This means that he is responsible for his own individuality and that of other men. The principle that man is nothing but what he makes of himself is also called "subjectivity". Subjectivism means that an individual chooses and makes himself and that it is impossible for man to transcend human subjectivity. This implies that when man chooses for his own self, in making that choice, he also chooses for all men. This means that in making a given choice, it is conferrable to everybody. We have a greater responsibility because this choice involves all mankind. Therefore, I am responsible for myself and for everyone else.

In making a choice, he creates at the same time an image of man as he thinks he ought to be. This process of making a choice and at the same time choosing for the whole humanity brings about anguish on man. This means that, the man who is making a choice and who realizes that he is not only the person he chooses to be, but also a law maker, he chooses for all mankind as well as himself. He cannot help to escape the feeling of his total and deep responsibility. Anguish is expressed in anxiousness of the universal implications of one's actions. This could lead man to ask himself (whenever he is confronted by a situation which requires him to act)

'Am I really the kind of man who has the right to act in such a way that humanity might guide itself by my action?' This is similar to the Kantian maxim commonly called 'categorical imperative' which states that the maxim of an action should be willed as a universal law. Both the existential anguish and the categorical imperative convey universal desire that can benchmark the rise of desire for legal and moral requirements in society. This is the reason why law, by nature, entails universal elements that may appear like a refinement of the principles above.

2.6 Legal Existentialism

In their daily work in resolving and settling disputes, judges in courts of law are assisted by rules of procedure, rules of evidence and statutory definitions of the elements of offences in drafting judgments and decisions. On the other hand, we might point out that judges routinely practice the sort of situational, intuitive reasoning when they interpret legal texts. They do it when they decide custody or visitation matters. This is done whenever they assess the likelihood that an arrested person will commit an offence if granted bail, or will flee before trial. They observe it whenever they defer to precedent or distinguish it. This calls for *Stare decisis* which always involves reasoning by analogy and analogies (as the old saw has it) always limp.

The soft logic of jurisprudence is not always evident, because judges generally construct an appearance of certitude even when there can be none. Sometimes they even believe in the illusions they create. Nowhere is this more evident than in carefully reasoned judgments that are accompanied by carefully reasoned dissents. If legal reasoning really was capable of irrefutable

logic – reasoning "more geometric" as the Belgian rhetorician and legal scholar Chaim Perelman (1990) calls it, in contrast with rhetorical reasoning – if judging could be as precise as mathematics or symbolic logic, then there would be no dissents when competent and impartial jurists encounter an identical combination of facts and law.

In their logic, judges are *de facto* existentialists, even in practice – whether they know it or not. They resolve issues with soft logic because rigorous logic fails them.

But there was more to existentialism than recognition of the limits of formal logic. It was also a reaction to two successive blows to conventional thought. The first was encapsulated in Nietzsche's declaration that God had died; the second was the realization that ethics – and by implication, law – can never be a science, at least not according to the rules of scientific reasoning established by the logical positivists.

Judging by the frequency with which God is invoked in current political debates all over the world, sometimes even occupying a privileged place in national Constitutions, like the Constitution of Kenya, it would seem that Nietzsche's obituary was at least premature. It is true, however, that we cannot count on God as a basis for public policy or judicial decisions, because those who claim to know God cannot agree about His opinion on a host of issues – on Constitutional laws, dress codes, sexual mores, reproductive rights, responsibility to the poor, the status of women, capital punishment, physician assisted suicide, or killing innocent civilians (let alone soldiers) for political, religious, or economic ends. It is worthy to note in this regard that the Preamble to the Constitution of Kenya, states: "We the people of Kenya – acknowledging

the supremacy of the Almighty God of all creation." What would arise here? If Nietzsche meant that God, as a transcendent, eternal, omniscient, omnipresent, and omnipotent being had somehow succumbed, he would have been making a statement that is equally beyond proof and refutation, and in any case, an assertion of no particular consequence, since believers will ignore it, as they are entitled to, and non-believers will wonder what all the fuss is about, since they had no belief to lose in the first place.

From the perspective of logical positivism, Nietzsche's statement is ludicrous. It is neither the sort of assertion that can be derived logically from *a priori* premises, nor can it be empirically tested. "God" is, furthermore, for believers and non-believers not the sort of entity that can be defined by empirical criteria – and hence, not the sort of entity that science is equipped to deal with. At the heart of the world's monotheistic religions is the assertion that God is "ineffable". This means that he is not capable of being represented in language (hence the prohibition of using God's name in vain) or in art (hence the prohibition of idols). Any representation of God for sophisticated believers is necessarily reductive.

Nietzsche might have said something less provocative but more consequential. Instead of "God" he might have said "religion" and instead of "dead" he might have said "an unreliable authority." He might have said that given the contradictory depictions of God offered by and within the world's religions, and given that there is no universally accepted method for determining which of them, if any, is actually correct, we cannot count on religion to ground public policy in secular or multicultural societies. If he had said something of this sort, he might have acquired less notoriety and he would have said something both irrefutable and useful. It is disturbing, perhaps

for those who are persuaded that their religious beliefs are valid, perhaps uniquely valid; but undeniable nonetheless.

In the West, the loss of ecclesiastical authority as a basis for personal ethics and public policy was followed by another disturbing realization: that science, which might have been regarded as a replacement for God, is equally incapable of providing objective support for ethics and law.

Logical positivism, according to Alfred Jules Ayer (1952) was largely responsible for the explosion of scientific achievement in the twentieth century. The exclusionary rules that make science "scientific" nevertheless, also make it incapable of resolving certain kinds of questions, including questions of ethics, esthetics, politics, metaphysics, and jurisprudence. For science to be "scientific," it must deal only with "things" that can be quantified and empirically observed. Science must avoid certain kinds of questions – among them, questions with predicates including modalities like "must," "ought" and their opposites – modalities that cannot be part of the lexicon of science because they cannot be defined by tautology or precise measurement, or tested by empirical data. Since ethics is based on modes of predication, there can be no scientific foundation for ethics or its public expression as law. This is the result of a purposeful limitation of science, not an indication that ethics and laws based on ethical assertions are somehow inferior because they cannot be empirically tested.

In denying the possibility of a logical or scientific basis for moral or legal philosophy, logical positivism made an unwitting contribution to both fields. It established the distinction between knowledge and belief, and consequently between what we can know and what we can be merely

entitled to believe. There is no harm in "mere belief" or "mere opinion," even though they had been derided by Plato long before Ayer. The simple fact is that not even the most committed skeptics can construct meaningful lives without relying on beliefs and opinions that can be neither proved nor refuted. The danger is to confuse belief with knowledge, and as a result feel entitled to impose beliefs on people who do not share them.

2.7 Existentialism and Abortion

The debate in Kenya during the formulation of the Constitution, about abortion, was a perfect storm of an ethical problem and a perfect illustration of legal existentialism. Most people agree that murder is wrong. They do not care whether science or logic can prove it. In the debate about abortion, however, a fundamental and often unstated question is whether and when a foetus becomes a human being, and consequently entitled to the protection of laws against homicide. Neither religion nor science can provide an answer. Competent religious authorities disagree. From a scientific perspective, while defining and identifying human protoplasm is a relatively easy task, determining when it acquires the status of a "human being" in the sense of a person with legal entitlements, is not a scientific question. There is no scientific criterion of determining the exact point at which the gestation of human protoplasm results in a legal person. We could, of course, designate a scientifically measurable definition – in terms of development of organs, or time in the womb, or viability outside the womb – but these designations would be the result of choice, not the necessary conclusion of scientific data.

The definition of "human being" is linguistically determined. Protoplasm becomes a human being when we say it does. A person is what we call a person. We choose the breaking point but we do not discover it. That is what makes this issue so intractable. The Latin origin of "infant" –

infans – literally means "non-speaking," suggesting that for the Romans it was the acquisition of speech that marked the point at which babies acquired human status. This is why they tolerated "infanticide" – killing of non-speakers, which would have been equated with the killing of human person and is considered acceptable. Few people would accept that standard today, but that doesn't make it any easier to decide exactly when between conception and birth a foetus becomes human. It would be comforting if either science or God or both were to settle the matter for us. Science is not equipped to address such questions and intelligent theologians of goodwill even disagree.

2.8 Existentialism and Religion

The discussion of language in the Book of Genesis (in Chapter Four) omitted one crucial distinction between God's language and Adam's. Again, this analysis is not affected by our assumptions about Genesis – whether we regard it as myth or revelation. In either case, God alone uses words to declare ethical imperatives. Neither Adam nor Eve does this. Only God says "Thou shall not."

If Adam and Eve had the temerity to ask God, "And why not", God would probably have responded the way all parents do when challenged by their children: "Because I said so." In Genesis, the power of the lawgiver proceeds from his or her status. It does not have to be bolstered by arguments from science or logic.

No matter what we believe about the Bible, it turns out to be that we human beings assume that in Genesis law was treated as a divine prerogative. We create for ourselves ethical imperatives with language and attempt to create them for our children. In legislative assemblies and courts,

we create them for our neighbours as well as for ourselves. Of course, we can choose to abdicate our responsibility to authorities of one kind or another; but in doing so, we formerly shift the burden to others who have no more objective grounds for their pronouncements than we ourselves would have.

One characteristic of existentialism was its recognition that ethical principles are based on choice, not on scientific proof or divine authority or irrefutable logic. When we are deprived of theological certitude and are unassisted by science, we find ourselves choosing our ethical principles. We don't "discover" them, the way scientists discover new species, new chemical elements, or new sub-atomic entities. We inscribe them with words against a universe that is silent and indifferent, assuming a responsibility that in Genesis was attributed to God.

2.9 Existentialism and choice

From an existentialist perspective, we have no option but to choose decisively. We have to tell between what is right and wrong before making choice. We have to create an ethical universe. Ethics is not out there, transcendent, and waiting to be discovered but it is within our power to reason. Choosing our code of ethics, as opposed to discovering them or having them handed down from a mountain-top, is an awesome responsibility. No wonder the existentialists speak of "dread" and the "anxiety of choice."

In the case of abortion, the non-religious basis for our choice is likely to include arguments from consequence. What will happen if abortion is criminalized? What will happen if abortion is

legalized? The issue is particularly vexatious because there will be unhappy consequences no matter what we choose.

This analysis begs other important questions. Who makes ethical choices which eventually become law? When is one segment of society entitled to impose its values on others who do not share them? What role, if any, should religion play in public policy in a secular or multi-cultural society?

The answer to the last question should be easy enough. Religion should play no role in determining public policies. This is not out of disrespect for religion, but because religions are based on non-negotiable beliefs that are simultaneously beyond logical or scientific proof or refutation, and therefore unable to command the assent of all reasonable people.

Some obligations and taboos based on sacred texts or traditions may turn out to be defensible as statutory norms in multicultural societies, but only by coincidence. Murder and theft are forbidden by the fifth and seventh commandments found in the Bible, but this is neither grounds for enacting criminal statutes forbidding these offences nor grounds for refusing to enact them.

Coveting a neighbour's wife or donkey (husbands are not mentioned) is also forbidden by specific commandments in the Torah, but this is no reason for enacting or not enacting that prohibition into law. There are purely secular reasons for not turning these prohibitions into law. Even if a bit of harmless coveting were considered reprehensible by the majority of a particular

society, it is not the sort of activity that can be detected and penalized. Commandment or not, this prohibition would be impractical and impracticable as a statute.

Law is ultimately a system of public ethics, struggling to find universal principles without the benefit or irrefutable logic, scientific proof, or indisputable access to divine authority. Some ethical principles in religion can be appropriately imposed on everyone. Others are clearly more problematic. The difference is whether a requirement or a prohibition can be justified on the basis of a non-religious argument, usually the argument from consequence or reciprocity (e.g., what would happen if we all were free to murder or steal or assassinate one another as a political tactic?).

The basis of existential ethics is the notion that we should be willing to allow others to make the same ethical choices that we make for ourselves. The various universal declarations of human rights can be judged on the basis of this distinction. Like every statute, regulation and municipal laws, are based on choices, justified by soft logic, assumptions that are at some level un-provable and irrefutable. They are based on choices, not discoveries, which account for the inconsistencies among them.

As individuals, we may choose our own ethics as long as we do not interfere with the rights of others, or we may delegate this responsibility to clerics or theologians. In a secular society, however, the responsibility for determining what ethical choices we are entitled to impose upon our neighbours and falls ultimately on the state. Sometimes it falls on the community of nations, with courts having what is at least, provisionally, the last word. The courts act as *superpartes*

guardians of inalienable rights even when these rights are threatened by the prevailing political powers.

2.10 Existentialism, Death Penalty and Fundamentalism

In Kenya and in several other countries of the world, the law-makers and enforcers have the authority to determine whether or not to impose capital punishment for certain offences. For the time being, many courts all over the world have been discussing the central issue of whether execution itself is cruel or unusual. They pass judgment on state laws, determining whether the method of execution is cruel or unusual, or whether the procedural rules leading to execution are fair. They also determine whether certain categories of persons – minors, for example, or the mentally handicapped – should be shielded from execution rule.

There is no right or wrong resolution from the perspective of legal existentialism. We have to choose, not just as individuals but as society. Religious beliefs have no contentious issues with this since both proponents and opponents of execution have found justification in sacred texts. Science cannot equally provide sufficient clue on whether to enforce execution or not. It can provide various methods for carrying out executions, but it is powerless to tell whether we should execute or not. We, as a society, have to decide whether and when deliberately death penalty is morally acceptable or not. So far, in the United States, that provision has been tossed back and forth between state legislatures and the Supreme Court, with no definitive solution thereto. Most other industrialized countries have chosen to abandon the practice, not on the basis of irrefutable empirical data, but on the basis of how they think civilized people ought to behave. A.J. Ayer (1952) had it right: our ethical preferences are just that – preferences. This does not

mean that they are invalid. It just means that in the absence of irrefutable logic or conclusive empirical data to support our ethical norms, we must choose them.

This can be a problem not only for moral philosophers, but for legal philosophers as law is a public declaration of right and wrong, a projection of somebody's or some group's ethical beliefs on the rest of society. There is, however, a "problem" only if we believe that there ought to be objective grounds for ethical choices, instead of recognizing that law and ethics must be based on arguments from consequences and arguments from reciprocity in the context of continually evolving community standards. If we believe, as the existentialists did, that there are no metaphysical absolutes or scientific grounds for our ethical choices, we can get on with the business of choosing – or avoiding responsibility by letting others to select for us.

This essence of fundamentalism is the illusion of certitude and where there is none, legal existentialism and existential ethics is its antidote.

Fundamentalism is not only limited to religious fanatics but is found in every field, including science. When scientists claim that their methods will eventually be capable of analyzing every meaningful question, they are committing an act of fundamentalism. They assert as a factual belief that their method that cannot be proved or disproved. A.J. Ayer's (1952) contention that what cannot be proven is not worthy of discussion is exclusively Platonic. It reveals a faith in logic and science that is simply not generated by our experience. This faith might be called "scientific or philosophical fundamentalism" which is not less naïve than religious fundamentalism.

2.11 Authenticity and the Singularity of Existence

The personal experience of 'individual nothingness' or that 'lack of essence' draws one about to experience "authenticity". This is a technical term coined by Sartre to describe the "will for the freedom of all men that they should make use of in their own choice and decision" (Olafson, 1967:27). Authenticity is the universal basis of values whose goal is "an end in itself" rather "a means". This is the will for the freedom of all men within which all individual freedom constitutes the basis upon which there can be a universality of equal judgment. In our quest for the possibility of existential foundations of law, authenticity qualifies as one of the vital conditions that allow us to conclude that there can be a possibility of existential foundations of law.

It is possible to conclude that all men possess faculties of reason. This has an assumption that all men have a *modicum* for universal judgment that can at the lowest level determine the precepts of law or in other words, the conditions of legal requirements. Kierkegaard (1971, 76) posits that all individuals should be completely free to determine their own destiny. This demands that the individual should be totally responsible for what he believes and for what he does. The logical connection here is that law is a precept or a product of reason. Law is developed from human's mental faculties. What guides the faculties of reason is men's total desire to shape his life. Shaping his life constitutes determining a set of rules to follow. These rules are a clear guide and a set of principles that guards individuals' rights and freedoms from trespassing into other people's freedoms and rights and vice versa. This may be described as the genesis of the clarion

call ‘in your enjoyment of your freedom, do not infringe into other people’s freedom and liberties’. In our local scene, Kenyans have had a desire since the early nineteen eighties (1980’s) to have a new Constitution. The basic desire in this endeavour was to grant each individual his rightful enjoyment of freedom. This is in such a way that the subject does not infringe or curtail the enjoyment of the right and freedom of others.

The courts deliberate on cases with the sole aim that it upholds the freedom of others and wrongs done can be restituted. The courts in Kenya and the world at large are guided by the fact that an individual acted knowingly and willingly. That is, every act of man is an individual choice and decision and within the ambits of individual freedom. It is therefore reasonable to conclude that men enact laws in their various forms to be the basis for their freedom. Law is a universal basis for freedom of people which shapes, guides and implies the universality of freedom that can be qualified by the following shared example. Whenever a judge is determining a case, it is common that one considers the number of previous cases the accused has had at law. The first time offender is always lightly punished or freed as compared to the frequent offender who is harshly punished upon conviction. This is so because a frequent offender is considered to be unobservant of the freedom bestowed upon him. Frequent trespassers on other people’s freedom ought to be reminded of their legally constituted spheres. This is true in following the words of Murdock where he observes:

> *Even if the individual is completely free in making his own choices, however, he cannot meaningfully choose himself in isolation. An individual’s choices and value-judgments can be in any significant sense intelligible only in an objectively meaningful human world, that is, in an already meaningful human environment. This is because even the most individual project is intelligible only from the background of a generalized existence* (Murdock; 1967:237).

Authenticity, with regard to individual freedom, shows direct approach towards the idea of value indoctrination. As the attitude that describes the manner in which I engage in my projects as my "own", as opposed to the "other", authenticity candidly exposes the expectation that law has on its subjects that they will observe it individually and not collectively. This individual expectation that makes me observe the law because I believe this is the good thing to do and the others will do likewise is what can constitute what is called the "community of legal will". The assumption behind this principle of community of legal will states that all subjects of any given legal doctrine or regime individually observes the law with the logical assumption that all others will follow suit. When all these 'wills' are constituted together, they form a society that recognizes a given set of rules, owns and follows them abidingly.

As we now turn our attention to discuss the concept of singularity of existence, Kierkegaard (1983) in his book "*Fear and Trembling*" argues that in ordinary philosophical teachings, my existence constitutes a meaning only when I raise myself to the universal. He reflects indirectly on the Kantian moral doctrine that in choosing my mode of action, I do so in the belief that this world is made of universal rules. In this way one loses his individuality since the rule will be universally applicable. Kierkegaard (1983) provides an example of Abraham's call from God to sacrifice his own son. God's call addresses Abraham in his existential singularity. This case exemplifies the philosophical problem of existence. Abraham's case shows that a single individual is higher than an individual. Kierkegaard identified three stages or levels on life's way or lifetime, projected or universalized from his own experience. First, is the Aesthetic stage, characterized by lack of commitment to any ideal, except the pursuit and enjoyment of pleasure. Second, is the moral stage which is transitory, ruled by reason and lastly the Religious stage,

which is the highest stage, attained by Abraham. In order for an individual to reach this stage, one must make a 'leap of faith.'

2.12 Legal Burial Disputes in Kenya: Wambui Otieno's Case

It is logically possible to import the Kierkegaardian concept of the singularity of individual existence into the discussion of the possibility of existential foundations of law. For example, whenever humanity is faced with legal conundrum of cases which are legally challenging we ought to side step the legal path and make reference to known legal doctrines. In Kenya, there are some cases that need to be addressed in their singularity because they are unique, new and have not been addressed by the existing state laws. The examples of the most unique cases that throw our laws into a legal circus are burial disputes in modern Kenya. ***James Apeli and Enoka Olasi versus Prisca Buluka (High Court Civil Case No. 283 of 1978*** and ***Court of Appeal Civil Appeal no. 12 of 1979)*** was the first burial dispute brought to the High Court for resolution as to the final burial site of deceased person. At that time aburial dispute case was seen as a weird, peculiar and unusual case. It was also the first time the court was presented with a prayer to resolve the issue of final resting place of a deceased person. Whereas this was a classic case of a burial dispute resolution, the court had to determine the preferred place of burial. The courts in this case went to a great length to confine the dispute within its peculiar fact. Other similar cases that befell this same tragedy ***are Virginia Edith Wambui versus Joash Ochieng Ougo and Omollo Siranga*** commonly known as ***Wambui Otieno versus Umila Kager clan (Kenya Appeal Reports (182 -88), 1 KAR, at 1049)*** and ***Sakina Sote Kaittany and Mustafa Kibet Kaittany***

versus Mary Wamaitha (HCC No. 4446 of 1994[1]). The above cases required extraordinary ways to resolve them or the privileged position of law makers like members of Parliament, judges and leaders in general and the manner of enacting laws and participation in resolving them in a variety of ways. This is in contrast to the "singularity of legal determination" a term that describes the unique ways that can connect an individual to the practices of law. The term 'Single individual'describes a unique experience that cannot be resolved using the ordinary statutory laws.

2.13 Conclusion and Observations

This chapter has explored the nature and origin of existentialism. The most profound claims of existentialism that give it its current appeal is not concerned with "existence" but rather its claim that thinking about human existence requires new categories not found in the conceptual repertoire of ancient or modern thought.

The emergence of existence as a philosophical problem arose through the establishment of a descriptive science of consciousness that enhanced the understanding of the 'transcendental' field of intentionality.

Existentialism provides a new paradigm in the study of social structures and systems and how these relate to existence.

[1] (unreported among others).

The fundamental contribution of existential thought lies with the idea that one's identity is constituted neither by nature nor by identity since to 'exist' is precisely to constitute such an identity. It is in light of this idea that key existential notions such as veracity, transcendence in project, alienation, and authenticity must be understood. It is within this transcendence in project law within this philosophical research makes meaning as a central pillar of 'to be' or to 'exist'. The next chapter analyses the nature of law.

CHAPTER THREE

THE NATURE OF LAW

3.1 Introduction

There cannot be any meaningful discussion about the possibility of existential foundation of law without a critical analysis of the nature of law. The philosophy of law or jurisprudence attempts to answer the general question of the concerns of law. This general approach to the study of law presupposes that it is a unique socio-political phenomenon with more or less universal characteristics that can be discerned through philosophical analysis. The methodological system of analysis applied in this chapter is phenomenological.

This chapter examines systematically the elements that constitute law. It explains how these constituent elements of law are universally alike and why this similarity points towards a common source probably, the mental faculty or reason.

Secondly the chapter demonstrates how the universal elements of law constitute the conditions of legal validity.

The central concern is the objectivity or normativity of law and its capacity to match the existentialists' claim of why man ought to act only in one prescribed way. Man finds himself with only one option; his power to reason freely and liberty of the will which makes him exercise his freedom by making choice. Law could also be a coercive institution that makes use of threats and violence. Existentialism demands that there is only one option, to make choice.

In this discussion emphasis is on demonstrating how and why similarity and contrasts about the nature of the normative aspect of law and existentialism are resolved. The confounding conclusion derived from this chapter is that perhaps the source of the normativity of law and law in general resides in the "polished and legislated moral experience" of existentialism.

3.2 The Constitutive Elements of Law

Jurisprudence or the scientific study of law as defined by Nyasani (2001, 1ff) is the science of law of the land, commonly known as the civil law. In its Latin derivation jurisprudence includes the entire body of legal doctrine or legal knowledge which has been systematized to make it truly scientific on both methodology and analysis. In a broad sense, jurisprudence encompasses a legal exposition extending to the past, that is, the history of a people, the sociology of a people and to their philosophy of life. It is the science of the actual legislation as it pertains to the particular historical time-frame incorporating the ethos, the ideology and Zeitgeist of a given epoch.

Jurisprudence in theoretical terms is a legal doctrine that is concerned with the abstract aspects of the law in as far as those aspects can claim to be its underpinning principles or rules. These by assumption, can be called metaphysics or philosophy of law.

Philosophy of law is concerned with determining the elements crucial in its definition. Law viewed from the basis of purpose can be defined as the body of principles recognized and applied by the state in the administration of justice. Justice is the end of law (Lyons, 1984, 6).Law is a basis for prediction rather than a mere guess of a principle or rule of conduct so established as to

justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged.

Philosophy of law is interested in the general question of what constitutes law or what are the elements of law. There has never been any consensus in the study of law or jurisprudence about the essence of the conventional law, among many law scholars. John Austin (1995, 27) perceived law as a rule of conduct imposed and enforced by the Sovereign. Thomas Hobbes (1994, 106) saw it as the commands of him or them that have coercive power. Sir William J. Salmond (1907, 76) was of the view that law is the body of principles recognized and applied by the State in the administration of justice. Karl von Savigny (1831, 33) attributed the sacredness of the law considering the law to be itself a subject of evolution and thus does not represent the arbitrary expression of the will of the law giver. Jhering (1954, 107) instead considers the purpose of law as the "delimitation of interests." Vinogradoff (1954) viewed law as a set of rules imposed and enforced by society with regard to the attribution and exercise of power over persons and things. De Montmorency (1954) considered law to be the rules which bind humans together in society in their struggle against the natural environment. In his words; "Adaptation to environment is the condition of survival. Custom is the method by which man adapts himself to environment. The violation of custom could lead to death. Coercion is a weapon of law which law has forged, but it is not the basis of law".

All the above definitions focus on the essence or the basis of law: Conventional focus on rights, duties, powers and immunities. The powers mainly attach to public authorities in their dispensations to legal persons who consequently come to bear certain rights and duties. Rights

and duties define the inter-personal relationships of legal persons, which are expressed in a variety of forms, such as contracts, torts, trusts, family and immunities which relate to special protections for public office-holders, conferred in the public interest. The conventional law focuses on dispute settlement by courts and tribunals. This phenomenon represents the essence of modern administration of justice in Kenya and elsewhere. In the discharge of their mandate, the courts of justice identify the criss-crossing chains of legal relationships under various causes of action, apply these to the disputes at hand, and determine the rights of the parties on the basis of the law.

This task has not proved to be a simple and straightforward one, in modern times. The definition of rights and duties has ceased to be plain. This is because the volume of applicable law has steadily grown. In addition to the standard doctrines of the common law, the legislative input to the constitutional and ordinary law-making has become increasingly significant. The constitution, as both a legal and a political document, unavoidably opens up novel spheres of legal thought and judicial interpretations.

Philosophy of law is interested in the general inquiry of what constitutes law. It is this general inquiry about the nature of law which presupposes that law is a unique social-political phenomenon, with more or less universal characteristics that can be discerned through philosophical analysis. General jurisprudence, or philosophical inquiry about the nature of law is universal. It assumes that law possesses certain features, and by its very nature, or essence, as law, whenever and wherever it happens to exist. Even if there are such universal characteristics of law, the reasons for a philosophical interest in elucidating them remain to be explained. First,

there is the sheer intellectual interest in understanding the complex social phenomenon of which law is, after all, one of the most intricate aspects of human culture. Law is also a normative social practice that guides human behavior, giving rise to reasons for action. An attempt to explain this normative, reason-giving aspect of law is one of the main challenges of general jurisprudence. These two sources of interest in the nature of law are closely linked.

Law is however not the only normative domain in our culture because morality, religion, social conventions, etiquette also guide human conduct in many ways which are similar to law. In an attempt to understand the nature of law, an explanation of how it differs from these similar normative domains must be made. The explanation must also be made on how it interacts with them, and whether its intelligibility depends on such other normative orders, like morality or social conventions. It should be noted that law depends on morality and vice versa.

The two main interests in the nature of law are defined by current legal theorists in the following terms. First, we need to understand the general conditions which would render any putative norm legally valid. Is it, for example, just a matter of the source of the norm, such as its enactment by a particular political institution, or is it also a matter of the norm's content? This is the general question about the conditions of legal validity. Second is the twofold philosophical interest in the normative aspect of law. A complete philosophical account of the normativity of law comprises both an explanatory and a normative-justificatory task. The explanatory task consists of an attempt to explain how legal norms can give rise to reasons for action, and what kinds of reasons are involved. The task of justification concerns the elucidation of the reasons people ought to have for acknowledging the normative aspect of law. It is the attempt to explain

the moral legitimacy of law. A theory about the nature of law, as opposed to critical theories of law concentrates on the first of these two questions. It purports to explain what the normativity of law actually consists in. Some contemporary legal philosophers, however, doubt that these two aspects of the normativity of law can be separated.

In the last few centuries, two main rival philosophical traditions have emerged. They provide divergent views about what constitutes the conditions of legal validity and also explain the normativity of law as the two main subjects informing any general theory about the nature of law. The older one, dating back to late mediaeval Christian scholarship, is called the "natural law tradition". Since the early 19th century, natural law theories have been fiercely challenged by the legal positivism tradition promulgated by such scholars as Jeremy Bentham (1970) and John Austin (1995). The philosophical origins of Legal Positivism are much earlier, though, probably in the political philosophy of Thomas Hobbes (1994). The main controversy between these two traditions concerns the conditions of legal validity. Legal Positivism basically asserts, while natural law denies, that the conditions of legal validity are purely a matter of social facts. In contrast to Positivism, Natural Law claims that the conditions of legal validity are not exhausted by social facts; the moral content of the putative norms also bears on their legal validity.

3.3 Criterion of Legal Validity

The criterion of legal validity as determined by social facts as the main insights of legal positivism, involves two separate claims which have been labeled as social thesis and the separation thesis. The social thesis asserts that law is profoundly, a social phenomenon and that

the conditions of legal validity consists of social facts. Early legal positivists followed Hobbes' insight that the law is, essentially, an instrument of political sovereignty, and they maintained that the basic source of legal validity resides in the facts constituting political sovereignty. Law, they thought, is basically the command of the sovereign as has been postulated by Austin (1995, 77). The later legal positivists have modified this view, maintaining that social conventions, and not the facts about sovereignty, constitute substantial grounds for law. Most contemporary legal positivists share the view that there exist conventional rules of recognition. These are social conventions which determine certain facts or events that provide the ways for the creation, modification, and annulment of legal standards. Facts, such as an act of legislation or a judicial decision, are the sources of law which are conventionally identified in each and every modern legal system.

A minimum threshold of morality must be passed for a putative norm to become legally valid. Natural law theorists accept this insight, insisting that a putative norm cannot become legally valid unless it passes a certain threshold of morality. Positive law must conform in its content to some basic precepts of natural law, that is, universal morality, in order to become law in the first place. In other words, natural law theorists maintain that the moral content of norms, and not just their social origins, also forms part of the conditions required for legal validity.

The contention that law is good by virtue of mere necessity or that the law must have some minimum moral content is asserted by natural law theorists and refuted by legal positivists. The separation thesis is an important negative implication of this social thesis. It maintains that there is a conceptual separation between law and morality; between what the law is, and what the law

ought to be. The separation thesis, however, has often been overstated. It is sometimes thought that Natural Law asserts, and Legal Positivism denies, that the law is, by necessity, morally good or that the law must have some minimal moral content. The social theory does not entail the falsehood of the assumption that there is something necessarily good in the law. Legal Positivism can accept the claim that law is, by its very nature or its essential functions in society, something good that deserves our moral appreciation. Legal Positivism is not forced to deny the plausible claim that wherever law exists, it must have great prescriptions which coincide with morality. There is probably a considerable overlap, and perhaps necessarily so, between the actual content of law and morality. Once again, the separation thesis, properly understood, pertains only to the conditions of the validity of law. It asserts that the conditions of legal validity do not depend on the moral content of the norms in question. 'Is' and 'ought' for law is independent from each other.

A contemporary school of thought, called Inclusive Legal Positivism, endorses the social thesis, affirming that basic conditions of legal validity derive their meaning from social facts, such as social rules or conventions which happen to prevail in a given community. Inclusive Legal Positivists however maintain that legal validity is sometimes a matter of the moral content of the norms, depending on particular conventions that happen to prevail in any given community. Those social conventions on the basis of which we identify the law may, but need not, contain reference to moral content as a condition of legality.

It is difficult to maintain that morally bad law is not law. The idea that law must pass, as it were, a kind of moral filter in order to count as law strikes most jurists as incompatible with the legal

world as we know it. The contemporary natural lawyers have suggested different and more subtle interpretations of the main tenets of natural law. John Finnis (Finnis; 1980, 76), for example views natural law, not as a constraint on the legal validity of positive laws, but mainly as an elucidation of an ideal of law in its fullest, or highest sense, concentrating on the ways in which law necessarily promotes the common good. As we have noted earlier,it is not clear whether such a view about the necessary moral content of law is at odds with the main tenets of Legal Positivism.

Ronald Dworkin's (Dworkin; 1986) legal theory supports the idea that the conditions of legal validity are partly a matter of moral content. He is not, however, a classical Natural Law theorist, and he does not maintain that morally acceptable content is a precondition of legality of norms. His core idea is that the very distinction between facts and values in the legal domain, between what the law is and what it ought to be, is much more blurred than Legal Positivism would have it. It is inevitable to determine what the law is, in particular cases, depending on politico-moral considerations about what it ought to be leading to evaluative judgments and partly determining what the law is.

The legal realism theory as conceptualized and developed by Dworkin underwent two main stages. His legal theory is further based on a certain conception of legal reasoning which also underwent two major stages. In the 1970's, Dworkin argued that the falsehood of Legal Positivism resides in the fact that it is incapable of accounting for the important role that legal principles play in determining what the law is. Legal positivism envisaged, Dworkin claimed, that the law consists of rules only. This is a serious mistake, since in addition to rules; law is

partly determined by legal principles. The distinction between rules and principles is basically a logical one. Dworkin maintained that rules apply in an 'all or nothing fashion'. If the rule applies to the circumstances, it determines a particular legal outcome. If it does not apply, it is simply irrelevant to the outcome. Principles do not determine an outcome even if they clearly apply to the pertinent circumstances. They basically provide the judges with a reason to decide on a case one way or the other, and hence they only have a dimension of weight. The reasons provided by the principle may be relatively strong, or weak, but they are never 'absolute'. Such reasons, by themselves, cannot determine an outcome, as rules do.

The moral dimension of legal principles by legal positivists is both interesting and problematic. Dworkin's theory, unlike legal rules, may or may not have something to do with morality. Principles are essentially moral in their content. It is, partly a moral consideration which determines whether a legal principle exists or not. A legal principle exists, according to Dworkin, if it follows from the best moral and political interpretation of past judicial and legislative decisions in the relevant domain. In other words, legal principles occupy an intermediary space between legal rules and moral principles. Legal rules are posited by recognized institutions and their validity derives from their enacted source. Moral principles are what they are due to their content, and their validity is purely content dependent. Legal principles, on the other hand, gain their validity from a combination of source-based and content-based considerations. Dworkin puts it in the most general terms that: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" (Law's Empire, 225).

The validity of a legal principle then derives, from a combination of facts and moral considerations. The facts concern the past legal decisions which have taken place in the relevant domain, and the considerations of morals and politics concern the ways in which those past decisions can best be accounted for by the correct moral principles.

Many legal philosophers doubt that there are legal principles of the kind Dworkin envisaged. There is an alternative, to account for the distinction between rules and principles in the law. This relevant difference concerns the level of generality, or vagueness, of the norm-act prescribed by the pertinent legal norm. Legal norms can be more or less general, or vague, in their definition of the norm-act prescribed by the rule. The more general or vague they are, the more they tend to have those quasi-logical features Dworkin attributes to principles.

At the end of last century, Dworkin radicalized his views about these issues, striving to ground his anti-positivist legal theory on a general theory of interpretation, emphasizing law's profound interpretative nature. Despite the fact that Dworkin's interpretative theory of law is extremely sophisticated and complex, the essence of his argument from interpretation can be summarized in a rather simple way. The main argument consists of two main premises. The first theory maintains that determining what the law requires in each and every particular case, necessarily involves an interpretative reasoning. Any statement of the form: "According to the law in S, X has a right/duty to y" is a conclusion of some interpretation or other. The interpretation, according to the second premise, always involves evaluative considerations. It is neither purely a matter of determining facts, nor is it a matter of evaluative judgment *per se,* but an inseparable mixture of both. One who accepts both theses must conclude that the separation theory is

fundamentally flawed. If Dworkin is correct about both theses, it surely follows that determining what the law requires always involves evaluative considerations.

Both of Dworkin's theses are highly contestable. Some legal philosophers have denied the first premise, insisting that legal reasoning is not as thoroughly interpretative as Dworkin assumes. Interpretation, according to this view, is an exception to the standard understanding of language and communication, rendered necessary only when the law is, for some reason, unclear. In most standard instances however, the law can simply be understood, and applied, without the mediation of interpretation. Other legal philosophers denied the second premise, challenging Dworkin's theory that interpretation is necessarily evaluative.

Dworkin's legal theory shares certain insights with the inclusive version of legal positivism. It is however noted that although both Dworkin and Inclusive Legal Positivists share the view that morality and legal validity are closely related, they differ on the grounds of this relationship. Dworkin maintains that the dependence of legal validity on moral considerations is an essential feature of law which basically derives from law's profoundly interpretative nature. Inclusive Positivism on the other hand, maintains that such a dependence of legal validity on moral considerations is a contingent matter; it does not derive from the nature of law or of legal reasoning as such. Inclusive positivists claim that moral considerations affect legal validity only in those cases which follow from the social conventions which happen to prevail in a given legal system. In other words, the relevance of morality is determined in any given legal system by the contingent content of that society's conventions. As opposed to both views, traditional, or Exclusive Legal Positivism maintains that a norm is never rendered legally valid by virtue of its

moral content. Legal validity, according to this view, is entirely dependent on the conventionally recognized factual sources of law.

It may be worth noting that those legal theories maintaining that legal validity partly depends on moral considerations must also share a certain view about the nature of morality. Namely, they must hold an objective stance with respect to the nature of moral values. If moral values are otherwise not objective and legality depends on morality, then legality would also be rendered subjective, posing serious problems for the question of how to identify what the law is. Some legal theories, however, do insist on the subjectivity of moral judgments, thus embracing the skeptical conclusions that follow about the nature of law. Skeptical theories state that law is, indeed, profoundly dependent on morality. These theorists assume that morality is entirely subjective and only demonstrate how the law is also profoundly subjective, or is always up for grabs, so to speak. This skeptical approach which is evident in post-modernist literature, depends on a subjectivist theory of values. This is rarely articulated in this literature in any sophisticated way.

3.4 The Normative Element of Law

Law enforces its demands on its subjects through threats and violence. From time immemorial, law has been viewed as coercive institution. This nature of law led some philosophers to claim that the normativity of law resides in its coercive nature. It is within the legal positivist tradition that the coercive aspect of the law has given rise to fierce controversies. Early legal Positivists, such as Bentham (1970) and Austin (1995) maintained that coercion is an essential feature of law, and even distinguished it from other normative domains. Legal positivists in the 20th

century have tended to deny the claim that coercion is neither essential to law, nor, actually, pivotal to the fulfillment of its functions in society.

John Austin maintains that each and every legal norm must comprise a threat backed by sanction. This involves at least two separate claims. In one sense, it can be understood as a theory about the concept of law. 'Law' can only be those norms which are backed by sanctions emanating from political sovereign. Second, though not less problematic sense, the intimate connection between the law and the threat of sanctions is a theory about normativity of law. This is basically a reductionist theory which maintains that the normativity of law consists in the subjects' ability to predict the chances of incurring punishment or evil.

There is a great concern about the relative importance of sanctions for the ability of law to fulfill its social functions. Hans Kelsen (1961) for instance, maintained that the monopolization of violence in society, and the law's ability to impose its demands by violent means, is the most important of law's functions in society. Twentieth century legal Positivists, like H.L.A. Hart and Joseph Raz (Hart; 1994 First Edition, 1961) deny this, maintaining that the coercive aspect of law is much more marginal than their predecessors assumed. Hart criticized the claim that the normative aspect of law consists in the subject's ability to predict a sanction was criticized by Hart. His fundamental objection to Austin's reductionist account of law's normativity is, on his own account: "that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for prediction that hostile reactions will follow but are also a reason or justification for such reaction and for applying the sanction" (Hart, 1983, 82).

The emphasis on the reason-giving function of rules is surely correct, but perhaps not enough. Supporters of the predictive account could claim that it only begs for further questions like why people should observe rules of law as reasons or justifications for actions. If it is, for example, only because the law happens to be an efficient sanction-provider, then the predictive model of the normativity of law may turn out to be after all corrective. In other words, Hart's fundamental objection to the predictive model is actually a result of his vision about the main functions of law in society.

The functions of laws in our culture are more closely related to its coercive aspect. The application of 'game theory' in the law tends to show that the rationale of a great variety of legal arrangements can be best explained by the function of law in solving problems of opportunism, like the so called Prisoner's Dilemma situations. In these cases, the law's main role is, indeed, one of providing coercive measures. Be that as it may, we should probably refrain from endorsing Austin's or Kelsen's position which provide that sanctions is law's only function in society. Law in our society resolves recurrent and multiple disputes which are about facts, setting standards for desirable behavior and proclaiming symbolic expressions of communal values. These have very little to do with law's coercive aspect and its sanction-providing functions.

The legal realism school questions the extent to which law can guide behavior by providing its subjects with reasons for actions. American Legal Realists claimed that our ability to predict the outcomes of legal cases on the basis of the rules of law is rather limited. In the more difficult

cases which tend to be adjudicated in the appellant courts, legal rules, by themselves, are radically indeterminate as to the outcome of the cases. The legal Realists thought that lawyers who are interested in the predictive question of what the courts will actually decide in difficult cases need to engage in sociological and psychological research. They strive to develop theoretical tools which would enable us to predict legal outcomes. Legal Realism was thus an attempt to introduce the social sciences into the domain of jurisprudence for predictive purposes. The extent to which this scientific project succeeded is a matter of controversy! Legal Realism paid very little attention to the question of the normativity of law, that is, to the question of how the law does guide behavior in those cases in which it seems to be determinate enough.

Joseph Raz's theory of authority contains an approach to the normativity of law (Raz; 1979, 156). It also shows how such a theory about the normativity of law entails important conclusions regarding the conditions of legal validity. The basic insight of Raz's argument is that law is an authoritative social institution. The law which Raz claims, is a de facto authority. It is also essential and must be held to claim legitimate authority. Any particular legal system may fail, of course, in its fulfillment of this claim. Law is hence the kind of institution which necessarily claims to be a legitimate authority. The essential role of authorities in our practical reasoning, according to Raz, is to mediate between the putative subjects of the authority and the right reasons which apply to them in the relevant circumstances. An authority is legitimate only if its putative subjects are likely to comply better with the relevant reasons which apply to them by following the authoritative resolution than by trying to figure out or act on those reasons by themselves.

In order for something to be able to claim legitimate authority, it must be the kind of thing capable of claiming it, that is, capable of fulfilling such a mediating role. There are at least two such features necessary for authority-capacity. First, for something to be able to claim legitimate authority, it must be the case that its directives are identifiable as authoritative directives, without the necessity of relying on those same reasons which the authoritative directive replaces. If this condition is not met or if it is impossible to identify the authoritative directive as such without relying on those same reasons the authority was meant to rely on, then the authority could not fulfill its essential, mediating role. It could not make the practical difference that is expected to make. This argument does not concern the efficacy of authorities. The point is not that unless authoritative directives can be recognized as such, authorities could not function effectively. The argument is based on the rationale of authorities within our practical reasoning. Authorities are there to make a practical difference. They could not make such a difference unless the authority's directive can be recognized as such, without recourse to the reasons it is there to decide upon. In other words, it is absurd to have authorities if to discover what is an authority and what is not, you have to engage in the same reasoning process that reliance on the authority is supposed to replace. Second, for something to be able to claim legitimate authority, it must be capable of forming an opinion on how its subjects ought to behave, distinct from the subjects' own reasoning about their reasons for action. In other words, a practical authority, like law, must be basically personal authority, in the sense that there cannot be an authority without an author.

Raz's conception of legal authority provides very strong support for Exclusive Legal Positivism. In his view it is a requirement that the law be identifiable on its own terms without necessarily relying on those same considerations for which it exists to settle. A norm is legally valid or

authoritative only if its validity does not derive from moral or other evaluative considerationsinforming its existence. Raz's theory challenges both Dworkin's anti-positivist legal theory, and the inclusive version of Legal Positivism. The challenge and controversies it gave rise to, form one of the main topics discussed in contemporary general jurisprudence.

If we hold the legal Positivist theory that law is essentially founded on social conventions, another important question arises: How does the conventional practice give rise to reasons for action and, in particular, to obligations? Some legal philosophers claimed that conventional rules cannot, by themselves, give rise to obligation. Leslie Green observed that: "Hart's 'view that the fundamental rules are 'mere conventions' continues to sit uneasily with any notion of obligation'. Green finds this troubling, because the rules of recognition point to the 'sources that judges are legally bound to apply" (The Concept of Law Revisited'; 1697).

The debate here is partly about the conventional nature of the rules of recognition, and the ways in which conventions can figure in our reasons for action. One influential theory, inspired by David Lewis (1990, 47) states that conventional rules emerge as solutions to recurrent coordination problems. If the rules of recognition are indeed of such a coordination kind, it is relatively easy to explain how they may give rise to obligations. Coordination conventions would be obligatory if the norm subjects have an obligation to solve the coordination problem which initially gave rise to the emergence of the relevant convention. It is doubtful, however, that coordination conventions are at the foundations of law. In certain respects, the law may be more like a structured game, or an artistic genre, which is actually constituted by social conventions. Such constitutive conventions are not explicable as solutions to some pre-existing current

coordination problem. The conventional rules constituting the game of chess, for example, are not there to solve a coordination problem between potential players. Antecedent to the game of chess, there is no particular coordination problem to solve. The conventional rules of chess constitute and in effect result into a kind of social activity people find worthwhile engaging in. Just like in the game of chess the constitutive conventions in part make for the values inherent in the emergent social practice. Such values, however, are only there for those who care to see them. Constitutive conventions, by themselves, cannot ground an obligation to engage in the practice which they constitute.

From a moral point of view, the rules of recognition, by themselves, cannot be regarded as sources of obligation to follow the law. Whether judges, or anybody else, should or should not respect the rules of recognition of a legal system is basically a moral issue that can only be resolved by moral arguments concerning the age old issue of political obligation. This is more generally so with the existence of a social practice, in itself, which does not provide anyone with an obligation to engage in the practice. The rules of recognition only define what the practice is, and they can say nothing on the question of whether one should or should not engage in it. If one engages in the practice, playing the judge, as it were, of course there are legal obligations defined by the rules of the game. In other words, there is nothing special in the idea of a legal obligation to follow the rules of recognition.

There are several arguments that support the essentially normative aspect of Legal Positivism. Perry (2001) argues that any attempt to conceptualize law necessarily requires a choice between different possible ways in which law can be conceptualized. Any choice between these

conceptual frameworks would necessarily have to rely on the attribution of some point or function to the law. This, in turn, Perry argues, necessarily involves moral argument. Jeremy Waldron (2001) offers a similar argument contending that it is a central issue for any theory about the nature of law to determine whether certain types of normative claims are legal or not. Second, Waldron argues, such disputes cannot be rendered sensible without testing the respective theories against our sense of why would it be important whether some norms count as legal and others do not. Finally, he claims, any answer to this 'Why' question is bound to be a normative one, relying on some moral political theory about what makes law good and worth of our appreciation. General jurisprudence necessarily relies on some normative, moral, considerations. Both of these views, and similar ones, purport to rely on Hart's own insistence that a normative social practice, like law, cannot be understood without taking into account the participants' internal point of view which view is essentially normative, rationalizing the ways in which the participants regard the law as reasons for their actions.

It is common to all these theories, including Hart's, that any attempt to understand what the law is, must rely on a fairly elaborate understanding of law's functions in society, and of the ways in which the law is constituted to fulfill those functions.

It seems, furthermore very plausible to maintain, as Hart himself suggested. We cannot understand law without understanding the ways in which it is typically regarded by those whose law it is. This is specifically, by those who normally regard the law as giving reasons for their actions. This common point of departure, however, leads to very different conclusions. Hart believed that none of this precludes jurisprudence from remaining basically descriptive and

morally neutral. Theorists like Dworkin, Perry, Waldron, and others like Moore, on the other hand, reach the opposite conclusion that jurisprudence necessarily relies on moral considerations. What is mostly at stake here, is the question of whether understanding the point, or purpose, or function, of a social practice (or any normative system), necessarily collapses into certain judgments about its worth or value. Hart basically claimed that we can come to understand the point of law, its main functions in society, and the ways in which it gives reasons for action, without necessarily forming any particular moral judgments of our own about those reasons, functions, etc. His critics obviously deny this, arguing that the separation between accounts of what the function of X is, or what its main point is, etc., cannot be given without a moral argument. This is indeed important an issue that is currently forming one of the main controversies in theorizing the nature of law.

3.5 A Critical Analysis of Legal Principles and Political Ideology

It might seem obvious that law is related to some ideology when it is viewed as a system of enforceable rules governing social relations and legislated by a political system. Ideology is a system of political ideas while law and politics seem to be inextricably intertwined. Just as ideologies are dotted across the political spectrum, so too are legal systems. We thus speak of both legal systems and ideologies as liberal, fascist, communist, and so on, and most people probably assume that law is the legal expression of a political ideology. One would expect the practice and activity of law to be shaped by people's political beliefs. Law might therefore seem to emanate from ideology in a straightforward and uncontroversial way.

The connection between law and ideology is both complex and contentious. This is because of the diversity of definitions of ideology and the various ways in which ideology might be related to law while the observation about law's link with ideology might seem a sociological commonplace, the link between law and ideology is more often made in a critical spirit. The issue here is an understanding of ideology as a source of manipulation. Law as ideology directs its subjects in ways that are not transparent to the subjects themselves; law, on this view, cloaks power. The ideal of law, in contrast, involves a set of institutions that regulate or restrain power with reference to norms of justice. The presence of the ideology in law must, in some sense, compromise law's integrity. Law is not only an ideology at odds with a lot of mainstream thinking about law, but it seems difficult to reconcile with the central philosophical positions on the nature of law. It is a positivist conception of law as a set of formal rules, or a natural law conception where law is identified with moral principles.

Claude Destutt de Tracy (1969) in his study of the enlightenment coined the word ideology to refer to the study of ideas and their origins. It understands ideas to issue, not haphazardly from mind or consciousness, but as the result of forces in the material environment that shape what people think. De Tracy believed his view of ideology could be put to progressive political purposes, since understanding the source of ideas might enable efforts on behalf of human progress. Ideologies are ideas whose purpose is not epistemic, but political. An ideology exists to confirm a certain political viewpoint, serve the interests of certain people, or to perform a functional role in relation to social, economic, political and legal institutions. Daniel Bell (1962) dubbed ideology 'an action-oriented system of beliefs.' It is action-oriented and does not render reality transparent, but rather motivates people to do or not do certain things. Such a role may

involve a process of justification that requires the obfuscation of reality. Bell and other liberal sociologists, nonetheless do not assume any particular relation between ideology and the status quo; some ideologies serve the status quo, others call for its reform or overthrow.

3.6 Conclusion and Observations

In this chapter, a critical examination of the nature of law has been made. It has been shown that law, through a philosophical inquiry, possesses certain features by its very nature, essence or purpose. Law, as a normative social practice, purports to guide human behavior, while Jurisprudence or the philosophical inquiry of law attempts to explain and unveil this normative, reason-giving aspect of law. The controversy on the centrality of legal validity has led to an examination of the insight of legal positivist and natural law theorists. The most crucial idea that is important to this thesis is the claim by natural law theorists that a putative norm becomes legally valid only when it possesses a certain threshold of morality. This means that the moral content of the norms and their social origins form part of the conditions of legal validity. The next chapter discusses the relationship between law and morality.

CHAPTER FOUR

LAW VERSUS MORALITY

4.1 Introduction

> "The general object which all laws have, or ought to have is to augment total happiness of the community" (Jeremy Bentham: Principles of Morals and Law).

The classic philosophical attempt to sever law and morals was that of Immanuel Kant. In his *Groundwork of the metaphysic of morals*, he argues that:

> The essence of things does not vary with their external relations; and where there is something which, without regard to such relations, constitutes by itself the absolute worth of man, it is by this that man must also be judged by everyone whatsoever – even by the Supreme Being. Thus morality lies in the relation of actions to the autonomy of the will, that is, to a possible making of universal law by means of its maxims (Kant ;1967, pp 36)

In this passage, Kant distinguishes between morality, as a function of the "autonomy of the will" which purely with inner motivation, and the law, which focuses on "external relations" – conformity to external standards. For morality motive or intention are important and central in morality. The moral man will act within an inner consciousness of duty. The fact that motivation conforms or does not conform to external legal standards is of no consequence to the inherent morality of his inner being. Law, in diametric contrast to morality, concerns itself only with externals; whether a legal act is performed or not, without regard to the motives behind it.

The significance of Kant's position will be immediately apparent to the legally trained individual. Fundamental to the definition of a crime are the dual concepts of *actus reus* and *mens rea* – the "guilty act" and the "guilty intent" – concepts which, according to Lord Denning, a celebrated English judge, go back at least to St Augustine in the Fifth century. Except for a

very limited number of statutory crimes, guilt can only be established when the accused has not simply done an illegal act but has in fact done it with the appropriate general or specific criminal intent. Del Vecchio (1953) has well said that "If Kant had been a jurist; he would have understood how important the consideration of the animus is in every branch of Law." Trendelenburg further refutes Kant when he points out, in his *naturrecht auf dem Grunde der Ethik*, that Kant's separation of the legal from the moral in this fashion "leads to the external formal legality of the Pharisees."

But, it is not only philosophers who have endeavoured to drive a wedge between law and morals. Juridical scholars themselves have also made the attempt, albeit on different grounds.

Sheriff Gordon, (2005) in his standard work, the Criminal Law of Scotland, maintain that legal responsibility is in principle amoral. The idea at root is not to provide infallible moral results in particular cases but to maintain a general concept of legal responsibility in society. He illustrates this using the example of a teacher who, before going out of the classroom, singles out a boy and says, "I shall hold you responsible for any noise." The issue here is not the boy's ability to prevent the noise; responsibility is imputed to achieve desired social ends. Law, for Gordon entails authority, and rules issued by that authority. Whether rules are ethical or not and if they are meant to achieve moral ends in each particular case are secondary questions.

The position of Sheriff Gordon derives, of course, from the legal philosophy of Positivism or Realism, as has been set forth by John Austin and Jeremy Bentham in the 19th century. The Positivists maintain that "law is the command of the sovereign" and the introduction of moral

issues into the definition of the law partakes of "nonsense on stilts," to use Bentham's epithet for Blackstone's Natural Law ideals. In our century, the strongest form of Legal Positivism has been that of the so-called Scandinavian Legal Realists (Hagerstrom, Olivecrona, Alf Ross), who have argued, along the lines of the Vienna Circle of Logical Positivists in the first edition of A.J. Ayer's *Logic Language and Truth* and, that ethical ideas are analytically, meaningless and technically nonsensical. They further note that law must be defined entirely without reference to moral values. A milder form of legal Positivism is that of the American Legal Realists (O. W. Holmes, Karl Llewellyn), who, while agreeing with the Scandinavians that moral considerations must not enter into the definition of law, are willing (and often eager) to discuss moral and policy questions as separate and distinct (non-legal) issues.

Legal Positivism, whether in its original English form or in its Scandinavian and American variations, has been subjected to intense criticism in recent years. Perhaps the most damning argument against it has been the amoral legal systems of Twentieth century totalitarianism (Nazi Germany, Vichy France, Stalinist Russia), which have epitomized legal power without moral restraint.

Returning to Sheriff Gordon's illustration, would we want to live in a society where any person (perhaps a Jew or a Black) could – by arbitrary fiat – be held accountable at law for wrongs committed by others? Granted, some law is better than no law, since anarchy is the closest to hell we can get on this earth (this is only too vivid in the minds of all Kenyans arising from the events of the 2007 post-election violence). It is common knowledge that there was total anarchy which, in fact, negated the concept of amoral legal system.

4.2 Existentialism, Law, and Morals

We argue of the connection between law and morals over and against Kant and the Legal Positivists. This is well demonstrated if we shall maintain (1) that moral law is a direct source of positive law, (2) that law can and does influence morals, and, finally (3), that morality deeply affects the content of the positive law.

4.3 Morality as a source of law

When one turns away from the philosophers of law and textbook writers to the most distinguished common law judges of modern times, one finds strong reason to believe that morality has a central influence on the very creation of the positive law. In America, Judge Dillon (1894), writing semi-autobiography in his immensely influential work, 'The Law and jurisprudence of England and America,' declared: conventional regulations, or are mere usages and customs, not having a moral quality, if there be any such, they have an ethical foundation.

Law in its nature is therefore opposed to all that is unfit, capricious, unjust, partial, or destructive. Kant's philosophy could in general, be unprofitable enough in practical results. There is nonetheless one noble passage of his that makes an impression that years have never effaced or dimmed: "There are two things which, the more I contemplate them, the more they fill my mind with admiration, - the starry heavens above me, and the moral law within me."

It is important to note that the "moral law" which Kant found within himself, and which is likewise found within and is consciously recognized by every man is the universal one. This moral law holds its dominion by divine ordination over us all, from which escape or evasion is

impossible. This moral law is the eternal and indestructible sense of justice and of right written by God on the living tablets of the human heart, and revealed in His holy Word. Its considerations of justice and right make up the web and woof and form the staple of a lawyer's life and vocation. The lawyer's work and business are, it is true, with human laws; but the lawyer could make a grievous mistake when s/he supposes law to be the mere equivalent of written enactments or judicial decisions. In a judicial a judge is irresistibly drawn to the intrinsic justice of the case, with the inclination, and if possible the determination, to rest the judgment upon the very right of the matter. In the practice of the profession, a judge will always feel an abiding confidence that if my case is morally right and just it will succeed, whatever technical difficulties may appear to stand in the way; and the result usually justifies the confidence.

Such comments inevitably remind one of Lord Denning on the English judicial scene. After examining Denning's early judgments and a number of his extra-judicial writings, F.E. Dowrick provides an evaluation that even Denning's critics would not contest: "As a judge of first instance in 1947 in the High Trees House case, he startled the profession by the use of a moral proposition as an integral part of his reasoning in such a way as to appear to challenge a deep-rooted legal principle, and he has continued to use moral criteria liberally in the process of restating the law in the Court of Appeal." Dowrick analyses Denning's use of moral categories in the following terms:

> In his judicial technique the notion may be discerned operating in two ways. In some cases he overtly relies on some moral principle, the validity of which is assumed a priori, and which he applies casuistically to the facts before the court. In others he concentrates upon the facts before the court, setting them out not only in the narrow from disclosed in the pleadings but in their wider social context, and then, relying on an intuitive sense of right and wrong, pronounces a moral judgment ad hoc (Dowrick, 1994).

Whether or not we agree with Denning's apparent willingness to subordinate precedent to the personal morality of the judge, we are compelled to see in his work – which unquestionably constitutes the single most influential judicial activity in England in this generation – clear evidence of morality providing a concrete and powerful source of legal development.

4.4 Law as an influence on Morals

A. L. Goodhart (1988, 47) in his *English Law and the Moral Law*, has provided important illustrations of the fact that the relation between law and morality is not a one-way street. In certain instances, public morality has stagnated its feet and only the pressures of enlightened legislation or judicial decision have been successful in raising the moral tone of society. The criminal law against commercial sex is a striking example. Today, in some countries, commercial sex has been legalized, licensed and taxed for revenue. This, though somewhat not universal change of moral perception, was squarely due to the conscientious judicial application of anti-prostitution laws.

The various Married Women's Property Acts offer another illustration. For centuries, society at large was not troubled by the fact that the *feme covert* – like the infant or the imbecile – suffered severe impediments to property ownership in her own right. It was only due to enlightened legislation and its implementation by the courts that the married woman's merger of civil existence in that of her husband came to be recognized as morally reprehensible. The extent to which the modern married woman has attained economic independence, she owes the public

approval of her liberated status very largely to the work of legislators and judges. **(See the Constitution of Kenya, Article 45 and the recently decided case of *Echaria v. Echaria [2009] K.L.R. 116.)***

On the basis of such examples Goodhart argues:

> The civil law has played an important part in shaping the moral law of this country. This is hardly surprising because both of them are essential and interrelated parts of our civilization. Any attempt to separate them in action is to cut "the seamless web" of English law, as Maitland has called it, because the law is seamless not only in its history but also in the forces which give it its life (Goodhart, 1988,47).

The interrelationship between law and morals is perhaps best symbolized by the chemical sign for a reversible reaction with the double-arrow: ⇄ which indicates that each factor works simultaneously on the other. There are two aspects in this equation. Law influences morality. At the same time, morality is in the continuous process of influencing law. The two are not divorced from each other. Since the latter aspect of the equation is less readily appreciated in legal circles, we shall spend considerably more time in the discussion of it. Whether one examines the civil or the criminal law, one encounters a multitude of illustrations of the direct impact of morality on legal doctrine.

In the sphere of the criminal law, we consider the fundamental historical distinction between *mala in se* and *mala prohibita*; crimes that are evil or heinous in themselves as contrasted with crimes that are such only because they are prohibited by statute. The practical significance of this distinction lies in the fact that if one commits a mere *malum prohibitum* and then seeks within that framework to have the court rectify an injustice one has sufferred, the court will generally do so. In the case of a *malum in se,* the court will refuse and simply leave the parties where they are.

If an individual engage voluntarily in a fight with someone, committing the *mala in se* crimes of battery or affray, and then attempt to sue your adversary civilly in tort for injuring you, you will get nowhere under Common Law. Except where statute has changed the Common Law (as it has in many jurisdictions), the courts will not assist you in recovering a prostitution debt. If for example a client visits the house of prostitution and pays by cheque, and the cheque is dishonoured, the unfortunate brothel will not be able to sue for the cheque.

Why does the Common Law take this position? Simply because it intuitively recognizes the tremendous moral gulf dividing, on the one hand, wrongs that are not inherently evil but are criminalized for social purposes, and, on the other, wrongs that in fact represent inherent immorality. The *malum in se/malum prohibitum* presupposes a moral standard capable of distinguishing genuine evil from merely conventional wrongdoing.

Moving on to the civil law, we can readily see the direct influence of morality in the major areas of contract, wills and trusts, and tort. The modern law of contract would be unrecognizable apart from the fundamental notion of good faith. The Uniform Commercial Code (UCC), which has codified the Common Law throughout the United States and has such international influence that it has been translated in its entirety into French, declares:

> Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement" (Art. 1-203), and good faith is defined as "honesty in fact in the conduct or transaction concerned" (Art. 1-201 [19]). Where did this concept of good faith come from? The rather vague notion of *bona fides* in Roman law was early Christianized by way of the biblical understanding of good conscience and the theological claim that Christian revelation provided "an absolute moral standard." By the end of

> the Middle Ages, "good faith was perceived, in philosophical thinking, as a universal ethical principle." As a result, good faith came to be "applied in the civil and the common-law, the two major legal traditions in the modern world.

Professor A. W. B. Simpson (1987) concludes his discussion of consideration in the Common Law of contract with the following significant judgment:

> The view that the law of contract is the handmaid of commerce seems to me to be mistaken if it is opposed to the view that the law of contract expresses, in a form thought appropriate (bearing in mind the practicalities of litigation), moral ideas. For commerce, like other areas of life, must be conducted morally if the general good is to be furthered, and there is no special set of principles of commercial morality. The doctrine of consideration is indeed intensely moralistic, and we may disagree with some of its judgments; what is mistaken is to fail to see that a good law of contract has as its function in relation to the commercial world the imposition of decent moral standards (Simpson, 1987).

4.5 Existentialism and Quasi – Contracts Law

The branch of contract law known as quasi-contract offers particularly powerful evidence of the impact of morality on law. Based on the original notion of a fictional contract, the modern law of quasi-contract is in reality a device by which unjust, that is, immoral, enrichment can be avoided. Sir Henry Maine (2005) in his classic, *Ancient Law* states that: "A quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund."

Closely related to the quasi-contractual abhorrence of unjust enrichment is the doctrine of the constructive trust. A constructive trust is a trust relationship imposed by law in the interests of justice. Dean Ames (1913) uses the following simple illustration:

> A man kills his only brother in order to inherit his land, the brother being unmarried. Under the statute the land descends to him as his heir. May he keep it? It seems clear that equity should compel him to surrender the property. As it is impossible to make specific reparation to the deceased, he should be treated as a constructive trustee for those who represent him, that is, his heirs, the murderer being counted out in determining who are the heirs (Ames, 1913, 311-322).

Here, the murderer is definitively an heir of his victim and should therefore take an appropriate portion of his estate under the laws of intestate succession. In order to avoid this immoral result (legally profiting from one's own crime), the law of trusts artificially makes the murderer a trustee of what he would normally receive; a trustee who holds mere naked legal title to the estate for the entire benefit of the other heirs, who become the holders of the equitable title and thus the sole beneficiaries of the estate. The result, in strict accord with the moralities of the case, is that the murderer benefits not at all from his crime.

Another example of the application of moral principle to the Law of estates is provided by Farwell, J, in the Chancery case of *Stevens v. King* ([1904] 2 Ch. Div. 30, 33):

> The doctrine that a legacy lapses by the death of the legatee in the testator's lifetime means, I take it, that the whole object of the testator in giving the legacy has failed by reason of the legatee's death. But, that must depend on the question what the testator's object was. I think that the case of Williamson v. Naylor (3 Y. & c. Ex. 208), Philips v. Philips, (Hare, 281; 64 R. R. 296) and in re Sowerby's Trust (2 K. & J. 630) have established the rule that, if the court finds, upon the construction of the will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there

> is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse (Farwell, 78).

The legal area of tort, or what the civil lawyers call *delict*, is a fruitful source of moral illustration. Tort covers legally recognized injuries which do not arise from breach of contract (negligence, misrepresentation and fraud, nuisance, defamation, etcetera.). As early as 1789, the court (Lord Kenyon, CJ) was faced with a case in which the defendant encouraged the plaintiff to sell goods to X on credit, knowing full well that X was uncreditworthy. (See *Pasley v. Freeman* (King's Bench: 3 T.R. 51). The defence was that no privity of contract existed between plaintiff and defendant. The court treated the case as sounding in tortuous deceit. In the words of judge Kenyon:

> All laws stand on the least and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. However, there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns (Com. Dig. Tit. Action upon the Case for a Deceit, A. 1), that "an action upon the case for a deceit when a man does any deceit to the damage of another."

There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals and in which cases he must apply to those whose sources of intelligence which enables them to give that information. And the law of prudence leads him to apply to them. The law of morality ought to induce them to give the information required. For it is

admitted that the defendant's conduct was highly immoral and detrimental to society. It is possible that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiff.

The modern law of negligencearises from the ethically-grounded "neighbour principle" set forth by Lord Atkin in the leading case of *Donoghue v. Stevenson* (H L [1932] l. r., a. c. 562). This was the famous snail-in-the-ginger-beer case (an American parallel involved, characteristically, a mouse in a Coca-Cola bottle!). Could the consumer successfully sue the manufacturer of the ginger bear? Observe Lord Atkin's reasoning:

> The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's question, who is my neighbor, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

We learn from Atkin's eldest grandson, who was seventeen at the time, that the neighbour principle had its origin in an ecclesiastical context.

> During the summer holidays of 1931, I was staying at Craig-y-don with other members of the family. In those days the family went to Matins at the Aberdovey Church every Sunday morning and there was a large family lunch with Aunts and cousins presided over by my grandfather, who took much pride in his carving of the joint. He often used the carving time and

> the carving weapons to conduct a discussion. I remember on several occasions that the post-Church discussion about the snail and the ginger beer bottle case – who is my neighbour? - was an easily understandable theme immediately after church.

The ecclesiastical connection should not seem strange when we recall that Lord Atkin's negligence principle is simply a more narrowly focused version of Luke 10: 25-37.

Whether one examines the judicial sources of law or looks at the specific interlocking relationships of morality and law as illustrated by the major legal disciplines, one is forced to conclude that law and morals are not merely acquaintances, but friends. The symbiotic connection between them is so powerful that two University of Sheffield legal philosophers have titled their jurisprudential opus, Law as Moral judgment. They argue – though on neo-Kantian grounds which we shall soon discover to be inadequate – the truth that "a Legal Order is a Moral Order." Law is defined as "a rule which there is a moral right to posit for attempted enforcement." For them – and their position is fully supported by the facts which we have adduced here – "the concept of law" is not morally neutral but is purely based on an existentialist foundation of law.

4.6 The Source of Moral Values

If morality and law are necessarily intertwined, and if moral principles are essential to the proper functioning of the law, we cannot avoid the most vexing question of all: Where are proper moral principles to be discovered? Here legal discussion turns out to be a philosophical and theological discourse.

The primitive legal Positivism of Austin and Bentham focused solely upon the command-element in law, relegating moral considerations (Austin's Unitarian ethic, Bentham's Utilitarianism to the realm of the extra-legal). H.L.A. Hart, raised Positivism to a new level of sophistication by distinguishing between the Austinian "primary rules" and higher-level "secondary rules" and justified them further. Ronald Dworkin, Hart's successor at Oxford, argues that even the secondary rules are not enough; one must move beyond these to the realm of principle in order to properly understand legal operations. How can the principles of a legal system, including its moral principles, be validated? Here, Dworkin does not provide an epistemological compass of any kind.

We could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards."

To be sure, Dworkin's dilemma is entirely understandable and elicits considerable sympathy. A legal system requires principled underpinnings. These will either be transcendent and absolute, or imminent and relativistic. As an inheritor of modern American cultural pluralism, Dworkin opts for the later, leaving him in the amorphous realm of "contemporary moral standards."

But can such standards fit the bill? Contemporary moral standards are in fact the inevitable reflection and expression of current values, and these have no more necessary moral force than past values. Fifty million Frenchmen can be wrong. If moral principles are derived by counting noses or by doing opinion surveys, this could be an egregious instance of G.E. Moore's naturalistic (or sociologist's) fallacy: which endeavours to derive the ought (the normative) from the is (the descriptive). Eighteenth-century secular Natural Law Theory suffered from this very same failing. It naively believed that a consensus of moral opinion would necessarily yield the moral absolutes (the "inalienable rights") law and society required for their proper functioning.

The neo-Kantian efforts have been made by such distinguished political theorists as Rawls, Nozick, and Gewirth to solve the dilemma. Gewirth illustrates were the blind alley to which all these endeavours lead. He seeks to demonstrate that Kant's categorical imperative is indeed a necessary principle of practical reason ("so act as if your maxims had to serve at the same time as a universal law"). How? By arguing that no human being can rationally reject the fundamental moral principle – guaranteeing respect for each individual's moral rights – that "I have rights to freedom and well-being because of my humanity, I must accord them to all others because they are also human". No-one , according to Gewirth, can rationally claim that rights depend on anything less – on one's intelligence, on one's race, on being named 'Wordswoth Donisthorpe,' or the like.

The rejection of moral imperatives by the Ghengis Khans, Hitler, and Stalin of this world and many dictators in Africa, has always been based on their conviction (rational to them) that their uniqueness justified operating apart from ordinary moral standards. Nietzsche rationalized the

"trans-valuation of values" and a life "beyond good and evil" on the part of the self-proclaimed *Uebermensch*.

As Wittgenstein demonstrated in the *Tractatus* (propositions 6.41-6.421), "The sense of the world must lie outside the world Ethics in transcendental." The fundamental moral principles required for a proper legal system cannot arise from within the system itself or from the society which it serves. Morals must not be confused with mores. And water cannot rise above its own level. Ethics is transcendental, and moral imperatives of the legal system must have a transcendental source.

But in the face of completing transcendental claims, what choice do we make? Religious options are hardly a matter of indifference, as the cultic horrors of Jonestown, Guyana, and Waco, Texas, and Uganda's Kibwetere cult amply demonstrate.

At the time of the French Revolution, efforts were made by many Deists and philosophers to create substitute religions for Christianity. One such attempt was "Theophilanthropy," a deification of man, propagated by David Williams, an English Deist. In France, Louis Marie de La Revelliere-Lepeaux took up the torch and endeavoured to spread the faith. Upon delivering a tedious paper promoting this system of worship, he received the following comment from Talleyrand: "For my part, I have only one observation to make. Jesus Christ, in order to found His religion, was crucified and rose again – you should have tried to do so as much."

The proper test of a transcendental claim is its historical factuality. It does not merely assert its divine truth, but it offers concrete, verifiable evidence that God has indeed come into our midst. In the case of historic Christianity, this test is amply fulfilled and we are thereby provided with a revelation source (the Bible) whose transcendental character is attested by the incarnate and resurrected Christ himself.

What does such a transcendental source of morality concretely offer to the legal system? It does not only deliver us not only from the subjectivism if contextual and situational ethics, but also from the vagaries of Dworkin's "shifting, developing, and interracting standards." The Bible provides three kinds of moral norms. First, there are the specific ethical rules, such as the Decalogue, more general principles, for example, the declaration (1 Timothy 5:8) that he who neglects his own family is "worse than an infidel". This provides a transcendental basis for the Common Law doctrine of quasi-contractual liability for one's spouse's necessaries. Second, are also the overall descriptions of and judgments upon man's nature and fallen state. For instance, the evidence in Genesis 3:12-13 that human beings have a powerful tendency to shift the blame for their reprehensible acts to others. This fact justifies, *inter alia*, the M'Naghten rule limiting the insanity defense to those situations where the accused did not understand the nature and quality of his act or was unable to appreciate its wrongfulness.

Third biblical relation goes well beyond such identifications of what objectively constitutes a wrongful act in the civil or criminal spheres (*actus reus*). Unlike other scriptures, the Bible also speaks directly to the central issue of the *mens rea*; subjective, wrongful intent. Why is, this so important? Maitre Nicolas Jacob gives us the answer when he writes:

> *II faut conclure que la morale est, avant tout, un problem de dormation personnelle; elle doit render I'homme capable d'agir de telle facon qu'il se realize pleinement et c'est certainement une erreur de reduire la morale a un catalogue d'actes a faire et a ne pas faire. La morale est I'art d'etre home et non pas un code qui ne peut conduire qu'a I'eternelle histoire du pharisien et du publicain.*

The Bible recognizes that evil proceeds "out of the heart" (Mathew 15: 18-20; Mark 7: 20-23), and that the only ultimate remedy for illegality and the non-adherence of the standards of the law is a change of heart. Conversion is possible because the same God who revealed the true moral path for his creatures was willing, in his love, even to die for them when they willfully departed from it, thereby providing the opportunity for restoration and a changed life.

4.7 Existentialist Morality in a Secular Legal Context

One may well object as to what makes us think that a moral standard derived from an alleged transcendental revelation will be of practical use. Moreover, if the human being suffers so much from finitude that he cannot arrive unaided at moral absolutes, is it not unlikely that he would properly understand or apply revelation truths should they be given to him?

Several points can be raised to answer these entirely legitimate objections. First, it is an empirical fact that biblical morality has been understood and effectively applied to constitute perhaps the most important single influence on modern Western legal systems (the European civil law system and the Anglo-American common law).

The introduction of the fundamental concept of the *mens rea* into Western law is noted from the theology of St. Augustine. A study on the positive influence of Christianity on Roman Maitre Troplong of the Institute, civil law by applying the Justinian Code, concluded that Christian

truth "*alimente la racine de notre droit, et nous vivons plus encore par elle que par les idees echappees a la ruine du monde grec et du monde romain*." Professor Patrick Nerhot has demonstrated that early Christian techniques of biblical interpretation permanently influenced all subsequent styles of Western legal hermeneutics.

The impact of generations of ecclesiastical chancellors on the development of the Courts of Chancery and on the doctrines of equity is important in studies of the Common Law. The most influential judges on the English bench – Include: Denning, Diplock and Hailsham who have consciously employed their Christian moral beliefs in the writing of what Ronald Dworkin has felicitously termed the "serial novel" of the law.

The objection that a supposed transcendent revelation carries no guarantee of absolute comprehensibility or effectiveness of application, could be well replied using Basil Mitchell's parable:

> Supposing a stranger comes into a Kingdom with whose laws and institutions he is unfamiliar. He asks an inhabitant, "Why do you do things this way?" The inhabitant replies, "Because this is the way the King commands; moreover, our institutions have the following practical advantages," which he then proceeds to enumerate. The stranger objects. "Your argument," he says, "is two –pronged; you justify your institutions by reference to the King's authority and also by considerations derived from social science. This procedure is detrimental to the King's authority; for it either makes the King a social scientist or it deprives his authority of any relevance to your affairs." It is not difficult to see how the inhabitant will answer this. "We have reason to believe," he will say, "that our King is very wise and that is why we accept his authority. Independent investigations in social science could lend support to this belief of our, in so far as we are able to rely upon them, although we do not make the mistake of supposing that or social scientists are omnicompetent. We need, of course, to interpret the King's commands, so as to apply them intelligently

> to the changing problems of our society. And, we find it a useful rule to interpret them in such a way that they make sense. In doing this we receive valuable help from the King himself (Mitchell).

There is no need to stress the limitations of the parable, but it does, fairly make the essential point, which is that the insights of theology are not to be regarded as prescriptions to be applied unreflectively to a world with which they have no affinity. If the teachings of Christianity are true, they should illuminate precisely on those human needs which men are found in experience to have. This is not just by accident but because the God of revelation is also the God of nature.

In the line of reasoning set forth in this matter, the objector may pose the particularly worrisome question: If one does accept a transcendent, revelation morality as the absolute foundation of law, will that not inevitably lead to intolerance – the forcing of Christian ethical principles upon those in a secular society who are not themselves believers?

An impolitic (though not unreasonable) response might be that, if the revelation in question is indeed what it claims to be, the "enforced morality" would be of equal benefit to all those living under the rule of law, whatever their personal beliefs. The establishment of the reformed part of the Holy Catholic Church for English subjects at least, in this Kingdom makes Christian morality normative constitutionally.

Where "horizontal" morality is at issue, however, believers ought to use the democratic process to build a more ethical society and legal system. Second Table moral principles can be defended by what Mitchell calls "independent investigations in social science" and even unbelievers can be persuaded to support them for the sake of creating and maintaining an honourable rule of law

and a society which one can be proud to pass on to one's children. The boundaries of horizontal morality are not always fully clear biblically, but there is little difficulty in showing that they embrace the right-to-life, the preservation of marriage and the nuclear family, unqualified condemnation of hard-core and child pornography, and opposition to homosexual practices. Where 'right-to-life' is concerned, so fundamental is the biblical theme of protecting the helpless child that it may be necessary for Christians to suffer the wrath of all against it and engage in a reduction in secular openness to evangelical witness for the sake of legislating greater protection of the lives of the unborn.

When we however decide these most controversial of moral issues and whatever the nature of future legislation and court decisions in respect to them, the general conclusion is plain: law cannot avoid morality and the best law will be infused by the best morality. The need for existentialist moral foundations today is apparent on all sides, both within and without the legal professions. Sir Henry Slesser, one of Her Majesty's Lords Justices of Appeal, put the matter squarely a generation ago; we end with his words – or, more accurately, with Psalm 127:1, with which he concludes:

> The modern world lacks the sense of the supernatural effect of wrong-doing, the offence against God, which alone, as the ancient Hebrews proclaimed, can give final vitality and endurance to law, criminal or civil.
>
> Without a prevailing moral action, no number of laws, police, judges or prisons will save society from disruption, and such sanction, to command general consent, must be based upon a generally accepted transcendent belief. "Unless the Lord keeps the city, the watchman waketh but in vain" (Bible).

4.8 Conclusion and Observations

This chapter has endeavored to show the interplay between law and morality. It has elucidated that some philosophers' and juridical scholars see the law as devoid of reference to moral values. It has been argued that morality is a direct source of positive law, that law influences morals. Morality at the same time directly influences legal doctrines. Law and morality are interrelated. Morality affects the content of positive law. And, a transcendent morality is the absolute foundation of law which as the transcendental source of morality greatly aids the legal system. There is a symbiotic relationship between the two. The next chapter examines the nature, foundations and the extent of obligations and duties that are inherently imposed by law.

CHAPTER FIVE

DEMARCATION OF THE EXISTENTIAL FOUNDATIONS OF LAW

5.0 Introduction

The critical differences demarcating legal normativity and existentialistic normativity are the elements of legal obligation and legal authority. The origin, nature and function of legal obligation and legal authority are discussed in this chapter. These two concepts demarcate the concerns of legal normativity and existential normativity. The nature and ways in which obligations are created, recognized and enforced within legal and existential circles differs a great deal. Emphasis is laid on what constitutes a higher order between legal and existential obligation and authority. The argument drives towards showing how law imposes an obligation whilst existentialism imposes a 'duty' on their respective subjects.

The study explicates the constitutes of legal authority, obligation, legitimacy and demonstrates the nature and extent of legal normativity and existential normativity both in relation to authority, obligation and legitimacy. An attempt is made to demonstrate what is obligation in the law and obligations to the law.

The voluntarists and non-voluntarist theories of obligation to law are expounded in this chapter by examining why and how the theory of political obligation is non-voluntarist if its principles justifying legal authority to not invoke the choice or will of the subjects as among the reasons for thinking they are bound to obey. On the other hand, in the voluntarist theory, they invoke the choice or will of the subjects as among the reasons for thinking they are bound to obey.

The legal and existential normativity of law are integrated in an effort to demonstrate their close proximity and their intricate connection. the main objective of discussing the obligations in and to law is to demonstrate the binding nature and the inescapability of society from the powers of law.

5.1 The Obligations in the face of Law

The term obligation denotes the inherent duty that a subject may have towards law. All legal systems recognize, create, vary and enforce obligations which are central to the social role of law, the need to explaining them is necessary for an appropriate understanding of law's authority and, therefore, its nature. Not only are there obligations in the law, but there are also obligations to the law. Historically, most philosophers agree that these include moral obligations to obey, or what is usually called "political obligations."

Voluntarists maintain that this requires something like a voluntary subjection to law's rule, for example, through consent. The non-voluntarists deny this, and insist that the value of a just and effective legal system is itself sufficient to validate law's claims. Both modes of argument have recently come under intense scrutiny because some philosophers deny that law is entitled to all the authority it claims for itself, even when the legal system is legitimate and reasonably just. There are legal obligations from this view that some of law's subjects have no moral obligation to perform. The nature of obligations imposed by law greatly varies depending on the nature of language used. On the face of it, some laws have other functions, a requirement that "a will must be signed" generally imposes no duty – not a duty to make a will, and not even a duty to have it

signed if you do – it sets conditions in the absence of which the document simply does not count as a valid will.

Some philosophers, including Jeremy Bentham and Hans Kelsen, argue that the content of every legal system can and should be represented solely in terms of duty-imposing and duty excepting laws. Bentham opines that what every article of law has in common with the rest is that it commands and by doing so creates duties or obligations" (Bentham: 1963; 294). It is argued that if laws are analyzed this way, they could reveal what legislators or subjects most need to know. The question that arises is, under what conditions will the coercive power of law be ultimately met? Some scholars could argue that, even if such a reduction were possible, it would be unwieldy, uninformative and unmotivated, concealing as it does, the different social functions that laws fulfill (Hart 1994:24-49) and the different kinds of reasons for action that they create (Raz, 1990).

5.2 The Legally –Imposed Obligations

The concept of legal obligations denotes the legal requirements within which law's subjects are bound to conform. An obligatory act or omission is something the law renders non-optional. Since people, can, plainly violate their legal obligations, "non-optional" does not mean that they are physically compelled to perform, or even that law leaves them without any eligible alternative. On the contrary, people often calculate whether or not to perform their legal duties. Could it be then that obligations are simply weighty reasons to perform, even if sometimes neglected or outweighed? This cannot be a sufficient condition. High Courts have for instance important reasons not to reverse themselves too frequently, but no legal obligation to refrain.

Hobbes and Bentham developed a similar theory that accounted for the circumstances that held one obligatory to observe law. This type of theory is called the "sanctions theory". The English jurist John Austin says that to have a legal obligation is to be subject to a sovereign command to do or forbear, where a command requires an expression of will together with an attached risk, however small, of suffering an evil for non-compliance. "When I am talking directly of the chance of incurring the evil, or of the liability or obnoxiousness to the evil, I employ the term duty or the term obligation…" (Austin; 1986, 18).

Other scholars have conceived an indirect connection between duty and sanction. Hans Kelsen for example holds that what is normally counted as the content of a legal duty is in reality only part of a triggering condition for the mandatory norm which commands or authorizes officials to impose a sanction: "[A} norm: 'You shall not murder' is superfluous, if a norm is valid: 'He who murders ought to be punished. "(Kelsen: 55). "Legal obligation is not, or not immediately, the behavior that ought to be. It is only the coercive act, functioning as a sanction, ought to be" (Kelsen: 119).

Various sanctions theories were attacked and fiercely criticized by Hart when he observed that, first, these theorists misleadingly represent a range of disparate legal consequences – including compensation and even invalidation – as if they all function as penalties. Second, they render unintelligible many familiar references to duties in the absence of sanctions. This is, for example, the duty of the highest courts to apply the law. Third, they offer an inadequate explanation of non-option. "You have an obligation not to murder" cannot merely mean "If you murder you

will be punished." Law is not indifferent between people, when applied, on the one hand, murdering and being jailed, and on the other hand not murdering at all. The most important, normal function of sanctions in the law is to reinforce duties, and not to constitute them. It is true that one reason why people are interested in knowing their legal duties is to avoid sanctions. This is however not the only reason nor is it, contrary to what Oliver Wendell Holmes supposed, a theoretically primary one. Subjects also want to be guided by their duties – whether in order to fulfill them or deliberately to infringe them – and officials invoke them as reasons for, and not merely consequences of, their decisions.

Upon realizing the sensitivity of such matters, Hart defended the rule-based theory. He contends that while sanctions might mark circumstances in which people are obliged to conform, they have an obligation only when subject to a practiced social rule requiring an act or omission. The fact that subjects use it as a rule marks it as normative. Three further features distinguish obligation-imposing rules. They must be reinforced by serious or insistent pressure to conform, they must be believed important to social life or to some valued aspect of it, and their requirements may conflict with the interests and goals of the subject (Hart 1994:85-88). This account of the nature of obligations is not an account of their validity. Hart does not say that a legal duty is binding whenever there is a willingness to deploy serious pressure in its support, etc. He holds that a duty is legally valid if it is part of the legal system, and a legal duty is morally valid only if there are sound moral reasons to comply with it. In his early work, Hart (1982, 263) offers the practice theory as an explanation of duties generally- legal duties are the creatures of legal rules, moral duties of moral rules and so on.

The constitutive role of social pressure is sometimes considered an Austinian blemish on Hart's theory. There are more serious problems with it as a general account of obligations (Dworkin 1978: 50-54; Raz 1990:53-8). People readily speak of obligations when they are well aware that there are no relevant social practices, as might a lone vegetarian in a meat eating society. Hart's practice conditions may be satisfied in cases where there is no obligation but only generally applicable reasons. Hart's theory will, at best apply only to a special class of obligations in which the existence of a conventional practice is an essential part of the reasons for conformity, though even here, the theory is open to doubt (Dworkin; 1978, 54-58; Green; 1988:88-121).

The third account which is reason-based argues that what constitutes obligations is neither the social resources with which they are enforced, nor the practices in which they may be expressed, but the kind of reasons for action that they offer. Legal obligations are content-independent reasons that are both categorical and pre-emptive in force. The mark of their content-independence is that their force does not depend on the nature or merits of the action they require. In most cases, law can impose an obligation to do something or to refrain from doing (Hart; 1958, 87). The view that they are pre-emptive means that they require the subject to set aside his own view of the merits and comply nonetheless. And if they are categorical, it means that they do not condition their claims on the subject's own goals or interests.

Joseph Raz (1996, 205) opines that obligations are categorical reasons for action that are also protected by exclusionary reasons not to act on some of the competing reasons to the contrary. Obligations exclude some contrary reasons – typically at least reasons of convenience and ordinary preference – but they do not normally exclude all: an exclusionary reason is not

necessarily a conclusive reason. The stringency of an obligation is thus a consequence, not of its weight or practice features, but of the fact that it supports the required action by special normative means, insulating it from the general competition of reasons. This is, at any rate what obligations do when they have the force to claim, i.e., when they are binding. The theory does not assume that all legal obligations are actually binding from the moral point of view, but it does suppose that the legal system puts them forth as if they were- a consequence that some have doubted (Hart; 1982, 263). While this account is invulnerable to the objections of sanction-based and practice-based theories, it does need to make good the general idea of an 'exclusionary reason.' The account has been adopted by legal philosophers with otherwise starkly contrasting views of the nature of law.

5.3. The Doctrine of Legal Legitimacy

Many philosophers and social scientists agree that a social order is a legal system only if it has effective authority. An effective (or *de facto*) authority may not be justified, but it does stand in a special relation to justify (*de jure*) authority. Justified authority is what effective authorities claim, or what they are generally recognized to have.

Legal authority is a kind of practical authority. It is authority over action. From one influential view, "To claim authority is to claim the right to be obeyed." (Wolff: 2002; 76). An interesting case is that of Mungiki, a tribal purist outfit that claims to restore cultural roots of the Kikuyu community. It strives to be obeyed by employing threats and violence against its victims. Nevertheless it lacks political authority to be obeyed. None of the citizens see an obligation to obey the Mungiki as it lacks legitimacy. Mungiki lacks legitimacy as it is a semi-criminal outfit.

This scenario can be compared to the Talibans of Afghanistan, who are a religious outfit imposing Islamic law on the citizenry, who also lacks legitimacy. They claim empty political authority. There are, of course, authorities that make no such claim. Theoretical authorities, or experts, are not characterized by claims to obedience – they need not even claim a right to be believed. There are weaker forms of practical authority. To give someone authority to use your car is merely to permit him. Political authority, of which legal authority is one species, however is normally seen as a right or rule, with a correlative duty to obey. On this account, law claims the right to obedience wherever it sets out obligations. To obey is not merely to comply with the law; it is to be guided by it. Max Weber (1976) says it is "as if the ruled had made the content of the command the maxim of their conduct for its very own sake." Robert Paul Wolff (1978, 9) opines that "Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do because he tells you to do it". This is not to say that one obeys only in treating the authority's say-so as an indefeasible reason for action. One must also treat it as a biding content-independent reason. The question whether there is an obligation of obedience to law is a matter of whether we should act from the legal point of view and obey the law as it claims to be obeyed (Raz, 1979, 233-49).

It has been argued whether one can tell what the authority requires, independent of whether the argument if justified or not on its merits. Richard Friedman (2001, 132) argues, "if there is no way of telling whether an utterance is authoritative, except by evaluating its contents to see whether it deserves to be accepted in its own right, then the distinction between an authoritative utterance and advice or rational persuasion will have collapsed". An idea of this sort is developed by Raz into one of the leading arguments for the sources; the idea that an adequate

test for the existence and content of law must be based only on social facts, and not on moral arguments. Authority's subjects "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle" (Raz; 1994, 219). If law aims at settling disputes about moral issues, then law must be identifiable without resolving these same disputes. The law is therefore exhausted by its sources such as legislative enactments, judicial decisions, and customs, together with local conventions of interpretation. This kind of argument has been generalized, but also subjected to criticism. It is uncertain what sort of constraint is posed by the idea that it should not involve " the very same issues" – perhaps if morality is a necessary condition only, there could be moral tests for authority that leave the relevant dependent reasons untouched (Coleman: 126-7). While law does indeed serve as a scheme for guiding and appraising behaviour, it may also have other functions, such as educating its subjects about right and wrong. This may be ill-served by the attitude that the rules are to be obeyed in part because they are the rules.

There is no universal acceptance on obligation-correlative view of authority. Some theorists argue that legal authority involves no claim of right, but only a set of liberties; to decide certain questions for a society and to enforce their decisions. The liberty conception must answer two questions. First, it is not a feature of a right to decide that it requires subjects to refrain from acting on competing decisions. If the law says that abortion is permissible and the Church says that it is not, what then does the denial of the Church's right to decide amount to, if not that public policy should be structured by the former decision and not the latter, even if the latter is correct? Second, does the right to enforce include a duty of the subjects to pay the penalty when required? If it does, then this is only a truncated version of the obligation-correlative theory –

one that holds that punitive and remedial obligations, but not primary obligations, are binding. If not, it is starkly at variance with the actual views of legal officials, who do not think that subjects are at liberty to evade penalties if they can.

The contentious issue above leads to the methodological issue in the philosophy of law. Some consider that the character of law's authority is a matter for descriptive analysis fixed by semantic and logical constraints of official language and traditions of argument. Other scholars maintain that such analysis is impossible or indeterminate and that we are therefore driven to normative arguments about what legal authority should be. They conclude that we should understand law to claim only the sort of authority it would be justifiable for law to have. Such is the motivation for Friedrich Hayek's suggestion that 'The ideal type of law provides merely additional information apt to be taken into account in the decision of the actor' (Hayek: 1944 150). Hayek favours the free market, and concludes that the nature of legal authority should be understood analogically. A most radical position is taken by Ronald Dworkin who prefers what he calls a "more relaxed" understanding of legal authority (Dworkin; 1986, 429). Some scholars have argued that the pre-emptive notion of authority is unsatisfactory because it is too rigid. Dworkin's objection is not that law only communicates a weaker form of guidance. It is to be understood as trying to communicate anything at all. A subject considering his legal duties is not listening to the law; he is engaged in "a conversation with oneself," and is "trying to discover his own intention in maintaining and participating in that practice" (Dworkin; 1986, 58).

In resolving the methodological question, there are two parallel normative problems. First is the problem of obligation which seeks for the reasons that justify the duty to obey the law and how

far that obedience extends. Second is the problem of legitimacy which seeks to justify the coercive power of the law and its extension or range. There is a great concern at the relationship between the problem of obligation and that of legitimacy.

Some scholars maintain that obligation comes first: "Though obligation is not a sufficient condition for coercion, it is close to a necessary one. A State may have good grounds in some special circumstances for coercing those who have no duty to obey. But, no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations" (Dworkin, 1986, 191). The idea here is that mere justice on one's side is an inadequate ground for coercing others because one needs a special title flowing from the moral status of the law.

This idea to some extent renders this relationship retrogressive. First, it is doubtful whether one could have an obligation to obey an illegitimate regime because contentious issue of just cause and moral acceptance of such a cause forms the central concern that exists between governments and rebel and militia groups. For example, in Somalia, there is the Al-Shabaab a case amongst others which highlights the problem of whether they are fighting for a just and moral cause or for them to gain acceptance. (Rawls; 1971, 343) says, "Acquiescence in or even consent to, clearly unjust institutions does not give rise to obligations". If so, at least some conditions of legitimacy precede an obligation of obedience. Second, there are substantive reasons for thinking we would not have obligations to obey if the law were not already justified in upholding its requirements "with steel." A legal system that could not justifiably coerce, could not assure the law-abiding that the recalcitrant will not take them for a ride. Without being able to solve this assurance

problem, it would be unjust to impose obligations on them, and unjust to demand their obedience. The idea underlying this suggestion is that effectiveness is a necessary but certainly not sufficient condition for justified authority.

5.4 The Dilemma of Legal Obligation

From time immemorial the philosophical reflection on political authority has focused on the obligation to obey law. The passive obligation of obedience is certainly not all we owe the law (Parekh; Green; 2003, 543-47) but many have taken it to be law's minimum demand. This gives rise to a puzzle. As Wolff puts it: "If the individual retains his autonomy by reserving to himself in each instance the final decision whether to co-operate, he thereby denies the authority of the state. If, on the other hand, he submits to the state and accepts its claim to authority then he loses his autonomy" (Wolff; 2002, 9). Wolff resolves the dilemma in favour of autonomy and on that basis defends anarchism.

Wolff's worries flow from the "surrender of judgment" itself – how can it ever be rational to act against reason as one sees it? Others flow from the fact that it is surrender to the law. On the first point, it is relevant to notice that promises and contracts also involve surrender of judgment and a kind of deference to others (Soper; 1992, 103-39), yet a rational anarchist needs such voluntary commitments to substitute for authoritative ordering. A principled objection to surrender of judgment is thus self-defeating. There seem however to be cases in which by surrendering judgment on some matters, one can secure more time and resources for reflection and decision on things that are more important, or with respect to which one has greater capacity

for self-direction. A partial surrender of judgment may therefore enhance the agent's autonomy overall.

Wolff's concern is better understood as skepticism about whether it is justifiable to surrender one's judgment wholesale to the law. Some philosophers have queried the intelligibility of this doubt. They say that it is the nature of law which makes it an obligation to obey it, at least in its central case (Fuller; 100, Finnis: 14-15). Some scholars even go so far as concluding that, it is therefore absurd to ask for any ground of the duty to obey the law. Law is that which is to be obeyed (McPherson: 64). We need a way into this circle and the best entrance is in specifying the nature. Three features are especially important (Hart 1994:193). First, law is institutionalized; nothing is law that is not connected with the activities of institutions such as legislatures, courts, administrators, police, etc. Second, legal systems have a wide scope. Law is not limited to the affairs of small face-to-face groups such as families or clans, nor does it only attend to a restricted domain of life such as football. It governs open-ended domains of large, loosely structured groups of strangers and regulates their most urgent interests: life, liberty, property, kinship, etc. Although law necessarily deals with moral mattes, it does not necessarily do so well, and this is its third central feature. Law is morally fallible as acknowledged by both positivists and natural lawyers, whose slogan "an unjust law is not a law" were never intended to assert the infallibility of law.

Political obligation addresses the question whether there are moral reasons to obey the mandatory requirements of a wide-ranging, morally fallible, institutionalized authority. This obligation purports to be comprehensive in that it covers all legal obligations and everyone

whose compliance to the law is required. It is not assumed to bind come what may, though it is to be one genuine obligation among others. Some philosophers also consider that it should bind people particularly to their own states, i.e., the states of which they are residents or citizens. An argument that could not show that one had more stringent duties to obey one's own country than a similarly just foreign one, would be in that measure deficient (Green; 1988, 227-28). It is true that a common ground of the obligation exists only when a threshold condition of justice is met, without which obligation would be untenable.

5.5 Theories of Political Obligation

These theories are propounded to justify the principles of legal obligation. A theory of political obligation is a set of arguments that justify the reasons for the subjects to obey an authority. There are two types of theories, non- voluntarists and voluntarists' theories.

5.6 Non-Voluntarist theories

A theory of political obligation is non-voluntarist if its principles justifying legal authority do not invoke the choice or will of the subjects among its reasons for thinking they are bound to obey. Three such arguments have some currency.

5.6.1 Constitutive Obligations

Obedience to a legal authority has been a contentious issue for a very long time. "It has not been understood what it means to be a member of political society if we suppose that that political obligation is something we might not have had and that therefore needs to be justified"

(McPherson, 1991;64). This view emphasizes that there are many attempts to find independent moral principles to justify obligation are not merely mistaken, they are conceptually confused; they exhibit a "symptom of philosophical disorder" (Pitkin; 1987, 75). The matter is resolved by attending to the meaning of "member". It is indeed hard to find philosophers who still think that normative questions can be resolved by linguistic considerations, but there are, surprisingly, some who do think that this argument strategy is essentially correct. Ronald Dworkin (1986, 2006) for instance claims, "Political association, like family of friendship and other forms of association more local and intimate, is itself pregnant of obligation". His obstetrical theory is parthenogenetic: politics is a form of association that in itself bears obligations. The idea of having a virgin birth, obligation has no father among familiar moral principles such as consent, utility, fairness, and so on. We justify it by showing how it is a kind of "associative" or "communal" obligations constitutive of a certain kind of community.

People in organic associations do often feel obligations to other members, but we normally seek an independent ground to justify them (Simmons: 1996; Wellman: 1997). One version focuses on the value of obligations attached to social roles. The duty to obey is therein explained by giving an account of the social role involved; for instance, "member", "citizen," or "subject". It is important to note that there is not one problem here, but two. There is the matter of validity and what makes these requirements binding on its occupants (as Hardimon inquires). These are however intimately linked because one cannot solve the second independently of the first. There is no general answer to the question why role duties bind some. It simply depends on the roles and the duties.

Dworkin (1968, 198) suggests that we generally have "a duty to honour our responsibilities under social practices that define groups and attach special responsibilities to membership," provided the group's members think that their obligations are special, personal, and derive from a good faith interpretation of equal concern for the well-being of all its members. In truth, however, these conditions are not a matter of the members' actual feelings and thoughts. They are interpretive properties that we would do well to impute to them. Even so, why do they ground a duty of obedience as opposed to a duty of respectful attention, or a duty to apologize for cases of non-compliance? Obedience is certainly not part of Dworkin's paradigm virtue of "fraternity" – mutual aid and support are the normal obligations there. The classical associative model for political authority was indeed not fraternity, but paternity, against which Locke argued so decisively. This is not to deny that we owe something to those decent associations of which we find ourselves non-voluntary members. We do need some further argument to determine exactly what this amounts to.

5.6.2. Instrumental Justification

The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him. This is if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly (Raz; 1994, 214).

Raz calls this the "Normal Justification Thesis" (NJT) which is satisfied only if the authority bases his directives on the reasons which apply to the subjects (the "dependence ") and if the

subjects take his directives as pre-emptive reasons, displacing their own judgments about what is to be done on the merits (the "pre-emption"). The points emphasized are: First, a normal justification is not a unique justification, but one typical to a variety of practical and theoretical authorities. At its core idea is that justified authorities help their subjects do what they already have good reason to do. It does not apply when it is more important for the subjects to decide for themselves than to decide correctly. Second, although the NJT has similarities to rule-utilitarianism, it is not a utilitarian theory; that requires further commitments about what sort of reasons are relevant and how about indirect policies may be pursued. Third, NJT does not require valid authority to promote the subject's self-interests. NJT is governed by whatever reasons correctly apply to the case, not reasons of which the agent is aware, or which serve his self-interest narrowly understood.

Something like this does capture the way we justify deferring to expert opinions of scientists or to the advice of doctors who know better than we do. If we were we to try to second-guess them, we could not profit from their expertise. To accept them as authoritative therefore requires deferring to their judgment, and allowing that to displace our own assessment of what is to be done. This is not blind deference because the subject remains attentive to higher-order considerations that to determine whether the authority is trustworthy, acting in good faith, and so on. The deference may be limited in scope and subject to checks of its effectiveness over time.

These considerations apply to political authority to some extent. A legislator or administrator may know better than most what is to be one to preserve the salmon fisheries or to slow global warming. Some scientists may however know as well, or better, and in some areas that there are

be criteria of relevant expertise at all. The only prospect of broadening NJT's reach therefore rests on its application to integrate the activity of many people who must cooperate but who disagree on these matters and more. If authority is able to create or support valuable schemes of social cooperation, subjects may be justified in obeying even though that is not the scheme they would themselves have chosen. It is sometimes argued that this is so in general "co-ordination problems" and in situations in which individual reasoning might be self-defeating, for instance, in prisoner's dilemmas.

It is uncertain about how far deference to authority is really needed here. The extent to which people need authoritative guidance to secure cooperation varies with context. Law can solve some problems of cooperation by simply providing information or by restructuring incentives (Green; 1988, 89-157). This suggests that NJT covers only a narrow range of legitimate state activity, but in another way it seems too broad. We do not think that political authority should be acknowledged whenever the rulers can better ensure conformity to right reason. There are matters that are too trivial or otherwise inappropriate for political regulation. Perhaps, some sort of threshold condition must first be met, and NJT should be confined to issues of general social importance.

5.6.3 Argument from Necessity

Locke thought that the most urgent question for political philosophy was to "distinguish exactly the business of civil government" (Locke 1982: 26), to determine what things are properly Caesar's. Some contemporary such as Elizabeth Anscombe argue that the domain of authority

focusses on necessary social functions. For example, "If something is for a necessary task in human life, then a right arises in those whose task it is, to have what belong to the performance of the task" (Anscombe:1987,160). Two questions then arise from this analogy: What tasks are necessary? What rights are needed to perform them?

The answers to the first question range widely. George Klosko (1992) ties it to the production of "presumptively beneficial public goods," goods that anyone would want and which require social co-operation to produce. Others are more extravagant. Finnis (81-97, 154-56) provides a comprehensive framework for realizing a list of supposedly self-evident values including life, knowledge, play and religion. An influential intermediate answer ties political authority to the realm of justice and grounds obedience in a natural duty which requires us to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves" (Rawls; 1971, 115).

The basis of Rawls's theory in necessity becomes evident if we explore what it might be for a just institution to "apply to us." A.J. Simmons persuasively argues that an Institute for the Advancement of Philosophers cannot benefit us. However just it may appear, and then demand that we pay its dues (Simmons; 1979, 148). He proposes therefore that a normatively relevant sense of application requires that one accept the benefits – but that is to transform a natural duty account into a weakly voluntarist one like fairness.

Jeremy Waldron (1993, 234) diagnoses the force of such counter-examples as deriving from the fact that, although operating justly, the Institute is not something whose activities are required by justice: they are optional, not necessary. This seems correct but if we then restrict the domain of authority to necessity, we will again leave many legal obligations behind. Many of the activities of legitimate government are optional. It must save us from the state of nature, but law's ambitions are more expansive than that. It also does things that are permissible but not necessary. It enacts residential zoning, declares official languages, establishes national holidays, supports education and the arts, and creates honours. In the service of what is mandated by necessity, law draws lines and sets standards that are themselves merely permissible – an age of consent, an acceptable level of risk-imposition, formalities for wills and marriages, and so on – what Aquinas called "determinations" of just requirements. The content of all this valuable and permissible state action is underdetermined by the theory of legitimacy and is grounded in considerations other than necessity. The necessetarian arguments leave unsupported some – possibly a lot – of valuable state action. It is unclear what is necessary for law to fulfill its socially necessary functions. Anscombe (1987) refers to the right to have what is necessary for law to fulfill its socially necessary functions. He refers to the right to have what is necessary for the role, but what is that? Hume (1964) thought it obvious that political society could not exist without "exact obedience of the magistrate". This is however, surely empiricism without facts. Everyone knows that a legal system can, and does, tolerate a certain amount of harmless disobedience and that this in no way hampers its capacity to function.

5.7 Voluntarism Theories

These theories place the centrality of the individual's consent or will and choice at the centre of an individual acceptance of a given proposal.

5.7.1 Expressive acceptance and Consent

Few scholars deny, in the words of the American Declaration of Independence, that all governments "derive their just powers from the consent of the governed." The Right of all Sovereigns," says Hobbes in Leviathan "is derived originally from the consent of every one of those that are to be governed." In the Second Treatise, Locke says: "Men being … by nature, all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent." The ideological influence of such theories in the struggles for representative government and decolonization was immense. It is perhaps not too much to say that consent has become the normal justification for political authority.

The contention is about whose consent should be considered. Not the consent of our ancestors, for such an "original" contract, as it was called in the seventeenth century, can have any authority over those who did not agree to it. A voluntarist theory requires the actual consent of each subject. But this cannot mean consent to every law or application thereof. The evident absurdity of that idea leads Finnis to declare consent "intrinsically implausible": "the need for authority is, precisely, to substitute for unanimity in determining the solution of practical co-ordination problems which involve or concern everyone in the community "(Finnis; 1996, 248). Consent theorists, however, have not generally proposed the principle as a solution to "practical co-ordination problems."

Unanimous consent would be a very bad decision rule. The transaction costs would be enormous and hold-outs could block many desirable possible policies. Consent is more commonly proposed as a part of the constitution rule that sets up the political community in the first place. Consent theorists reject, therefore, Kant's idea in the Metaphysics of Morals that the mere capacity of A to violently affect B's interests is sufficient license for anyone to subject them both to a regime of positive law. For consent theorists, an A-B interaction does not become a candidate for authoritative regulation until A and B agrees to unite under one jurisdiction. Beyond this foundational role, however, consent theorists take different views of whether it has any further significance in policy. Locke explains that it is then displaced by majority rule by delegates as the natural procedure for most decisions.

Consent has attracted powerful criticism. The criticism focusing on the questions of whether it is in fact given and, if given, whether it would bind (Simmons; 1979, 57). Consent is not mere consensus or approval. It is a performative commitment that undertakes an obligation through the very act of consenting. Like other promises and oaths, however, there are limits to its validity. We need to ensure that consent is not defeated by mistake, coercion or duress. It must also respect substantive limits on its validity. Locke (1975) argues that one cannot consent to be killed, and thus not to slavery, including absolute government.

One can imagine a similar argument to the conclusion that political consent must be revocable. But as we build in all these validity conditions, the commitment itself seems to be doing less and less work. Pitkin (2005, 57) thinks that in Locke's version it becomes "essentially irrelevant". Consent is saved from irrelevance only if we can explain why we also value a power to bind

ourselves to obey. David Hume (1964, 481) could conceive no reason at all; promise-keeping is an "artificial virtue" serving the public good, just like obedience to law. So long as law is tolerably legitimate – and Hume is prepared to give it a very wide berth – a promise to obey is redundant. Any plausible answer to the question why we are bound by the promise would "immediately, without any circuit, have accounted for our obligation to allegiance," "being of like force and authority, we gain nothing by resolving the one into the other". A consent theory need not, however, "resolve" allegiance into a promise as there may also be non-promissory conditions on obedience. It must explain why it should be conditional on it. Three sorts of arguments have been popular. First, there are instrumental reasons for wanting deliberate control over the liability to legal duties. In political authority, where the stakes are as high as they come, the power to give and withhold consent serves an ultimate protective function beyond what we could expect from the fallible institutions of limited government. Second, consent enables people to establish political allegiances by creating new political societies or joining existing ones without awaiting the gradual emergence of bonds of community and reciprocity. Consent is an immediate passport to "perfect membership" in a commonwealth (Locke; 1975, 119). Third, though consent is defined by its performative character, ancillary non-performative features naturally accompany it. Consent also expresses the acceptability, or at least tolerability, of the government. This may mark consented-to rulers as salient from among a number of possible contenders. It may also signal that they stand a good chance of being effective, which is itself a necessary condition for the justification of any political authority.

Consent is not an open or straightforward issue because there is nothing that many people can do to pass off as giving consent. Even the freely given oaths of office and naturalization do not

usually amount to a general commitment to obey the law. Other acts are even less plausibly so interpreted. Plato's *Crito* introduces the idea that continued residence counts as some kind of tacit consent to obey, and Locke extends that to include any enjoyment of the benefits of government (Paton; 1986, 22). Whatever the moral relevance of these facts, they do not count as consent, for people do these things without imagining they will create obligations, and they do them in circumstances in which they have no feasible alternative. Other non-promissory actions, for example voting or participating in politics, fare no better. Many people do not vote, and the few who do, do not regard it as undertaking any duties at all. We can perhaps say that if people consent, and if the relevant legitimacy conditions are fulfilled, then they will have a duty to obey the law. That is obviously a far cry from establishing law's claims.

5.7.2 The Theory of Expressive Obligations

There are weaker forms of voluntarism and some relationships that one may freely enter which are marked by obligations. In essence, this is a voluntarist version of the theory of constitutive obligations and it offers the most plausible interpretation of arguments from gratitude (Klosko; 1989, 98) or community.

It is upon such views that we are bound to obey because that is an appropriate expression of emotions. We have good reason to feel gratitude to the law for all that it gives us, respect for its good-faith efforts to guide us, or a sense of belonging to community. In the last case, the relationship cannot merely be that of being a subject of the law; it must be something like membership in the community whose law it is (Raz; 1979, 250-61). Friendship provides an analogy where people choose their friends, but not in order to have obligations to them. In

addition to the familiar reasons for fulfilling its duties of support, honesty, reciprocity etc., it is plausible to suppose that doing so also expresses and is known to express loyalty to one's friends, and that that gives additional support to the duties. It is suggested "A person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express itself, among other ways, in respect for the law of the community" (Raz; 1979, 259).

This is bound to be a somewhat loose fit. The institutional and bureaucratic structure of law means that it will generally be an imperfect expression of the society it regulates. Raz notes that expressive arguments apply only to those who actually stand in this special relation. They neither show that it is obligatory to do so, nor that it is obligatory to express one's loyalty in this way rather than some other. It is even unclear why we should think that obedience is a fitting expression of this sort of relationship in the first place.

5.7.3 The theory of Fair Play and Reciprocation

The most influential voluntarist argument grounds political obligation in neither performative nor expressive acts, but in a bare willingness to benefit from a system of mutual restraint. This is the territory of fairness, or fair play, as articulated by Hart and elaborated by Rawls. The core idea is that those who accept the benefits of fair scheme of cooperation have a duty to do their allotted part under that scheme. If others obey the law to our benefit, we owe them a duty not to take a free-ride on their compliance.

If the law's benefits must be accepted then they may not be a necessary condition for the validity of all obligations of fair play (Arneson; Klosko, 1992). It is essential for any obligation that aspires to be consistent with political voluntarism. If a scheme of cooperation simply thrusts

benefits on people as the unavoidable fall-out of the cooperative activity of others – even very valuable benefits – any duty of compliance would have to be justified by one of the non-voluntary principles considered above. The acceptance condition does not of course reduce fairness to consent. Those motorists flout traffic lights signs do not mean to assume an obligation to pay the fine, but it does render fairness vulnerable to the very same objection, when not enough people perform the relevant action. The central benefits of an effective legal system, including security and order, are all the sort of non-excludible public goods that Simmons (1979: 138-39) calls "open benefits." They can be avoided only at great cost and in many cases not at all. What is more evident is that, not all cases of disobedience can plausibly be represented as free-riding, and obligations of fairness track the jurisdiction of the law only in a rough-and-ready way. Fairness will give rise to obligations whenever there is a beneficial practice of mutual constraint and accepted benefit – it matters not whether this is sustained by a law claiming jurisdiction over the subjects.

5.8 Conclusion and Observation

This chapter has examined the nature, foundations and the extent of obligations and duties that are inherently imposed by law. Although obligations and duties are crucial in the realization of the social role of law, it is equally important equally to analyze them in order to understand their source and nature. Obligations to the law also constitutes a moral obligation to obey or what some philosophers term as 'political obligation'. It has been shown that the voluntarists insist that only a voluntary subjection to law's rule is needed while the non-voluntarists deny this and insists that the value of a just and effective legal system is sufficient to validate both legal obligation and authority. These two claims have come under close scrutiny and existential philosophers wonder if law's claims might lie elsewhere. The possibility that law's claim lies

within existential foundations is a thesis closely examined in the next chapter but one. The next chapter deals with African Existential philosophy.

CHAPTER SIX

AFRICAN EXISTENTIAL PHILOSOPHY

6.1 Introduction

The genesis of western science and Christianity in Africa at the turn of the Eighteenth century seems to have influenced the African mind and indeed, way of life. To some extent, western science and Christianity are a product of the western world view, that today perceived as the source of hope for Africa by African governments, politicians, scholars and the general public. Questions have however been asked by scholars as to whether science is the only way to attain objective knowledge.

This chapter examines African social-cultural and existential dynamics with the aim of establishing if these have in any way granted African people a holistic approach of acquiring and appropriating knowledge from time immemorial. The concept will be examined in this chapter which is generally floated by some African philosophers and thinkers (Patterns of Thought in African and the West: Robert Horton (1193) that Africans have heavily relied on Western knowledge and that the perception of the western worldview as the ideal has enslaved and impoverished the African mind which scholars have argued that this enslavement hinders the African mind from being creative, innovative and able to think outside a constricting box and that for this reason, African contribution to philosophy and knowledge generally has been ignored in the last century.

6.2 Prejudices against the African Cultures, Religions, Art and Education

The perceptions and interests of the western minds which control knowledge, technology, philosophy and information, emphasize the following characteristics which are common in the person of the Africans:-

(a) Africans have no religions in the proper sense of it, and where they have semblances of religion, they have no real conception of a Supreme Being, a being who is creator and artificer of all, with no equal, and totally self-sufficient;
(b) Africans are primitives with no understanding of the distinction between the holy and the profane, the religious and the secular, cause and effect, chance and probability theory, and are of a pre-logical mentality (as their thoughts fail to obey any rules of logic that characterize Western explanatory models and thinking processes, p.65) in accounting for events and reality;
(c) Africans never developed any science, technology, civilization or culture;
(d) That traditional Africans were mainly uneducated, preliterate, with no history, no literature, no mathematics, no structured mode of thinking, no political institutions, no formal systems of education before colonization, no vocational specializations;
(e) That the African continent is the home to all kinds of diseases, plagues, and barbarity, about which nothing has been done, because the mental firmament of the Africans neither comprehends the danger of these problems nor proceeds to find solutions to them, and;
(f) This is why there is no success story in the form of modern political, social and economic development on the continent of Africa or among African dominated states of the Diaspora. It all has to do with the innate weakness and inferiority of the African consciousness and intellect, which make the African suitable for eternal tutelage under the ambit of other peoples of the world!

The above beliefs and misinformation have bred all kinds of responses such as:

(i) Senghor-Negritude;
(ii) Cessaire's- Hailing of the Natural Children of the Earth;
(iii) Nkrumah's-Consciencism;
(iv) Nyerere's-Ujamaa;
(v) Hallen/Sodipo's-Knowledge, Belief and Witchcraft and;
(vi) Oruka's - Philosophic Sagacity and
(vii) Existential Africana and Existence in Black

After this denigration of the existence of the black folk by the western powerful scholars, it was important to find all kinds of responses – for example, Black Existentialism.

6.3 African Existentialist Philosophy

Black existentialism is not only existential philosophy produced by black philosophers but it is also thought that it addresses the intersection of problems of existence in black contexts. *Existential Africana* (Lewis, Gorron, 149-160). It is a form of philosophy emerging out of the critical thought of the African Diaspora. Black philosophical thought pertains to the ideas emerging from black-designated peoples. Such people include, for example, Australian Aboriginal people, who often refer to themselves as "black." There is also work in black existential philosophy from Australia, such as those organized through forums and articles by Danielle "drongo" Davis in the Oodgeroo Unit of Queensland University of Technology in Brisbane, Australia.

In his book on *American philosophy*, W.E.B. DuBois' the notion of *double consciousness* has been revisited by many scholars as a notion doused in *existentialism*. Du Bois addressed several problems germane to black existential philosophy. He raised the question of black suffering as a philosophical problem. Was there meaning behind such suffering? Dubois observed that black people were often studied and addressed in public discussions as problems of the modern world instead of as people facing problems raised by modern life. Black people, he argued, often faced double standards in their efforts to achieve equality in the wake of enslavement, colonialism, and racial apartheid. This double standard led, he argued, to "twoness" and "double consciousness." The **twoness** was the experience of being "black" and "American," where the two were treated as contradictory. Double consciousness followed in two forms. The first was of the experience of being seen from the perspective of white supremacy and anti-black racism. It was from the perspective of seeing themselves as lowly and inferior. The second, however, as Paget Henry

argues, involves seeing the contradictions of a system that in effect blames the victim. That form of double consciousness involves seeing the injustice of a social system that limits possibilities for some groups and creates advantages for others while expecting both to perform equally. Black people were imprisoned for challenging the injustices of a social system born on the memorable phrase, "all men are created equal…," is a case in point. The subsequent criticism of whether "men" meant "women too" pushes this point further, as Frederick Douglass, Anna Julia Cooper, and other earlier Nineteenth century black critical thinkers contended. Du Bois also theorized about the importance of black music, especially the spirituals, and through them raised the question of the inner-life of black people, which he referred to as their "soul". This in his discussion of double consciousness became "souls" (see, for example, the work of Terence Johnson, "My Soul Wants Something New", Reclaiming the Souls Behind the Veil of Blackness," in *The Souls of W.E.B. Du Bois: New Essays and Reflections*, eds. Jason R. Yound and Edward J. Blum [Macon GA: Mercer University Press, 2009], 110-133). These writers thought that the study of back people affected how history is told; they were misrepresented. This misrepresentation of history as an apology for white supremacy and colonialism led to the degradation of black people as passive objects of history instead of makers of history. This depended on denying the struggles for freedom waged by black people in the effort to expand the reach of freedom in the modern world.

6.4 Black Suffering

Black suffering is also examined by the philosopher and psychiatrist, Frantz Fanon (1925-1961). In his book *Black Skin, White Masks* (1967, 49), he argued that the modern world afforded no model of a normal black adult. There are instead the pathologies of the black soul, which he

calls a white construction. This problem placed back people in an alienated relationship with language, love, and even their inner dream life. He was careful to claim that there are exceptions to these claims; the general situation is as follows. Blacks who master the dominant language are treated either as not really black or receive much suspicion. They find themselves in worse conditions seeking white recognition, which affirms the role of whites as the standard by which they are judged. The matter repeats itself with love. Black women and black men seeking white recognition do so, he argued, through asking for recognition from white male symbols of authority. This effort is self-deceiving and makes such black women ask to be loved as white instead of as women, and it makes such back males fail to be men. Fanon (1967) also brings out the philosophical problem of reason and its relation to emotions by considering whether a flight into Negritude, the intellectual movement coined by Aime Cesaire, could enable blacks to love themselves by rejecting white reason. Jean-Paul Sartre's criticism in "*Black Orpheus*" led Fanon into "changing his tune" by realizing that such a path was still relative to a white one and faced being overcome in expectations of a "universal" humanity, which for Sartre was a revolutionary working class. Fanon's response was that he needed not to know and he later on in *A Dying Colonialism* (1967; original French 1959), pointed out that although whites created the Negro, it was the Negro who created Negritude. His point was that it was still an act of agency, and that theme of being what he called "actional" continued in his writings. At the end of Black Skin, White Masks, he asked his body to make of him a man who questions. Fanon's point was that racism and colonialism attempted to over-determine black existence, but as a question, black existence faced possibility and could thus reach beyond what is imposed upon it. In *The Wretched of the Earth* (1963) (original French 1961), he returned to this question at the historical

level by demanding the transformation of material circumstances and the development of new symbols with which to set afoot a new humanity.

6.5 Existentialist Philosophy in South Africa

Black existential philosophical thought was also influential in the South African anti-apartheid movement through the thought of Steve Bantu Biko. In *I Write What I Like*, Biko continues Fanon's project of thinking through alternative conceptions of humanity and offers his theory of Black Consciousness. Black Consciousness applies to anyone who is involved in anti-racist struggle and is marked as the enemy of an anti-black, racist state. All people of colour – indigenous Africans, Asians, mixed peoples, and whites are according to Biko "blackened" by their allegiance to anti-racism. He further presents here a political view of identity that resists a prior essence of back identity. One becomes black, reminiscent of Simone de Beauvoir's observation that one becomes a woman. South African philosophers influenced by Biko's existentialism include Noel Chabani Manganyi.

6.6 Black Feminist Existential Thought

There is also the growing area of black feminist existential philosophy dating back to the Nineteenth century and early twentieth century in the thought of Anna Julia Cooper. She explored problems of human worth through challenging the double standards imposed upon black populations in general and back women in particular. Cooper, in response to the racist claims of black worthlessness (that the world would be better off without black people), that the measure of worth should be based on the difference between contribution and investment. Since very little was actually invested in back people but so much was produced by them, she argued

that black worth exceeds that of many whites. She used the same argument to defend the worth of black women. Black feminist existential philosophy is taken up by Kathryn Gines, founder of the Collegium of Black Feminist Philosophers and brings together ideas from Copoer, Sartre, Fanon, Hannah Arendt, Bell Hoods, and recent work in Africana phenomenology and black popular culture in books such as: "Sex and Sexuality in Contemporary Society and Philosophy: Rhyme 2 Reason. (2005)"

6.7 The Mau Mau War and Black Existentialist Philosophy

The conditions of life experienced by slaves led many thinkers to critically reflect on three questions:

(i) What is a human being?

(ii) How can one become free?

(iii)What are the methods used to justify the first two.

Gordon (2000) in *Existentia Africana* argues that these questions make sense because enslaved, colonized racially oppressed, and dehumanized people are forced to question their humanity. This leads to questioning the meaning of being human and leading to the formation of liberation movements with the objective of to freeing humanity from oppression. It is this situation that gave rise to the formation of freedom movements in Africa and Kenya's Mau Mau movement.

6.8 Individualism and Existentialism

Charles (1998,21) surmises that human person is the only kind of being who defines him/herself through the act of existence and spends a lifetime making something of the self. Without life, there can be no meaning, no essence, no consciousness, no thinking, no reality of, or for the self.

Without life there is no capacity for self-agency, which would consequently mean that there can be no realization of individuality as individuality. The compromising of the existence of the self would mean the compromising of the essence that could have derived from being.

6.9 Existentialism and Personal Freedom

What emerges from the study on subjectivity and Cartesianism is that Existentialist thought has stressed the importance of the inner self as an experiencing self, as a passionate individual in taking action and in deciding questions of both 'morality and truth'. Personal experience, understanding, apprehension, projection, and acting on one's convictions are essential in arriving at 'truth'. In the situation of existence, this cannot be properly undertaken unless one is involved in that situation, because self-involvement is superior to that of a detached, objective observer. The emphasis on personal involvement and the personal coefficient in experiencing, all a priori theorization on realities become precipitously endangered by problems of essentialism which were in the contrast made between existence and essence.

It would appear that, on one hand, subjectivism means the freedom of the individual subject as a subject experiencing realities and, on the other hand, that human beings cannot pass beyond human subjectivity. It is the ability of the self to locate the absolute 'truth' within the ontology of the self's being. To simply say that in existentialism a person chooses him/herself, we do mean that every one of us must choose him/herself. We can also mean that in choosing for him/herself he chooses for all humans in all similar circumstances of existence.

On the other hand, one of the important tropes of existentialism is individual freedom; an absence of a restraining external force on both thought and action of the individual. This freedom has been theorized in various ways in Western scholarship, especially within phenomenology, existentialism, libertarian political, economic and legal backgrounds. Freedom is innate to human beings because of their capacity to experience, think and choose. Humans are animals that cannot but be free, and in being free come face to face with the consequences of freedom, the consequences of being endowed with an ability that is both special and loaded with awesome responsibility. This is the condition of existence of the human person as an agent in the universe.

Not taking in hand the freedom that comes with being human is bad faith (Lewis; Gordon; 1995, 1997). Bad faith is also attempting to escape from freedom, choice and responsibility. Existentialists have shown that the condition of being human imposes choices on us, even in instances where we suppose we may have none. One may find reason to question the methodological foundations of existentialism, but the validity of necessity for choice and decision-making is not in contest. We have, as persons – leaders and followers – the freedom to choose, we have determinate capacity to affect our collective destiny. The recognition of this capacity is good faith or authenticity; the denial of it is bad faith or inauthenticity. Even in an interdependent world, in the called "global economy", there are acts of freedom which are inalienable, and denying responsibility or anchoring one's fortunes on the whims of external agencies is bad faith. What is being suggested here is that there are simple acts of self-sufficiency that attract respect and approbation. Such acts are in the form of honesty, only accepting justly earned reward, and refraining from benefiting from others on the grounds of

vested interests. These are not too much as expectations of the people who have reposed trust in the leadership. This could lead to a denial of self-agency and freedom thus becoming bad faith.

6.10 African Experience and Existentialism

Friedrich Nietzsche cited in Davis 1997,32-33) has argued, in *Human All Too Human*, that:

> All philosophers involuntarily think of "man" as an aeterna veritas, as something that remains constant in the midst of all flux, as a sure measure of things … Lack of historical sense is the family failing of all philosophers; many, without being aware of it, even take the most recent manifestation of man, such as has risen under the impress of certain religions, even certain political events, as the fixed from which one has to start out.

What does a "historical sense" require in the attempt to ensure the phenomenological visibility of the Africans in the ontological struggles for relevance? Gordon argues (2003, 34) that the question of existence is, in itself, an empty one; it is always a conductive affair. In other words, the question must always be situated in the existential realities of theorizing blackness and the African. According to him:

> At the heart of existential thought are two questions; "What are we"? and "What shall we do?" these questions can be translated into questions of identity and normative action. They are questions, further, of ontological and teleological significance, for the former addresses being and the latter addresses what to become – in a word, "purpose"

Since the elements of African cultural identity have been undergoing significant changes in response to their confrontation with European imperialism and American racism, it would seem necessary to reformulate a new context for the confrontation with the questions of identity and normative action.

In constructing such a resistance identity, some kind of reinvention would serve the Africans well. Many African scholars, including Appiah, see the need for such an imagined locus of solidarity. Like Appiah, Mazrui argues that: "Real Pan-Africanism must go beyond the twin stimuli of poetry and imperialism. Pan-Africanism is based on a positive false memory – that Africa was divided by colonialism and was previously one" (Mazrui; 2000, 90). This project of reclamation radically confronts the necessity of an ethnophilosophical examination of the African cultural past beyond any romantic idealization. Henry gives two reasons for the necessity of a phenomenological analysis of African traditional heritage.

First, through a Shutzian (reference to Alfred Shutz, the Phenomenologist) Proprietary relationship, African philosophers have a significant tie with these cultural constructs as invaluable properties in a way such that "expectation, (particularly of continuity), obligations and constraints are imposed upon us. This legacy is our responsibility in ways that cannot be for non-African groups." We are therefore saddled with the responsibility of preserving and developing "this heritage by examining it ethnophilosophically, by reflecting on it in [our] own lived experience, or collectively with contemporaries and associates." Second, Henry contends, that this proprietary relation with the symbols and discourses of traditional Africa is extended to a unique ego-genetic relation with the predecessors in such a way that the relations "establish certain common cultural or mytho-poetic elements in the formation of African, African-American, and African-Caribbean egos" (Henry; 2003, 56). This formative role of the cultural elements will constitute them as common elements that will facilitate the self-reflection of African philosophers on their own ego-genetic processes, and on the cultural identity of an African philosophy.

After immersing ourselves in historical thinking, a point of Nietzschean modesty is in order. This is because Nietzche holds that the "virtue of modesty" is allied to the necessity of historical philosophizing. This takes many dimensions. The first is that after the ontological determination of the self-identity of Africans and African philosophy, African philosophers must go on to confront the social-existential dimension of the African predicament that bears directly on the problems of African development. This is generally the problem of how African cultures can be modern. This, after all, is the basis for the universalism of Appiah, Hountondji, Wiredu and lately Oyeshile, Oruka and Mazrui.

The preceding arguments have revealed that, modernity is originally and incredibly constituted as a western – Euro-American Phenomenon together with its exclusionary ontology. The West rightly defines modernity as: "The descriptive notion that connotes the historical state of affairs characterized by an abundance of wealth resulting from the industrial and technological revolution and the ensuing cultural isolation and fragmentation due to a disintegration of closely-knit communities and the decline of religious systems" (West; 2003, 12).

6.11 Conclusion and Observation

The question of how Africans can become modern is only meaningful from the background of the rescue of African cultural visibility from the anonymity of Euro-American philosophical and cultural imperialism and humanism. A regained cultural distinctiveness provides a strong arsenal for meeting a modernity defined by sciences and technology. In other words, since the scientism of Euro-American modernity requires the "phenomenological disappearance" of myth, tradition,

religion and other supposedly extra-scientific discourses, then these “extras” are crucial for the authentic formation of an African postcolonial identity or ego. This then calls for a dialectical relationship between the two will be significant for the constitution of an African modernity as an important dimension of the modernity project itself. This is where the concept of Black African Existentialism lies. The next chapter discusses the existentialist Foundation of Law and elucidates on the Gacaca courts in Rwanda and their quest for justice.

CHAPTER SEVEN

RWANDAN GENOCIDE AND GACACA COURTS' QUEST FOR JUSTICE: A Study in Existentialist Foundations of Law

7.1 Introduction

Rwanda is one of the five regional states forming the East African Community. The East African Community's foundation is the Treaty for the East African Community which was originally conceived by Kenya, Uganda and Tanzania. Burundi is the other signatory.

Between April and July 1994, more than 700,000 Tutsi were killed in the Rwandan genocide. In parallel massacres, tens of thousands Hutu were killed for being too moderate, too sympathetic to Tutsi, too wealthy or too politically inconvenient. After the genocide a new government came to power, dominated by Ugandan-born Tutsi returnees but with the participation of other political parties. It inherited a totally destroyed country, with a traumatized and impoverished population, a collapsed state and a destroyed infrastructure. Eight years later, much of the physical fabric of the state and the economy has been rebuilt – at times better than it was before. The giant tear in the fabric of Rwanda's society has not been largely repaired at all. And, the achieving of justice and reconciliation remains the great challenge for Rwanda. (The origin of the Rwandan Genocide – Amherst, New York; Humanity Books, 2003 – 196-197).

Right from the beginning, the new government argued that unless the "culture of impunity" was once and for all ended in Rwanda the vicious cycle of violence would never end. Some donors were interested in the South African "truth and reconciliation" mode, but the government firmly rejected this. The reason was that it is only when the guilty had been punished that there could be a possibility for the victims and the innocent to create a joint future together. As a result, the Rwandan Government and the donor community invested heavily in the reconstruction of the justice system. More than one hundred justice-related projects were funded to train lawyers, judges, investigators and policemen; supporting reform of administrative and court procedures; funding the construction of courts, libraries and prisons; paying for vehicles and fuel;

supplementing the salaries of judges; and supplying technical assistance to the ministry of Justice and the Supreme Court. (Genocide: A short History of the Rwanda Genocide by Jennifer Rosenberg ch. 1 7 3)

In 1996, the Rwandan National Assembly adopted a genocide law, creating four categories of crime and associated punishments, ranging from particularly cruel behavior (category 1) to simple property offences (category iv). Trials started by the end of the same year. By mid-2001, approximately 3,500 persons had been judged.

The quality of the trials improved over the years because the verdicts were more nuanced, but serious problems remained. The quality of the justice delivered was deficient because there were too many instances of investigative bias, corruption of judges, intimidation of witnesses, weak defense counsel or absence of a defense counsel, and political pressure. A second major problem was quantitative in nature because the pace of ensuring just trials would take more than a century to complete the one hundred and thirty thousand persons who are currently imprisoned, often in horrendous conditions. It is widely believed that the justice system simply cannot work much faster than it currently does (it could work faster but not, let us say, 50 times faster, which is what is really needed). More people who were accused of participation in the genocide died in Rwanda's prisons each year than those who are judged. This is socially, economically and politically very costly for the Rwandan Government and society.

From mid-1997, senior Rwandans began thinking about innovative ways of dealing with this challenge. Out of these discussions grew the idea of transforming a traditional Rwandan community-based conflict resolution mechanism called Gacaca into a tool for judging those accused of participation in the genocide and the massacres. This system is labeled the

"modernized Gacaca" and constitutes an unprecedented legal-social experiment in its size and scope. In the summer of 1999, a draft law began to circulate. This was followed by a large number of meetings and discussions involving various segments of government and society, as well as the international donor community. The law underwent various modifications, which resolved some of the criticisms against it but not others, and was finally passed by the National Assembly in October, 2000. Elections for approximately 255, 000 Gacaca judges took place in October 2001. Training for the judges followed in April and May 2002, with international support. (Success and Challenges of ICTR – p.309: Salome Bossa).

7.2 Official Objectives of the Gacaca Court System

The "mission" of this system is to achieve "truth, justice, [and] reconciliation." It aims at promoting community healing by making the punishment of perpetrators faster and less expensive to the state.

The official Rwandan government website of the National Service of Gacaca Jurisdictions the "Gacaca Courts" system has the following objectives:

- The reconstruction of what happened during the genocide,
- The speeding up of the legal proceedings by using as many courts as possible,
- The reconciliation of all Rwandans and building their unity.

The Supreme Court [of Rwanda] has been endowed with a 6th court called "Gacaca Courts Department" in order to co-ordinate and supervise the activities of the various courts without having to interfere with the decisions that they will have to make [and] in order to keep the

national as well as the international community informed about the evolution of the Gacaca Courts' activities.

Since 2002, Gacaca Courts Department was replaced by the National Service of Gacaca Courts so as to coordinate the Gacaca Courts activities and speed up this process (Introduction, National Service of Gacaca Jurisdictions).

There are eight thousand one hundred and forty Gacaca courts located throughout the country. In 2002, seven hundred and forty six courts were experimentally established as an attempt to speed up procedures, which is currently in a state of stagnation due to lack of support and constant threats to members of the court (ICTR- Statistic – 2004).

7.3 Tradition of Gacaca

Traditionally, the Gacaca settled village or familial disputes while the courts were informal means of solving disputes around issues like theft, marital issues, land rights, and property damage. The Gacaca were constituted as village assemblies, presided over by the ancients, when each member of the community could request to speak. The trials were meant to promote reconciliation and justice of the perpetrator in front of family and neighbours.

Respectable elders, known as *Inangamugayo*, were elected based on their honesty by the people of the community. The name *Gacaca* originates from Rwanda's national language, Kinyarwanda, which translated roughly into English means short, clean cut grass or "*umucaca*."

It is symbolic for a gathering place for elders to sit on and judge the trial. "*Inyangamugayo*" would assemble all parties to a crime and mediate a resolution involving reparations or some act of contrition. The Gacaca court is thus a system of grassroot legal bodies inspired by traditional power structures. One easily recalls the tradition in Kenya by which village leaders, chiefs and other well respected members of society sit under a tree to resolve and deliberate issues at grassroot level, be they familial or social (the Rwandan Maps & Facts – Edn.2005).

In relation to genocide, the Gacaca process provides a basis for settlement; the system emphasizes the importance of accord, condemns the guilty, and promotes collaboration between those deciding as well as among the spectators. In keeping with tradition, villages elect nine representatives for each Gacaca court to be the judges known as "people of integrity."

7.4 How the Gacasa Works

The Gacaca courts are meant to provide smaller courts to relieve the burden of the larger courts. Criminals are charged with acts against humanity, such as murder and serious assault. These courts are however not allowed to try accused rapists. The idea is to let the village courts resolve issues and hopefully provide some reconciliation and justice. In conducting their exercise the defendant is accused and brought to trial which is held in public, where survivors and the victims' families can confront the accused. The accused could either confess to their crimes or maintain their innocence. The villagers can either speak for or against the defendant. Since only five per cent of the one hundred and twenty thousand imprisoned suspects had been tried as of 2005, the government is hoping the Gacaca courts, which are in charge of judging two (of the

three) categories of people accused of implication in the 1994 Rwandan Genocide will charge all of them.

There are three levels of jurisdiction for the Gacaca Courts: the Cell's Gacaca Courts, the Sector's Gacaca Court, and the Sector's Gacaca Courts for Appeal. These are then organized into three parts. A general assembly, which collects facts and establishes the lists of victims and perpetrators, among other things; the Bureau of the Gacaca jurisdiction, which is made of nineteen members elected by the General Assembly; and the co-ordination committee, of which is designed to coordinate the Gacaca Court's activities.

Each Gacaca court has nine judges and has the power to sentence criminals up to life imprisonment, but not the death penalty. The Rwandan government's website states that Gacaca courts' activities are organized into three steps:

(i) Collection of information relating to the genocide.

(ii) Categorization of persons prosecuted for having committed genocide or having played a role in different genocidal crimes.

(iii)Trial of cases falling under their competence (or jurisdiction).

The first judgment of the operational phase took place on March, 11, 2005.

7.5 Other forms of justice in Rwanda

Later, after the genocide, the International Criminal Tribunal for Rwanda (ICTR), an international court, was established in November, 1994 by the United Nations Security Council. The official objectives of this system were to judge the people responsible for the Rwandan

genocide and other violations of the international law which took place in Rwanda between 1st January and 31st December, 1994. The Tribunal is currently located in Arusha, Tanzania targets genocide, crimes against humanity and war crimes, which are defined as violations of the Geneva Conventions. Abuse of mass media and involvement with sexual crimes are also brought to justice. Several trials were completed during the first period (1995-1999). These included the trial of former mayor of Taba commune Jean Paul Akayesu and former Prime Minister Jean Kambanda, who were both found guilty. During the second period (1999-2003) several other people were put on trial (New Internationalist magazine: 2006).

7.6 Classification of crimes into four categories

The categories of trials were originally created in 1996 by the Act on the Organization and Pursuits of Crimes against Humanity. The Organic Law 08/96 of August 30, 1996 established the categorization of genocide defendants:

1st category

(i) Planners, organizers, instigators, supervisors of the genocide,

(ii) Leaders at the national, provincial or district level, within political parties, army, religious denominations or militia,

(iii) The well-known murderer who distinguished himself because of the zeal which characterized him in the killings or the excessive wickedness with which killings were carried out,

(iv) People who committed rape or acts of sexual torture,

2nd category

(i) Authors, co-authors, accomplices of deliberate homicides, or of serious attacks that caused someone's death,

(ii) The person who – with intention of killing – caused injuries or committed other serious violence, but without actually causing death,

3rd category

The person who committed criminal acts or became accomplice of serious attacks, without the intention of causing death.

4th category

The person having committed offences against property.

Sentences are provided according to the crime category and confession/guilty recognition.

1st category

(i) Has not confessed or his/her confession has been rejected – Death sentence or life imprisonment;

(ii) Confession before the publication of his/her name on the list of first category – 25 years imprisonment;

2nd category

(i) Has not confessed or his/her confession has been rejected – 25 years imprisonment or life imprisonment;

(ii) Confession after accusation and name put on the list made by the Cell's Gacaca Courts – 12 to 15 years imprisonment, half of it is spent in prison, the other is commuted to works of public interest;

(iii) Confession before accusation and name put on the list made by the Cell's Gacaca Court – 7 to 12 years imprisonment, half of it is spent in prison, the other is commuted to works of public interest;

3rd category

(i) Has not confessed or his/her confession has been rejected – 5 to 7 years imprisonment, half of it is spent in prison, the other is commuted to works of public interest;

(ii) Confession before name being put on the list made by the Cell's Gacaca Court – 1 to 3 years imprisonment, half of the sentence is served in prison and the rest is commuted to works of public interest;

4th category

- Return the stolen things or pay the equivalent.

Gacaca has been implemented in a pilot phase (lasted 18 months) with the Organic Law 40/2000 of 26.01.2001. Organic Law 16/2004 of 19.06.2004 reorganizes Gacaca process. The categories have been reduced to three (3). The former categories (2) and (3) were combined to make the 2nd category and the 4th category become the 3rd one.

The first category of alleged criminals (those accused of planning or leading the Genocide and those accused of torture, rape or other sexual crimes) will be (and in some cases already are) prosecuted before State (national) criminal courts. These do not have jurisdiction over crimes of the first category. These Gacaca courts will adjudicate the two other remaining categories ("simple" murder, bodily injury, property damage), which has started early 2006. Capital punishment was abolished in Rwanda in the summer of 2007.

How defendants were categorized by Gacaca Courts (pilot phase)

- Number of persons categorized: 59,171.

    1. Category 1 – 6,817 (11.5%)
    2. Category 2 – 36,426 (61.6%)

Because the trials are based on witness's testimonies, the length of time between the crime and trial heightens the risk that the witnesses' memories will be unreliable.

Senior human Rights Watch adviser, Alison Des Forges, said the lack of legal representation was a serious concern. "The authorities" view is that this is a quasi-customary kind of procedures which did not use lawyers, so there's no need for lawyers now. The problem with it is that little is evident except for the name. In this system, there is considerable weight given to the official side. The office of the prosecutor provides considerable assistance to the bench [of judges] in terms of making its determination, so you no longer have a level playing field." There may, however, be no alternative to the Gacaca trials, she added.

> Obviously the problem of delivering justice after the genocide is an overwhelming problem. Gacaca may not be ideal but there is at this point no alternative…. The official explanation is that people did not speak openly until the Gacaca process and now many more accusations are surfacing. The concession programme, also requires the naming of all those who participated along with accused [in return for a lighter sentence], has led to a multiplication of names. "How many of these are well-founded, what is the credibility of the evidence, these are very serious concerns.

It has to be noted that with time, some suspects have made enemies during their spell in prisons who they have come out to later accuse, not necessarily because they committed crimes, but because the accusing parties see them as enemies worth serving longer or similar sentences. Obtaining evidence on this respect is not easy as witness reports take precedence in most cases.

There is an important gender issue. If no special efforts are made to pay attention to gender issues then women's participation in the Gacaca process may well be minimal. The election of Gacaca members in October 2001 was a worrying sign in this regard. Relatively few women were elected, varying from one-third of all judges at cell level to only one-fifty at the provincial level. There is concern that women may also be neglected during discussions about restitution and compensation, contrary to the law. As a consequence of their precarious economic situation, widows are particularly vulnerable to family and social pressure. Given the prevalence of social taboos, the horrific sexual crimes suffered by many of these women are likely to go un-discussed. The absence of trauma counseling; the fact that a fixed representation of women on the Gacaca benches was not accepted; and the generally weak position of women in Rwandan society are all cause for concern. On the other hand, women's groups, often made up of widows, have emerged across the territory, and they may well act as strong new voices.

Underlying a neo-traditional mechanism such as the modernized Gacaca jurisdictions is a notion of community – the existence of rather close-knit groups of people sharing certain values and expectations (at a minimum the expectation that they will live together for a long time to come). This condition is not always met in present-day Rwanda. In many areas, a significant proportion of the population has arrived since the genocide, and thus the process of witnessing and confrontation may be incomplete. This situation is bound to be worst in urban areas. In general, the degree of distrust that still reigns may well make any notion of community a mirage.

Finally, the way in which the Gacaca process unfolds will be profoundly affected by broader social and political trends, both nationally and locally. The extent to which people distrust or dislike the government (perhaps because they suffered heavily from the counter-offensives against rebel infiltration, or because they judge the central government to be increasingly unrepresentative and exclusive), the memories they carry about of the behavior of government soldiers immediately after the genocide, and even general economic trends (for example, the impact of localized famines) – all these factors could influence people's willingness to engage in the risky process of Gacaca. While these factors fall outside the design of the law, they may well be the key factors that determine its success or failure.

7.7 Is the System Perfect?

There are criticisms and controversy surrounding the decision to implement Gacaca courts. Human rights groups worry about the fairness since trials are held without lawyers which means that there is less protection for defendants than in conventional courts. In addition, conventional trials have seen false accusations and intimidation of witnesses on both sides; issues of revenge have even been raised as a concern. The acquittal rate has been 20 percent which suggests a large number of trials were not well-founded.

7.8 Conclusion and Observation

The Gacaca system may be the most expedient choice of solving the Rwandan peculiar problem, though certainly not the best owing to the above enunciated weaknesses. It could solve problems of the current slow judicial practice but it could also have the potential to create significant benefits in terms of truth, reconciliation and even empowerment. For these reasons, the international community, including many human rights organizations, has decided to cautiously support the process. These potential benefits follow from the central role played by local communities, as well as from the fact that the system involves many more people, particularly victims, and involves fewer time-consuming rules on the formal justice system. The Gacaca system is also very vulnerable to unpredictable political, social, psychological and economic dynamics. As such, the results are potentially dangerous.

In adopting Gacaca justice system, the Rwandans were attempting to find self and the meaning of life through free will, choice and personal responsibility. They were searching for whom and what they are throughout life as they make choices based on their experiences of massive and brutal genocide, beliefs, and outlook. Just like existentialists profess, a person should be able to choose and be responsible for all his actions without the help of laws, ethnic rules or traditions. Existentialist ideas came out of a time in society when there was a deep sense of despair following the Great Depression and World War II. The Gacaca system came to Rwanda immediately after the genocidal massacre of over a million people and was dictated by a grim period of history which was followed by despair.

An existentialist could either be a religious moralist, agnostic relativist, or an animist. Kierkegaard, a religious philosopher, Nietszche an anti-Christian, Sarte and Camus both atheists,

all basically agree that human life is in no way complete and fully satisfying because of suffering and losses that occur. This is in considering the lack of perfection, power and control one has over their life which even though not optimally satisfying it nonetheless has meaning. Rwandan politicians, scholars and religious leaders all desired a new beginning in their country.

They realized that the arbitrary acts which occur when someone or society tries to impose or demand that their beliefs, values, or rules be faithfully accepted and obeyed, destroys individualism. It also makes a person become whatever those in power desire and are thus dehumanized. This system was abhorrent and must be discarded.

The law's capacity to possess unique elements of symbiosis, autopoiesis and being utility based in society is examined in the following chapter.

CHAPTER EIGHT

THE INTELLIGIBILITY OF SYMBIOTIC-AUTOPOIESIC-UTILITARIAN THEORY

8.1 Introduction

The symbiotic-autopoiesic-utilitarian theory is a three in-one-theory that has been adopted in this study. This chapter expounds the intelligibility of the theory and discusses its currency, and explanatory power as a research-guiding tool. Symbiosis and autopoiesis are both theories borrowed from biological science while utilitarianism is rather from philosophy. This chapter demonstrates the superiority of theory-combination and applies the multi-faceted theories or hybrid theory in a comparatively new phenomenon that is rooted in the maxim "no knowledge stands in isolation."

The chapter further aims at providing a logical defense against intellectual enemies of the "hybridization of research." This "hybridization process" of knowledge is calls for application of scientific methodology that transforms the arts subjects into [pseudo] sciences. This chapter aims at answering the question whether philosophy is at all a science and secondly if scientific methods are applicable to philosophy? The following question arises is philosophy compatible to sciences and if yes how and what is the intellectual appeal of the possible results. An attempt is made to demonstrate whether philosophy is at all compatible with scientific methodologies. Finally, positive results, if any, are applied to reinforce the compatibility of scientific theories and methods with philosophy.

8.2 Autopoiesis

Autopoiesis is the process whereby an organization produces itself. An autopoietic organization is an autonomous and self-maintaining unity which contains component-producing processes. Through their interactions, and generate recursively the same network of processes which produced them. An autopoietic system is operationally closed and structurally state determined with no apparent inputs and outputs. A cell, an organism, and perhaps a corporation are examples of autopoietic systems.

Autopoiesism is the property of systems whose component participate recursively in the same network of productions that produced them, and realize the network of productions as unity in the space in which the components exist. Autopoiesis is a process whereby a system produces its own organization and maintains and constitutes itself in a space, for example, a biological cell, a living organism and to some extent a corporation and a society as a whole.

Autopoiesis means "auto (self) –creation" (from the Greek *auto* for self-and *poiesis*- for creation or production), and expresses a fundamental dialectic between structure and function. This term was originally introduced by Chilean biologists Humberto Maturana and Franscisco Varlela in 1973.

Both developed an analogical example of a machine thus; "An autopoietic machine is a machine organized (defined as a unity) as a network of processes of production (transformation and destruction) of components which, first, through their interactions and transformations continuously regenerate and realize the network of processes (relations) that produced them; and

secondly constitute it (the machine) as a concrete unity in space in which they (the components) exist by specifying the topological domain of its realization as such a network." Further "the space defined by an autopoietic system is self-contained and cannot be described by using dimensions that define another space. When we refer to our interactions with a concrete autopoietic system, however, we project this system on the space of our manipulations and make a description of this projection." (Maturana; Varela, 1980, 89).

The term autopoiesis was originally conceived as an attempt to characterize the nature of living systems. A canonical example of an autopoietic system is the biological cell. The structures, based on an external flow of molecules and energy, produce the components which, in turn, continue to maintain the organized bounded structure that gives rise to the components. An autopoietic system is to be contrasted with an "allopoietic" system, such as a car factory, which uses raw materials (components) to generate a car (an organized structure) which is something other than itself (the factory.)

Autopoiesis generally reassembles the dynamics of a non-equilibrium system; organized states that remain stable for long periods of time despite matter and energy continually flowing through them. The notion of autopoiesis, from a very general point of view is often associated with that of self-organization. An autopoietic system is however, autonomous and operationally closed, in the sense that every process within it directly helps in maintaining the whole. Autopoietic systems are structurally coupled with their medium in a dialectical dynamic of changes that can be called sensory motor coupling. The continuous dynamics are considered as knowledge and can be observed throughout life-forms.

Autopoiesis is based on the way living systems address and engage with the domains in which they operate. This biology based theory, defines life as the ability to self-produce, rather than as (conventionally) the ability to reproduce. Like the complexity theory, it is a systems perspective, and is applicable to brains and societies as well as to biology and artificial life. In its original form it was applied to cognition, and replaces an external objective view of this subject with an internal relativistic understanding, in terms of an embedded observer.

8.3 Structural Determinism

Only two types of structural changes are possible in living organisms; changes of state that preserve identity, or disintegration (death). External perturbations trigger the changes to the organism but do not themselves determine them. The available states of the organism determine which environmental triggers can be recognized and which will disintegrate it, but the available states occur by a process of self-organization. This is the concept of 'structural closure' or 'structural determinism' that forms the main theme in autopoietic thinking. Note that this means that we do not 'map' our environment but just respond to a sub-set of it.

Instructive interactions (traditional imposed learning) are said by Maturana to be incapable of being subjected to scientific procedures. Like molding clay, they leave no trace of the original structure. Thus, the standard neo-Darwinist idea that the environment imposes order on organisms is at best metaphorical. The light entering our eye, for example does not 'cause' the photochemical release that occurs. That mechanism must already exist, light just triggers it.

These ties in with the complexity view that selection acts on systems whose structure are already self-organized.

8.4 Structural Coupling

An organism undergoes a history of perturbations from its environment (also seen as a dynamical system at a higher level, subsuming the organism) which triggers its own state trajectories. If these triggers are regular then the organism has also regular state cycles, if continuously changing then novel trajectories will occur. If the organism affects (triggers) the environment, in turn then we have the co-evolution of two structurally coupled systems.

If these triggers result in state changes that involve component changes (rather than just interactional ones) then we have adaptation. This plasticity in structural topology at both state and component levels is referred to as 'structural coupling' and can operate in both directions. By this process, the medium or environmental organization becomes coordinated with that of the organism. It is noteworthy that there is no necessary informational or semantic commonality between the two. Each reacts to the other on its own terms.

8.5 Self-Production

The components of the organism are regarded as a form of autocatalytic set. In other words, the components take in food (lower level components) from the environment and by a dissipative process (using energy) act on each other in such a way as to recreate themselves dynamically (unlike machines with fixed parts). This closure of the system allows it be bounded, to isolate itself from the outside world and become a self-sustaining constant (homeostatic) system. This

definition of life is far better than the systemic illogicality of defining it as the reproduction of a passive gene. A living system is an ongoing process that self-defines and self-maintains its form, reproduction is not a necessary function of this.

Autopoiesic closure is a systems property and is thus not restricted to biological systems. It gives Autonomy; Phenomenal Distinctions – an emergent composite level as well as a part level (these are not logically deducible from each other); Adaptability – tracking its environment in the present (ontological); and Adaptation – divergent trajectories of parallel systems (some disintegrate). Reproduction and natural selection is thus a domain orthogonal to self-producing 'being' or existence itself – they are different dimensions.

8.6 Learning and Instinct

The organism's current state is due to its history of structural coupling. This base or instinctive state is a combination of evolutionary and developmental processes. Learning is also a form of structural coupling, so is indistinguishable from instinct. Distinctions between evolutionary, developmental and experiential structural change are thus those of timescale and not of type, and this suggests that they can be modeled by a common mechanism.

The independence of system states from environment states allows for decoupling, seen (from outside) as inappropriate behavior – often called 'instinct' or 'mistake'. This relates to systems that are internally dynamically self-consistent with some external understanding. This insight suggests that many alternative and equally valid 'human systems' can exist without being

regarded as ‘faulty’. This idea has many implications for medical interventionism aimed at ‘normalization.’

8.7 Consensus Domain

This is the structural coupling between two autopoietic and structurally plastic systems. The interactions between the two systems are closed on triggers but are open on the systems that realize them (organization is independent of the parts that create it). This means that we can substitute functionally equivalent systems without affecting the co evolutionary result. Artificial life forms would be indistinguishable from natural ones from a behavioral point of view.

Further, because any individual is organizationally closed and cannot distinguish the source of its triggers, then the ‘reality’ that we create bears no relationship to the external world. We do not model or describe a reality, it is simply a consensus. Interacting systems serve as a source of compostable perturbations to each other, but do not share explicitly any external common reality.

8.8 Identifying Autopoiesis

There are six criteria given to determine if a system is autopoietic. First, is whether the system constitutes identical boundaries; second, whether it has constituent elements or boundaries; third, if the boundaries are self-produced; fourth, if it is mechanistic or subject to cause and effects; fifthly, if the components of the boundaries are self-produced, and lastly, if the rest of the components are self-produced. Under these criteria, not only are biological organisms autopoietic, but so is cognition, society and many institutions within it.

8.9 Co-evolution

Co-evolution relates to the two-way interplay between the organism and aspects of its environment and can occur in various forms. First, the organism can affect the physical environment by changing the adaptive pressures on itself (for example by moving around, digging holes), thus the physical environment should not be regarded as a static 'object'. Second, physical changes in this environment can affect the organism (for example, weather changes) leading to adaptation or changes in behavior. Most forms of co-evolution, however, will occur with respect to other organisms, and again there are several aspects to this also. The interactions encountered can be with members of its own species, either competitive or cooperative, with 'prey' species (lower on the food chain), with 'predator' species (higher on the food chain), with neutral species (at any level) and with kin (family). In evolutionary biology, economics and game theory the dynamics of such interactions lead to such concepts as 'Nash equilibria' or 'Evolutionary Stable Strategies' (ESS) – situations where no agent can improve their lot so long as the others continue with their current strategy. This leads to repetitive behaviours' (cyclic attractors). For our purposes, however, we are interested in more complex situations where stability is at best temporary due to the multiplicity of influences.

All these influences may be multi-faceted, that is they can affect several interacting values or needs in each organism. A particular set of relevant interactions, almost ignored so far in the research community, relates to synergic co-evolution, where a number of organisms enter into a mutual arrangement such that the net benefit to all exceeds their individual costs (a win-win situation). This dynamic approach also takes many forms including symbiotic, social and ecological networks. In general, all these effects will be present to some degree in any complex

system, including economic, technological and cultural ones. This necessitates a much more holistic and multilevel approach if we are to: understand which mutual structural changes are taking place, which niches are being dynamically created, and what their relative stabilities are. It is found from simulations that such co-evolving systems naturally adjust their parameters to maximize overall group fitness, moving from either static or chaotic regimes to a metastable edge of chaos' state possessing complex mixes of behavior with fractal structure on both spatial and temporal scales.

8.9.1 Levels of Co-evolution

Whilst the dynamics of all these forms of co-evolution have many common systemic characteristics, we can divide them for explanatory purposes into three distinct levels related to the organic or human needs involved in each. It is important to note however that, all these levels interact and they should not be regarded as just 'stand-alone' subjects for study, although since such dynamics have been significantly neglected so far in science there is much scope to remedy this situation also. The level names used below are illustrative and are not, in any sense (as yet), common 'complexity' terminology.

8.9.2 Biophysical co-evolution

At this level, the world's physical resources are employed by biological organisms to meet their primal needs. In this dynamic relationships matter is transformed into life and conversely (upon death) life is transformed back into matter (recycling is endemic to this process). This two-way interplay between the physical and biological realms is lost in the general separation between physical and biological sciences, although it does feature to some extent in the various cycles studied in biochemistry, and it also features significantly in the Gaia theory of James lovelock.

Many separate resources and different types of organisms operate here. In this mode, we concentrate on the individual's co-evolution between matter and life, the maintenance, in whatever way, of an autopoietic (self-sustaining) overall organism (body plus the lower instinctive mind aspects), in other words the emergence of 'life' itself.

8.9.3 Biosocial co-evolution

In the next level up, we study the interplay between individual life forms and their social fellows, the 'collective' behavior. Here, we engage a more complex dynamic whereby many types of social structure become possible, including the move between 'individual' and 'social' forms seen in the slime mold. We also consider animal societies, which can take innumerable complex forms, and we can extend this to include the interplay between different species which are studied in ecology and ethnology. In this mode, many human behaviours also fit well, especially our day-today social interactions. These take place largely unconsciously and are automatically constrained by our cultural norms (akin to animal instincts). This co-evolution between life and society is, once more, largely missed by our scientific compartmentalization, which separates biological, psychological and sociological disciplines. This level relates to the maintenance of an autopoietic socio-ecosystem (akin to the organization of a multi-cellular organism, but rather less constrained) and the emergence of society and ecosystem.

8.9.4 Mythico-social co-evolution

The final level that we will consider is generally thought to apply only to humans, who uniquely have the ability to generate abstract ideas, non-material concepts like mathematics, philosophy,

ethics and politics which nonetheless affect how we behave and the dogmas we so often adopt. They are not, in any sense, irrelevant to science (in any of its forms) as is so often assumed by those of a purely 'materialist' or 'reductionist' bent. This is because they define and constrain the very behaviours employed within such disciplines. Thus we have co-evolution between our social level and a mythical (yet very real to all the people involved) world of the imagination, which takes place along many separate abstract dimensions. It is here that language and symbolism come to the fore and the autopoiesis here takes place largely in these realms. Academically, these dimensions are however increasingly all kept divorced from one another, sometimes with murderous ferocity – even though they are all of the same type and all co-evolve necessarily with each other. This autopoietic level maintains 'culture' itself, in the form of our self-sustaining and self-reinforcing 'belief systems' or philosophical 'world views. It tries to defend such 'systems' – even in the face of contradictory 'facts'. This level relates to the emergence of 'virtual realities'. A more fragile balance exists here however, than in the other two levels. This level is more subject to perturbation and systemic disintegration by outside influences. This we see in the more frequently seen extinction or transformation record of human 'societies' or 'civilizations' , as compared to either ecosystems or individual species.

8.10 Conclusion and observation

Autopoietic systems are self-sustaining wholes. However, where these are fairly loosely defined with vague, open boundaries (for example most human systems) the terms sympoietic is sometimes used. These terms can be contrasted with; heteropoietic which refers to externally sustained or planned systems (for example, a person looking after an aquarium) and allopoietic

which is an unsustainable, throughput-based, system (for example, a production line which depletes the environment). We should note that most companies are not autopoietic systems, even internally, since they are forced into being and do not spontaneously organize (although they could, advantageously, be transformed into such systems). With today's emphasis upon sustainability, it is clear that a focus upon autopoiesis is both invaluable and necessary if we are to correct the many errors caused by our misunderstanding of the nature of systems, evolution and learning.

Autopoiesis, with its stress on action within an environment helps us to understand life at all levels. This relates to the situated or selected self-organization mode of complexity thought, which considers the co-evolution of system and environment. Whilst autopoiesis usually does not incorporate the complexity concept of dynamical attractors, it uses the same idea of limited flexibility due to structural connectivity, along with the need to change structure if we are to develop new modes of behavior. There is no mechanism however which is generally suggested to drive these structural changes and in this respect complexity of thought goes beyond this field, allowing for internal mutation or recombination to generate emergent options for subsequent testing against environmental response. Autopoiesis remains nonetheless a valuable perspective with which to understand the essential nature of the interplay between any system and its current environment. The next chapter forms the conclusion of this thesis.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1 Introduction

This chapter provides the critical analysis that points to the possibility of existential foundations of law. The second chapter addresses the nature, trends and current status of existentialism. The most critical point is that existentialism provides a new paradigm shift in the study of social structures and systems. The phenomenological analysis of law as a reality of a social phenomenon demonstrates the central concern of this research report, the possibility of an existential foundation of law.

The third chapter has analyzed the nature of law and unveiled the critical elements of law. The chapter delved on what constitutes the validity of law. Natural law theorists contend that any law in order to satisfy the conditions of legal validity must possess by necessity a modicum of moral content. The chapter also examined the normativity of law, an element which contends that law to some extent guides behavior by providing its subjects with reasons for action. The chapter also explored the conditions that enable law to possess authority and therefore demand an obligation to be observed by its subjects. The features that constitute authority-capacity are observed to hold legitimate authority. The chapter concluded by observing that any legitimate-authority constitutes a practical authority, which in turn is basically a personal authority, that is, this authority is self-authored. The capacity for personal authority to constitute a universal dimension is what points towards possibility of existential foundations of law.

The fourth chapter dealt with law and morality and showed the interplay and interconnection between law and moral. It critically analyzed and demonstrated how both law and morals influence each other in a manner that the two cannot be divorced from each other.

The fifth chapter examined the demarcation of the existential foundations of law and critically analyzed two critical elements of law in order to identity the sources of obligations to and in the law. The two facets of law: legal obligation and legal authority are discussed. It is observed that, though interestingly, law as it is practically known constitutes no decisive linguistics term like 'obligation' or its near synonym 'duty' it inherently imposes an obligation and duty to its subjects. What is observed is that, each and every law universally places a command on its subjects and by so doing creates' duties' and 'obligations'. The opposing views by voluntary and non-voluntary theorist on how principles of political obligation justifying legal authority to invoke the choice or will of the subjects as among its reasons for thinking that they are bound to obey have been discussed. These opposing views expose the 'ground upon which to base the existential foundation of law'.

The sixth chapter has explicated the African existentialist philosophy. It investigated the African Socio-cultural existential dynamics with a view of establishing if these dynamics have granted the African people a wholesome manner of acquiring or appropriating knowledge; if Africans can be deemed to be modern. It identified the prejudices, beliefs and misinformation against African culture, religion, Arts and education. It further discussed the existentialist philosophy in South Africa, the Black feminist existential thought, the Mau Mau war in Kenya and the Black existentialist Philosophy. It also dealt with the African experience and existentialism. It

concluded that the concept of Black African Existentialism lies in the constitution of an African Modernity as an important dimension of the modernity project itself.

The seventh chapter examined the creation of the Gacaca Courts in Rwanda after the Rwandan Genocide. It investigated the workings of these courts, the composition of the courts, the category of crimes that can be adjudicated by these courts and the penalties for these crimes. The chapter also revealed the shortcomings of the courts and it is quite clear, despite these shortcomings that these courts are deemed necessary. The creation of these courts buttressed the view that existentialist ideas emerge at times where there is a deep sense of despair as the said views were also prominent after the Great depression and World War II. It is evident from this chapter that Rwandans, through their Gacaca Courts, sought to find self and the meaning of life through free will, choice and personal responsibility.

The eighth chapter examined the intelligibility of symbiotic-utilitarian-autopoiesic theory. The term‘autopoiesis’ was coined by biologists. It is used to describe the self-referential, self-replicating qualities of the typical biological systems. The term utilitarianism is associated with Jeremy Bentham who gave currency to its formulation as the principle of the greatest happiness for the greatest number. Symbiosis describes the mutual co-existence by organisms whereby each benefits from this co-existence.

The intelligibility of symbiotic-autopoietic utilitarian theory lies in its capacity to explain the power of law to hold the society in such a way that its very constituents mutually benefit each other. The subject of the law is the whole community members to whom the basic universal goal

of law is to hold them and ensure social harmony, maintain peace and order and promote a necessary condition for social continuity. This mutual benefit of law is what constitutes its symbiotic capacity. The mutual benefits of the existence of law in society percolate to all its subjects within a given society. Law's commands and edicts are by nature tailored to benefit the society at large. Law rewards observance while prescribing threats and punishments for non-observance. The utility of law lies in its striving to achieve the common good in society. It aims to benefit the majority while its threats and punishment are to the selected few. The Autopoiesis of law lies in the fact that first, law is operationally closed and it distinguishes itself by being a normative rather than a cognitive entity. The autopoiesis of the legal system is normatively closed in that only the legal system can bestow leally normative quality on its elements and thereby constitute them as elements. The symbiotic-autopoietic-utilitarian theory thrusts the individuals at the centre of the necessity of law. This concretization of the supremacy of the individual is akin to the importance that existentialism bestows on being as opposed to its existence. The symbiotic-autopoietic-utilitarian theory places an essence as opposed to existence of law in society. The critical element of autopoietic systems like law is that it constitutes the elements of which it consists through the elements of which it consists. Such a system is operationally closed and consists in the fact that all operations always reproduce the system.

Saint Thomas Aquinas observation that law is the promulgation of reason means that law is a product of pure reason. It is as Kant would put it, a product of pure and not practical reason. Law is in the same level with mathematics, geometry and other theoretical sciences. The truths of law are not verifiable. And their claims are not practical or empirical in nature. The fact that law is not an empirical science means that its claims are only known and applicable to reason

alone. Right reason according to existentialists verifies the worthiness of such legal claims. This verification means law must pass a minimum of moral consideration or moral threshold. Aquinas proclaims "unjust law is not law" "*lex injusta non est lex*". This is considerably true when apartheid and slavery laws were revoked on the grounds of being morally deficient. The dictates of reason demands a minimum of morality that can instill justice or fairness in law. This is why in Kenya, despite the law being there in exempting members of parliament and constitutional office holders from paying tax, there is a lacuna of morality that promotes justice, ethical fair-play and equality when considering all the masses are punitively taxed to ironically fund the lavish lifestyles of the former.

The ethical dimension of fair-play is reciprocated by the existentialist's proclamation that what you do is on behalf of all. "When you choose, you choose for all men". This is equivalent to the Kantian doctrine that "act in a way that it can be willed to be the universal Maxim". The claim that when you choose, you choose for humanity means that by your choice, you set a Maxim or a standard which others can follow. In the course of the enactment of law, men through the use of right reason make a choice by setting a standard that he will guide the others.

The Kantian Maxim, (Kant, 1967) the categorical imperative, suggests that when we select a course of action, it should be on the assumption that it becomes a universal guideline for all others to follow. The categorical imperative appears to be the fact that informs and guides the existentialists on their insistence that when you act you do so for all men. Since all the future actions will follow the present one as their base, it is safe to conclude that the formulation,

enactment and observation of law in its present form is founded on both moral and existential foundations.

Conscience may be defended as the inner feeling or consciousness about being aware of something in terms of right or wrong. The awareness within law is that it is brought about by guilt. This is because consciousness about law instills a sense of choice to obey good laws and defy bad laws. Within men's mind, there is consent to obey legitimate authority provided that it acts towards their own good. Men consent to a political authority in view of the positive derivatives that accrue from obeying it. The greatest of them all is justice without which social order is impossible.

Teubner defines conscience as that which renders man humane. Conscience provides what arouses in us the desire for social order and justice. He opines that it ought to be more alert in leaders as they are the ones changed with the duty of guarding social interests. Leaders with conscience are expected to safeguard and promote social interests. World dictators who are inept, corrupt and always clinging to power exhibit no conscience. Conscience is a derivative of reason. Conscience of the subjects is contained in their awareness of their duties and obligations to obey the law and their rightful enjoyment of freedom.

It is possible to conclude this research report by asserting that the source of law is not the command of the sovereign, not even the habit of a community, but the instinctive sense of right possessed by every race. Customs may be evidence of law but its real source lies deeper in the minds of men. A phenomenological study of law reveals that law is a product of pure reason,

intended to guide man, or what existentialists consider to be a “project”. Law is what is exhibited in man to be eternally transcendent and thus similar to “the becoming” of man as such. Law is what is exhibited in man to be eternally transcendent and thus similar to “the becoming” of man as such. Law has never been an end in society but always a means. This is the means towards justice and equality.

BIBLIOGRAPHY

PRIMARY SOURCES

Akins, K. (1993). *"A bat without qualities?" In Consciousness: Psychological and Philosophical Essays,* M. Davies and G. Humphreys, eds. Oxford: Blackwells.

Akins, K. (1996). *"Lost the plot? Reconstructing Dennett's multiple drafts theory of consciousness." Mind and Language*, 11: 1-43.

Alexy, Robert (2002). *The Argument from Injustice: A Reply to Legal Positivism*, Oxford: Clarendon Press.

Ames, D. *Lectures in Legal History*, (1913) Harvard Law Review Vol. 30, No. 6, Apr., (1917), Constructive Trust Theory as Applied to Property Acquired by Crime.

Amstrong, D. (1968). *A Materialist Theory of Mind*. London: Routledge and Kegan Paul.

Amstrong, D. (1981). *"What is consciousness". In The Nature of Mind*. Ithaca, NY: Cornell University Press.

Anderson, J. (1983). *The Architecture of Cognition*. Cambridge, MA: Harvard University Press.

Apel, K-Q, (1973). *"The Apriori of the Communication Community and the Foundation of ethics." In Towards a Transfromation of Philosophy*. Tr. Glyn Adey and David Frisby. London: Routledge.

Arendt, H. (1998). *The Human Condition* (1958) Chicago: University of Chicago Press.

Arendt, H. (1978). *" Heidegger at Eighty,"* in M. Murray, ed., *Heidegger and Modern Philosophy*. New Haven :Yale University Press.

Aron. R, (1969). *Marxism and the Existentialists*. New York: Harper and Row.

Austin, John 1832). *The Province of Jurisprudence Determined*. Ed. W.E. Rumble, 1995. Cambridge: Cambridge University Press.

Austin, John. (1832). *The Province of Jurisprudence Determined*. London: Weidenfeld 7 Nicolson, 1954.

Ayer Jules Alfred. (1952). *"Language, Truth and Logic*." Dover Publication: 2nd edition.

Baars, B. (1988). *A Cognitive Theory of Consciousness*. Cambridge University Press.

Balog, K. (1999). *"Conceivability, possibility, and the mind-body problem." Philosophical Review*, 108: 497-528.

Baret, W. (1962). *Irrational man: A Study in Existential philosophy* (1958) Garden City: Doubleday.

Barnes. H. (1967). *An Existentialist Ethics*. New York: Knopt

Beauvoir, S. (1989). *the Second Sex* (1949) Tr. H.M. Parshley. New York: Vintage Books.

Beckermann, H. Flohr, J. Kim, eds. *Emergence and Reduction*. Berlin and New York: De Gruyter, 157-179.

Behaviour and Brain Sciences, 18/4: 659-722.

Bell, Daniel. (1962). *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties : with "The Resumption of History in the New Century*." Harvard University Press.

Bentham, Jeremy (1782). 1970. *Of Laws in General*. Ed. H.L.A. Hart: London:

Bentham, Jeremy (1776). 1977. *A Fragment on Government*, ed. J.H. Burns and H.L.A Hart, London: Athlone Press.

Biko Steve .(1987). *I write what I want.* Heineman African Publishers.

Binding, integration, and Dissociation. Oxford: Oxford University Press.

Block, N. (1980)a. "Troubles with Functionalism," in *Readings in the Philosophy of Psychology*, Volume 1, ned Block, ed., Cabridge, MA: Harvard University Press, 268-305.

Block, N. 1980B/ "Are absent qualia impossible?" Philosphical Review, 89/2: 257-74.

Block, N. (1990). "Inverted Earth," *Phiolosophical Perspectives*, 4, J.Tomberlin, ed., Atascadero, CA: Ridgeview Publishing Company.

Block, N. (1994). *"What is Dennett's theory a theory of*?" *Philosophical Topics*, 22/1-2:23-40.

Block, N. (1995). "On a confusion about the function of consciousness." *Behavioral and Brain Sciences*, 18: 227-47.

Block, N. (1996). *"Mental paint and mental latex*." In E. Villanueva, ed. Perception. Atascadero, CA: Ridgeview.

Block, N. and Stalnaker, R. (1999). "Conceptual analysis, dualism, and the explanatory gap." *Philosophical Review*, 108/1: 1-46.

Boyd, R. (1980). "Materialism without reductionism: What physicalism does not entail." Block N., ed. "*Readings in the Philosophy of Psychology."* Vol.1. Cambridge, MA; Harvard University Press.

Brandt, Richard. (1979). "*A Theory of the Good and the Right*," New York: Oxford University Press.

Brink, David. "Legal Positivism and Natural Law Reconsidered," (1985), 68, the Monist 364.

Buber, M. (1970). *I and Thou* T. Walter Kaufmann. New York: Scriber.

Buber, M. (1978). :*Between Man and Man*." Tr. Ronald Gregor Smith. New York: Macmillan.

Bultmann, R. (1957). "*History and Eschatology*," Edinburgh: Edinburgh University Press.

Bultmann, R: (1987). "*Faith and Understanding*." Tr. Louise Pettibone Smith. Philadelphia: Fortress Press.

Busch, T. (1999). "*Circulating Being: From Embodiment to Incorporation (Essays on Late Existentialism*)," New York: Fordham University Press.

Butler, J., (1990) "*Gender Trouble: Feminism and the Subversion of Identify*," New York: Routledge.

Byrne, A. (1997). *"some like it hot: consciousness and higher-order thoughts*." Philosophical Studies, 2: 103-29.

Byrne, A. (2001). "Intentionalism defended". *Philosophical Review*, 110: 199-240.

Cambridge University Press.

Campbell, K. (1970). "*Body and Mind*." New York: Doubleday.

Campbell, Tom (1996). "*The legal Theory of Ethical Positivism*." Dartmouth:

Campell, J. (1994). "*Past, Space, and Self*. Cambridge," MA: MIT Press

Camus, A (1955). "*The Myth of Sisyphus and Other essays*." Tr. Justin O'Brien. New York: Knopf.

Camus. A. (1988). "*The Stranger*." Tr. Mathew Ward New York: Knopf.

Carr, D., (1986). "*Time Narrative, and History*," Bloomington: Indiana University Press.

Carruthers, P. (2000). "*Phenomenal Consciousness*." Cambridge: Cambridge University Press.

Chalmers, D. (1995). *"Facing up to the problem of consciousness*." *Journal of Consciousness Stories*, 2: 200-19.

Chalmers, D. (1996). "*The Conscious Mind*". Oxford University Press.

Chalmers, D. (2002). *"Does conceivability entail possibility?*" in T. Gendler and J. Hawthorne eds. "*Conceivability and Possibility*." Oxford: Oxford University Press.

Chalmers, D. (2003). "the content and epistemology of phenomenal belief."

Jokic and Q. Smith eds. *Consciousness; new Philosophical Perspectives*. Oxford: Oxford university Press.

Chalmers, D. and Jackson, F. (2001)."Conceptual analysis and reductive explanation". *Philosophical Review 110:315-61*.

Church land, P.S. (1981). "On the alleged backwards referral of experiences and its relevance to the mind body problem". *Philosophy of Science*, 48: 165-81.

Church land, P.S. (1983). "Consciousness: the transmutation of a concept". Pacific *Philosophical Quarterly*, 64: 80-95.

Churchland, P.M. (1985). *"Reduction, qualia, and direct introspection of brain states". Journal of Philosophy 82 (January):8-28.*

Churchland, P.M. (1995). *The Engine of Reason and Seat of the Sul*. Cambridge, MA: MIT Press.

Churchland, P.S. (1996). "The horns woggle problem." *Journal of Consciousness Studies*, 3: 402-8.

Clark, A. (1993). *Sensory Qualities*. Oxford University Press.

Clark, G. and Riel-Salvatore, J. (2001). "Grave markers, middle and early upper Paleolithic burials." *Current Anthropology*, 42/4 481-90.

Cleeremans, A., ed. (2003). *The Unity of Consciousness: Binding, Integration and Dissociation*. Oxford: Oxford university press.

Cognitive Psychology, 12: 97-136.

Coleman, Jules (1982) "Negative and Positive Positivism," 11 *Journal of Legal Studies* 139.

Coleman, Jules (2001). *The Practice of Principle*. Oxford: Clarendon Press.

Coleman, Jules (ed.), (2001), *Hart's postscript: essays on the Postscript to The Concept of Law*, Oxford: Oxford University Press.

Coleman, Jules, (1998), 'Incorporationism, Conventionality, and The Practical Difference thesis ' *Legal Theory*, 4:381-425.

Collins, J. (1952). *The existentialists: A Critical Study*. Chicago; Henry Regnery Company.

Cooper, D., (1999). *Existentialism*. oxford: Blackwell.

Crick, F. and Koch, C. (1990). "Toward a neurobiological theory of consciousness". *Seminars in neuroscience*, 2: 263-75.

Crick, F.H. (1994). *The Astonishing hypothesis: The scientific Search for the Soul*. New York: Scribners.

Crowell, S. (2004) " Authentic Historicality, " in *Space, Time, and Culture*. Ed. David Carr and Cheung Chan-Fai. Dordrecht: Kluwer.

Crowell. S., (2001) *Husserl, Heidegger, and the Space of Meaning: Paths Toward Transcendental Phenomenology*, Evanston: Northwestern University Press.

Darby D & Shelby T (2005), *Hip-Hop and Philosophy: Rhyme 2 Reason (Popular Culture and Philosophy).* Open Court.

Damasio, A. (1999). *The Feeling of What Happens: Body and Emotion in the Making of Consciousness*. New York: harchourt.

Davies, M. and Humphreys, G. (1993). *Consciousness: Psychological and Philosophical Essays*. Oxford: Blackwell.

Del Vecchio, Giorgio. (1953). *Justice. An Historical and Philosophical Essay*, Philosophical Library.

De Waal, Frans, Good Natred. (1996). *The Origins of Right and Wrong in Humans and Other Animals*. Harvard University Press.

Dennet, D.C. (1978). *Brainstorms*. Cambridge: MIT Press.

Dennet, D.C. (1990). "Quining qualia." In *Mind and Cognition*, W. Lycan, ed., Oxford: Blackwell, 519-548.

Dennett, D.C. (1984). *Elbow Room: The Varieties of Free Will Worth Having*. MIT Press.

Dennett, D.C. (1991). *Consciousness Explained*. Boston: little, Brown and Company.

Dennett, D.C. (1992). "The self as the center of narrative gravity". In F. Kessel, P. Cole, and D.l. Johnson, eds. *Self and Consciousness: Multiple Perspectives*. Hillsdale, NJ: Lawrence Erlbaum.

Dennett, D.C. (2003). *Freedom Evolves*. New York: Viking.

Dennett, D.C. and Kinsbourne, M. (1992). *"time and the observer: the where and when of consciousness in the brain."* Behavioral and Brain Sciences, 15: 187-247.

Descartes, R. 1644/1911. *The Principles of Philosophy*. Translated by E. Haldane and G. Ross. Cambridge: Cambridge University Press.

Destutt de Tracy, Antoine Louis Claude. (1969). *A Commentary and Review of Montesquieu's Spirit of Laws*, trans. Thomas Jefferson (1811) New York: Burt Franklin.

Dickson, Julie. (2001). *Evaluation and Legal Theory*. Oxford: Hart Publishing.

Dickson, Julie. (2001). *Evaluation and Legal Theory*, Hart Publishing.

Dostoevsky, F. (1976). *The Brothers Karamazov*: The Constance Garnett translation revised by Ralph. E. Matlaw. New York: Norton.

Dretske, F. (1995). *Naturalizing the Mind*. Cambridge, Mass: The MIT Press, Bradford Books.

Drettske, F. (1994). "Differences that make no difference: *Philosophical Topics* 22/1-2: 41-58.

Dreyfus, H, and J Haugeland. (1978). " Husserl and Heidegger: Philosophy's Last Stand, " in *Heidegger and Modern Philosophy*. Ed. Michael Murray. New haven: Yale University press.

Dreyfus, H. (1979). *What Computers Can't Do: The Limits of Artificial Intelligence*, New York: Harper Colophon.

Dworkin, Ronald .(1978). *Taking Rights Seriously*. Cambridge MA: Harvard University Press.

Dworkin, Ronald. (1986). *Law's Empire*. Cambridge MA: Harvard University Press.

Dworkin, Ronald. (1977). *Taking Rights Seriously*. London: Duckworth.

Dworkin, Ronald. (1986). *Law' Empire (Legal Theory).* Belknap Press.

Eccles, J. and Popper, K. (1977). *The Self and Its Brain: An Argument for Interactionism*. Berlin: Springer

Ed. Michael Murray. New Haven: Yale University Press.

Edlman, G. (1989). *The Remembered Present: A Biological Theory of Consciousness*. New York: Basic Books.

Fackenheim, E., (1961) *Metaphysics and Historicity*, Milwaukee: Marquette University Press.

Farah, M. (1990). *Visual Agnosia*. Cambridge: MIT Press.

Fell, J., (1979) *Heiddeger and Sartre: An Essay on Being and place*, New York: Columbia University Press.

Finnis, John (1996). "The Truth in Legal Positivism," in *The Autonomy of Law*, ed. Robert P. George . Oxford: Clarendon Press, pp. 195 – 214.

Finnis, John, (1980), *Natural Law and Natural Rights*, Oxford: Clarendon Press.

Flanagan, O. (1992). *Consciousness Reconsidered*. Cambridge, MA: MIT Press.

Flohr, H. (1995). "An information processing theory of anesthesia." Neuropsychologia 33:9 1169-80.

Flohr, H., Glade, U. and Motzko, D. (1998). "The role of the NMDA synapse in general anesthesia." *Toxicology Letters*, 100-101: 23-29.

Flynn, T. (1997). *Sartre, Foucault, and Historical Reason*, vol. 1, Chicago: University of Chicago Press.

Fodor, J. (1974). "Special sciences". Synthese, 28: 77-115.

Fodor, J. (1983). *The Modularity of Mind*. Cambridge, MA: MIT Press.

Foster J. 91996). *The Immaterial Self: A Defence of the Cartesian Dualism Conception of Mind*. London: Rutledge.

Foster, J. (1989). "A defense of dualism." In J. Smythies and J. Beloff, eds. *The Case for Dualism*. Charlottesville, VA: University of Virginia Press.

Frankena, William. *Ethics*, Englewood Cliffs, J.J.: Prentice-Hall 1973.

Frankena, William. (1980). *Thinking about Morality*. Ann Arbor: University of Michigan Press.

Fuesser, Klaus (1996), "Farewell to "Legal Positivism: The Separation theory Unraveling," In *The Autonomy of Law*, ed. Robert P. George. Oxford: Clarendon Press, pp.119-162.

Fuller, Lon (1958). "Positivism and Fidelity to Law: a Reply to Professor Hart," 71 *Harvard Law Review* 630.

Fuller, Lon. (1964). *The Morality of Law*, rev. ed. New Haven: Yale University Press.

Fuller, Lon. (1969). *The Morality of Law*, [1965], revised ed., New Haven & London, Yale University Press.

Gallistel, C. (1990). *The Organization of Learning*. Cambridge, MA: MIT Press

Gardiner, H. (1985). *The Mind's New Science*. New York: Basic Books.

Gardner, John. (2001). 'Legal Positivism: 5 ½ Myths', American Journal of Jurisprudence, 46:199-227.

Gazzaniga, M. (1988). *Mind Matters: how mind and Brain Interact to Create our Conscious lives*. Boston: Hughton Mifflin.

Gelven, M. (1990) *Truth and existence: A Philosophical Inquiry*, University park: Penn State Press.

Gelven. M (1997). *The Risk of Being: What it Means to be Good and Bad*, University Park: Penn State Press.

Gennaro, R. (1995). *Consciousness and Self-consciousness: A Defense of the higher-Order Thought Theory of Consciousness*. Amsterdam and Philadelphia:

Gennaro, R., ED. (2004). *Higher-Order Theories of Consciousness*. Amsterdam and Philadelphia: John Benjamins.

George, Robert, (ed.). (1992). *Natural Law Theory: Contemporary Essays*, Oxford: Clarendon Press.

Gert, Bernard. (2004). *Common Morality: Deciding What to Do,* New York: Oxford University Press. Paperback edition, with glossary, 2007.

Gert, Bernard. (2005). *Morality*: *Its Nature and Justification*, Revised Edition, New York: Oxford University Press.

Goodhart,A. L. (1988). *English Law and the Moral Law.* Fred B. Rothman.

Gordon Gerald. (2005). *Criminal Law of Scotland.* Sweet and Maxwell.

Gordon, L. (2000). *Existentia Africana; Understanding Africana Existential Thought*, London: Routledge.

Gordon. L. (1995). Bad Faith and Antiblack Racism, Atlantic Highlands: Humanities Press.

Gray, J. (1995). "The contents of consciousness: a neuropsychological conjecture." Behavioural and Brain Sciences 18:9, 659-722.

Green, Leslie (1996). "The Concept of Law Revisited," 94 *Michigan Law Review* 1687.

Green, Leslie (1999). "Positivism and Conventionalism," 12 *Canadian Journal of Law and Jurisprudence* pp. 35-52

Green, Leslie (2001). "Law and Obligations," in Jules Coleman and Scott Shapiro, eds. *The Oxford Handbook of jurisprudence and Philosophy of Law*. Oxford: Clarendon Press.

Green, Leslie, (1996), 'The Concept of Law Revisited' *Michigan Law Review*, 94/6:1687-1717.

Grene, M. (1948). Dreadful Freedom: *A Critique of Existentialism*, Chicago: University of Chicago Press.

Griffiths, A. Phillips, editor, *Ethics*, New York: Cambridge University Press, (1993).

Guignon, C. (1993) " Authenticity, Moral Values, and Psychotherapy", in *The Cambridge Companion to Heidegger*, Cambridge UK: Cambridge University Press.

Guignon, C. and D. Pereboom (eds), " Introduction: The Legacy of Existentialism, " in *Existentialism: Basic Writings*. Indianapolis: Hackett.

Hacker, P.M.S. (1973). "Sanction Theories of Duty," in A.W.B. Simpson, ed. *Oxford Essays in Jurisprudence*: *2nd Ser*. Oxford: Clarendon Press.

Haidt, Jonathan. (2006). *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom*, New York: Basic Books.

Hameroff, S. (1988). "Quantum computation in brain microtubules? The Penrose-Hameroff "Orch OR" model of consciousness". *Philosophical Transactions* Royal Society London, A 356: 1869-96.

Hannay. A. (19820. *Kierkegaard*. London: Routledge.

Har, R.M. (1963). *Freedom and Reason*. New York: Oxford University Press.

Hardin, C. (1992). "Physiology, Phenomenology, and Spinoza's true colours."

Hare, R.M. (1981). *Moral Thinking*, New York: Oxford University Press.

Haridn, C. (1986). *Colour for philosophers*. Indianapolis: Hackett.

Harman, G.(1990). "The intrinsic quality of experience". In J. Tomberlin, ed. *Philosophical Perspectives,* 4. Atascadero, CA: Ridgeview Publishing.

Harris, J.W. (1979) *Law and Legal Science: An Inquiry into the Concepts Legal Rule and Legal System*. Oxford: Clarendon Press.

Hart, H.L.A (1958). "Positivism and the Separation of Law and Morals," 71

Hart, H.L.A. (1955) "Are There Any Natural Rights?" 64 *Philosophical Review,* pp. 175-91.

Hart, H.L.A. (1983). *Essays on Jurisprudence and Philosophy*. Oxford: Clarendon Press.

Hart, H.L.A. (1994, First Edition 1961). *The Concept of Law*, 2nd ed. ed.p. Bulloch and J. Raz. Oxford: Clarendon Press.

Harthsorne, C. (1978). "Panpsychism: mind as sole reality." *Ultimate Reality and Meaning*, 1: 115-29.

Harvard Law Review 593 repr. In his *Essays in Jurisprudence and Philosophy* (1983). Oxford: Clarendon Press.

Hasker, W. (1999). *The Emergent Self*. Ithaca, NY: Cornell University Press.

Haugeland, J. (1998). *Having Thought: Essays in the Metaphysics of Mind*, Cambridge MA: Harvard University Press.

Hauser, Thomas. (2006). *Moral Minds: How Nature Designed our Universal Sense of Right and Wrong*. New York:HarperCollins.

Heidegger, M. (1927/1962). *Being and Time* (Sein und Zeit). Translated by J. Macquarrie and E. Robinson. New York: Harper and Row.

Heidegger, M. (1962). *Being and Time*. Tr John Macquarie and Edward Robinson. New York: Harper and Row.

Heidegger, M. (1981)" Only a God Can Save us' The Spiegel Interview (1966),' in 505. *Heidegger: the Man and the Thinker*. Ed. Thomas Sheehan. Chicago: Precedent Publishing.

Heidegger, M. (1985). *History of the Concept of Time: Prolegomena* Tr. Theodore Kisiel. Bloomington: Indiana University Press.

Hellman, G. and Thompson, F. (1975). "Physicalism: ontology, determination and reduction". *Journal of Philosophy,* 72: 551-64.

Hill, C. (1991). *Sensations: A Defense of Type Materialism*. Cambridge: Cambridge University Press.

Hill, C. (1997). "Imaginability, conceivability, possibility, and the mind-body problem." *Philosophical Studies,* 87: 61-85.

Hill, C. and McLaughlin, B. (1998). "There are fewer things in reality than are dreamt of in Chalmers' philosophy." *Philosophy and Phenomenological Research*, 59/2: 445-54.

Himma, Kenneth I. (2001). "The Instantiation theory and Raz's Critique of Inclusive Positivism," 20 *Law and Philosophy*, pp.61-79

Hobbes, Thomas, *Man and Citizen, (translations of six chapters of de Homine and all of De Cive*) edited by Bernard Gert, Indianapolis: Hackett Publishing Company, 1991.

Hobbes, Thomas. 1994. *Leviathan*, edited by Edwin Curly, Indianapolis: Hackett Publishing Company.

Hooker, Brad. (2001). Ideal Code, *Real World: A Reel Consequentialist theory of Morality*, oxford: Clarendon Press.

Horgan, T. (1984). "Jackson on Physical Information and Qualia." *Philosophical Quarterly*, 34: 147-83.

Horgan, T. and Tienson, J. (2002). "The intentionality of phenomenology and the phenomenology of intentionality." In D.J. Chalmers, ed., *Philosophy of Mind: Classical and Contemporary Readings*. New York: Oxford University Press.

Hume, D. 1739/188. *A Treatise of human Nature*, ed. L. Selby-Bigge. Oxford: Oxford University Press.

Humphreys, N. (1982). *Consciousness Regained*. Oxford: Oxford University Press.

Humphreys, N. (1992). *A History of the Mind*. London: Chatto and Windus.

Hurley, S. (1998). *Consciousness in Action*. Cambridge, MA: Harvard University Press.

Husserl, E. 1913/1931. *Ideas; General introduction to Pure Phenomenology (Ideen au einer reinen Phanomenologie und phanomenologischen Philosophie*).

Husserl, E. (1929/1960). *Cartesian Meditations: an Introduction to Phenomenology*. Translated by Dorian Cairns. The Hague: M. Nijhoff.

Huxley, T. (1866). Lessons on Elementary Physiology 8. London

Huxley, T. (1874). "On the hypothesis that animals are automata." Fortnightly Review, 16.95.

Marcel A,and E. Bisiach, eds., *Consciousness in Contemporary Science*. Oxford: Oxford university Press.

In Cleermans, A. ed. *The Unity of Consciousness*:

In H. Fiegl, G. Maxwell, and M. Scriven eds. *Minnesota Studies in the Philosophy of Science II*. Minneapolis: University of Minnesota Press.

In T. Metzinger, ed. Conscious Experience. Paderborn: Ferdinand Schoningh.

Jackson, F. (1986). "what Mary didn't know". *Journal of Philosophy*, 83: 291-5.

Jackson, F. (1993. "Armchair metaphysics". In J. O'Leary-Hawthorne and M. Michael, eds. *Philosophy of Mind*. Dordrecht: Kluwer Books.

Jackson, F. (1998). "Postscript on qualia." In F. Jackson *Mind, Method and Conditionals*. London: Routledge.

Jackson, F. (2004). "Mind and illusion." In P. Ludlow, y. Nagasawa and D. Stoljar eds. There's Something about Mary: *Essays on the knowledge Argument*.

Jackson. F. (1982). "Epiphenomenal qualia." *Philosophical Quarterly*, 32: 127-136.

James, W. (1890). *The Principles of Psychology* New York: Henry holt and Company.

Jaspers, K. (1968). *Reason and Existenz,* New York: Noonday Press:

Jaspers, K. (1968). *Reason and existenz*. GTr. William Earle. New York: Noonday Press.

Jaynes, J. (1974). *The Origins of Consciousness in the Breakdown of the Bicameral Mind*. Boston: Hughton Mifflin.

John Benjamins.

Journal of Philosophy, 82: 8-28.

Judt, T. (1992). Past Imperfect: *French Intellectuals 1944-1956,* Berkeley: University of California Press.

Jurisprudence, Fourth Series Oxford; Clarendon Press, 1-15.

Kant, I. (1787/1929). *Critique of Pure Reason*. Translated by N. Kemp Smith. New York: Macmillan.

Kant, I. (1960). *Religion Within the Limits of reason Alone*. Tr. Theodore m. Greene and Hoyt H. Hudson. New York: Harper & Row.

Kant, Immanuel, *Groundwork of the Metaphysics of Morals*, New York: Barnes & Noble 1967.

Kariuki, J., (1981). *The Possibility of Universal Moral Judgement in Existential Ethics*. Frankfurt Peter Lang.

Kaufmann, W. (1968) *Existentialism from Dostoevsky to Sartre*, Cleveland: meridian Books.

Kelsen, Hans (1928) "The Idea of Natural Law," in his *Essays in Legal and Moral Philosophy* (1973) ed. O. Weinberger, trans. P. Heath. Dordrecht: Reidel.

Kelsen, Hans (1945). *General Theory of Law and State*, trans. AS. Wedberg, repr. 1961. New York: Russell and Rusell.

Kelsen, Hans (1967). *Pure Theory of Law*, trans. M. Knight. Berkeley: 632.university of California Press.

Kelsen, Hans, (1945/1961), *General Theory of Law and State*, translated by Anders Wedberg, New York: Russell & Russell.

Kierkegaard, S., (1983). *Fear and Trembling*. Tr. Howard V. Hong and Edna H. Hong. Princeton; Princeton University Press.

Kierkegaard, S. (1971). *Concluding Unscientific Postscript*. Tr. David F. Swenson and Walter Lowrie. Princeton: Princeton University Press.

Kim, J. (1987). "The myth of non-reductive physicalism." *Proceedings and Addresses of the American Philosophical Association*.

Kim, J. (1998). *MIND IN Physical World*. Cambridge: MIT Press.

Kinsbourne, M. (1988). "Integrated field theory of consciousness". In A. Marcel and E. Bisiach, eds. *Consciousness in Contemporary Science*. Oxford: Oxford university Press.

Kirk, R. (1974). "Zombies vs. Materialists." *Proceedings of the Aristotelian Society*, Supplementary Volume, 48: 135-52.

Kirk, R. (1991). "Why shouldn't we be able to solve the mind-body problem?"

Koffka, K. (1935). *Principles of Gestalt Psychology*. New York: Harcourt Brace.

Kohler, W. (1929). *Gestalt Psychology*. New York: liveright.

Korsgaard, C., (1996). *The Sources of Normativity*, Cambridge UK: Cambridge University Press.

Kramer, Mathew (1999). *In Defense of Legal Positivism: Law Without Trimmings*. Oxford: Clarendon Press.

Kramer, Matthew, (2004a), "On the Moral Status of the Rule of Law", *Cambridge Law Journal* 63:65

Kruks, S. (1990). *Situation and Human Existence: Freedom, Subjectivity, and Society*, London: Unwin Hyman.

Ladenson, Robert (1980). "In Defense of a Hobbesian Conception of Law," 9 *Philosophy and Public Affairs* 134.

Leibniz, G. W. (1720/1925). *The Monadology*. Translated by R. Lotte. London: Oxford University Press.

Leibniz, G.W. 1686/1991. Discourse on metaphysics. Translated by D. Garter and

Leiter, rian (1997). "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," 76 *Texas Law Review* 267.

Levine, J. (1983). "Materialism and qualia: the explanatory gap." *Pacific Philosophical Quarterly*, 64: 354-361.

Levine, J. (1993). "On leaving out what it's like." In M. Davies and G. Humphreys, eds. *Consciousness: Psychological and Philosophical Essays*. Oxford: Blackwell.

Levine, J. (1994). "Out of the closet: a qualophile confronts qualophobia". Philosophical Topics 22: 1 and 2, 107-26.

Levine, J. (2001). Purple Haze: *The Puzzle of Conscious Experience*. Cambridge: MIT Press.

Lewis, D. (1972). "Psychophysical and theoretical identifications." *Australasian Journal of Philosophy*, 50: 249-58.

Lewis, D. (1990). "What experience teaches." In W. Lycna, ed. *mind and Cognition.* Oxford : Blackwells.:

Lewis, V Bradley, (2006), "Plato's Minos: The Political and Philosophical content of the problem of Natural Right', *Review of Metaphysics* 60:17-53

Libet, B. (1982). "Sybhectuve abtedatubg fi a sebsirt exoereubce abd nubd-bruab tgeirues". *Journal of Theoretical Biology*, 114: 563-70.

Libet, B. (1985). "Unconscious cerebral initiative and the role of conscious will in voluntary action". *Behavioral and Brain Sciences*, 8: 529-66.

Llinas, R. (2001). *I of the vortex: from neurons to self*. Cambridge, MA: MIT Press

Loar, B. (1990). "Phenomenal states," in *Philosophical Perspectives*, 4: 81-108.

Loar, B. (1997). "Phenomenal state". In N. Block, O. Flanagan, and G. Guzeldere eds. *The nature of Consciousness*. Cambridge, MA: MIT Press.

Locke, J. (1688/1959). *An Essay on human Understanding*. New York: Dover.

Locwood, M. (1989). *Mind, Brain, and the Quantum*. Oxford: Oxford University Press.

Lorenz, K. (1977). *Behind the mirror* (Ruckseite dyes Speigels). Translated by R. Taylor. New York: Harcourt Brace Jovanovich.

Luhman, N., (1995). *Operational Closure and Structural Coupling*: *The Differentiation of the Legal System*. Massachusetts, Masachusset Press.

Lycna, W. (2004). "The superiority of HOP to HOT". In R. Gennaro ed. *Higher-order Theories of Consciousness*. Amsterdam and Philadelphia: John Benjamins.

Lyons, David (1982). "Moral Aspects of Legal Theory," 7 *Midwest Studies in Philosophy* 223.

Lyons, David (1984). *Ethics and the Rule of Law*. Cambridge: Cambridge University Press.

MacCormick, Neil (1985). "A Moralistic Case for A-moralistic Law," 20 Valparaiso *Law Review 1*.

MacIngtyre, a. (1967) " Existentialism, " in *The Encyclopedia of Philosophy*, vol. III Ed. Paul Edwards. New York; Macmillan Publishing Company.

Maine S Henry. (2005). *Ancient Law*. Cosimo Classics.

Mandler, G. (1975). *Mind and Emotion*. New York: Wiley.

Marcel, G. (1949). *Being and Having*. Tr. Katherine Farrer. London: Westminster.

Marcel, G. (1968. *The philosophy of existentialism*, New York; Citadel Press.

Marmor, Andrei (1998). "Legal Conventionalism," 4 *Legal Theory* 509.

Marmor, Andrei, (1992) *Interpretation and Legal Theory*, Oxford: Clarendon Press; revised 2nd ed., Hart Publishing, (2005)

Marshall, I. and Zohar, D. (1990). *The Quantum Self: Human Nature and Consciousness Defined by the New Physics*. New York: Morrow.

Maturana, S., (1990) *Biology of Recognition*. Stanford, Stanford University Press.

Maturana, S., Luhman., Teubner, G. *et al*, (1990). *Systemic Principles; After Social Darwinism What Next*? London. Kerrier Press.

McBride, w. (Ed) 1997). *The development and meaning of Twentieth Century Existentialism*, New York: Garlan. Publishers

McGinn, C. (1989). "Can we solve the mind-body problem?" Mind, 98: 349-66

McGinn, C. (1991). *The Problem of Consciousness*. Oxford: Blackwell.

McGinn, C. 1995). *"Consciousness and space."* In T. Metzinger, ed. *Conscious Experience*. Paderbon: Ferdinand Shconingh. 219.

Merleau-Ponty, M. 1945/1962). *Phenomenology of Perception* (Phenomenologie de lye Perception). Translated by Colin Smith. London: Routledge and Kegan Paul.

Merleau-Ponty, m. (1962). *The Phenomenology of Perception*. Tr. Colin Smith. New York: Routledge and Kegan Paul.

Merleau-Ponty, M. (1962). *Phenomenology of Perception*. Tr. Colin Smith. New York: Routledge and Kegan Paul.

Merleau-Ponty, M. (1973). *Adventures of the Dialectic*. Tr. Joseph Bien. Evanston: Northwestern University Press.

Metzinger, T. ed. (2000). *Natural Correlates of Consciousness*: Empirical and Conceptual Questions. Cambridge, MA: MIT Press.

Metzinger, T., ED. (1995). *Conscious Experience*. Paderbon: Ferdinand Schoningh.

Mill, J.S. (1865). *An Analysis of Sir William Hamilton's Philosophy*. London.

Mill, John Stuart, *Utilitarianism*, edited by Roger Crisp, N work: Oxford University Press, 1998.

Moore, G.E. (1922). "The refutation of idealism." In G.E. *Moore Philosophical Studies*. London: Routledge and Kegan Paul.

Moore, G.E.(1912). *Ethics*, New York: H. Holt and company.

Moore, G.E.(1993). *Principia Ethica*, New York: Cambridge University press.

Moore, Michael. (1998). 'Hart's Concluding Unscientific Postscript' *Legal Theory*, 4: 301-327.

Moore, Michael. (1992), " Law as a Functional Kind", in George, 1992

Moran, R. (2001) *Authority and estrangement: An Essay on Self knowledge*. Princeton University Press.

Morison, W.L. (1982) *John Austin*. Stanford: Stanford University Press.

Nagel, T. (1974). "what is it like to be a bat?" *Philosophical Review*, 83: 435-456.

Nagel, T. (1979). "Panpsychism." In T. Nagel *Mortal Questions*. Cambridge University Press.

Natanson, M., (1968) *Literature, Philosophy and the Social Sciences*, The Hague: Martinus Nijhoff.

Natnson. M. (1986). *Anonymity: A study in the Philosophy of Alfred Schutz*, Bloomington: Indiana University Press.

Natsoulas, T. (1983). "Concepts of consciousness." *Journal of Mind and Behaviour*, 4: 195-232.

Nehamas, A. (1998). *The Art of Living: Socratic Reflections from Plato to.Foucault*, Berkeley: University of California Press.

Neisser, U. (1965). *Cognitive Psychology*. Englewood Cliffs: Prentice Hall.

Nelkin, N. 1989). "Unconscious sensations." *Philosophical Psychology*, 2: 129-41.

Nemirow, L. (1990). "Physicalism and the cognitive role of acquaintance." In W. Lycan, ed. *Mind and Cognition: A Reader*. Oxford: Blackwell.

Neuropsychologia, 33/9: (1169-80).

Nida-Rumelin, M. (1995). "what Mary couldn't know: belief about phenomenal states." In T. Metzinger, ed. *Conscious Experience*. Paderborn: Ferdinand Schoningh.

Nietzsche, F. (1969). *On the Genealogy of Moral*. Tr. Walter Kaufmann. New York: Vintage books.

Nietzsche, F. (1975). *Thus Spoke Zarathustra*. *In the Portable Nietzsche*. Tr. Walter Kaufmann. New York: Viking Press.

Nietzsche, F. (1974). *The Gay Science*. Tr. Walter Kaufmann. New York: Vintage Books.

Nyasani, J. (2001). *Legal Philosophy: Jurisprudence*. Nairobi, Consolata Institute of Philosophy.

Olafson, F. (1967). *Principles and Persons: An Ethical Interpretation of existentialism*, Baltimore: The Johns Hopkins Press.

Orrego, Cristobal, forthcoming, "Natural law under other names: de nominibus non est disputandum".

Ortega Y Gasset, J. (1985). *Revolt of the Masses*. Tr. Anthony Kerrigan. Notre Dame: University of Notre Dame Press.

P.G Osborn. (1954). *"The Concise Law Dictionary*" 4th Edition, London, U.K., Sweet and Maxwell.

Panksepp, J. (1998). *Affective Neuroscience*. Oxford: Oxford University Press.

Papineau, D. (1994). Philosophical Naturalism. Oxford: Blackwell

Papineau, D. (1995). "The antipathetic fallacy and the boundaries of consciousness." In T. Metzinger, ed. *Conscious Experience*. Paderborn: Ferdinand Schoningh.

Papineau, D. (2002). *Thinking about Consciousness*. Oxford: Oxford University Press.

Pashukanis, Evgeny (1983) *Law and Marxism: A general Theory*. Trans. B. Einhorn. London: Pluto Press.

Peacocke, C. (1983). *Sense and Content,* Oxford: Oxford university Press.

Pearson, M.P. (1999). *The Archeology of Death and Burial College Station*, Texas:

Penfield, W. (1975). *The mastery of the Mind: a Critical Study of Consciousness and the Human Brain*. Princeton, NJ: Princeton university Press.

Penrose, R. (1994). *Shadows of the Mind*. Oxford University Press.

Pensorse, R. (1989). *The Emperor's New Mind: Computers, Minds and the Laws of Physics*. Oxford: university Press.

Perelman Chaim, 1990. *The realm of rhetoric.* University of Notre Dame Press; 1 edition.

Perry, J. (2001). *Knowledge, Possibility, and Consciousness*. Cambridge, MA: MIT Press.

Perry, Stephen (1989). "Second Order Reasons, uncertainty, and Legal theory 62 S. CAL. L. REV.913.

Perry, Stephen, (20010, 'Hart's Methodological Positivism' in Coleman (ed.) 2001, pp. 311-354.

Philosophical Review, 110/3: 315-60/

Philosophical Topics, 13: 51-70.

Philosophical Topics, 22/1-2: 107-26.

Place, U. T. (1956). "Is consciousness brain process?" *British journal of Psychology*, 44-50.

Poster, M. (1975). *Existential Marxism in Postwar France: From Sartre to Althusser*, Princeton: Princeton University Press.

Press: revised 2nd ed., Hart Publishing, (2005).

Putnam, H. (1975). "Philosophy and our mental life." In H. Putnam Mind Language and Reality: *Philosophical Papers Vol. 2*. Cambridge: Cambridge University Press.

Putnam, H. and Oppernheim, P. (1958). "Unity of science as a working hypothesis." In Minnesota Studies in the Philosophy of Science (vol. 2) pp.3–36. Reprinted in Boyd et al.

R. Aries. Indianapolis: Hackett.

Rawls, J., *A theory of Justice*, Cambridge, mass, Harvard University Press, (1971)

Raz, J., (1979). *The Authority of Law*. Oxford: Clarendon Press.

Raz, J., (1986). *The morality of Freedom*. Oxford: Clarendon Press.

Raz, J., (1990). *Practical Reason and Norms*. Princeton: Princeton University Press.

Raz, J., (1995). *Ethics in the Public Domain: Essays in the morality of Law and Politics*. Oxford: Clarendon Press.

Raz, Joseph, (1972), 'Legal Principles and the limits of Law', the Yale Law Journal, 81/5 (April): 823-854; reprinted in M. Cohen (ed.), Ronald Dworkin and Contemporary Jurisprudence, Totowa, NJ: Rowman & Allanheld, (1984.

Raz, Joseph, (1980), *The Concept of a Legal System: An Introduction to the Theory of Legal System*, [1970] 2nd ed., Oxford: Clarendon Press.

Review, 95: 555-80. *Reprinted in Collected Essays*. London, (1893).

Rey, G. (1986). "A question about consciousness." In H. Otto and J. Tuedio, eds. *Perspectives on Mind*. Dordrecht: Kluwer.

Ricoeur, P. (1992). *Oneself as another*. Tr. Kathleen Blamey. Chicago: University of Chicago Press.

Robinson, D. (1993). "Epiphenomenalism, laws, and properties." *Philosophical Studies*, 69: 1-34

Robinson, H. (1982). *Matter and Sense: A Critique of Contemporary Materialism*. Cambridge: Cambridge University Press.

Rosenberg, G. (2004). *A Place for Consciousness: Probing the Deep Structure of the Natural World*. New York: Oxford University Press.

Rosenthal, D. (1986). "Two concepts of consciousness." *Philosophical Studies*, 49: 329-59.

Rosenthal, D. (1991). "The independence of consciousness and sensory quality." In E. Villanueva, ed. (Consciousness. A tascadero, CA: Ridgeview Publishing.

Rosenthal, D. (1994). "First person operationalism and mental taxonomy." *Philosophical Topics*, 22/1-2: 319-50.

Rosenthal, D. M. (1993). "Thinking that one thinks." In M. Davies and G. Humphreys, eds. *Consciousness: Psychological and Philosophical Essays*. Oxford: Blackwell.

Rosenthal, D.M. (1997). "A theory of consciousness." In N. Block, O. Flanagan, and G. Guzeldere, eds. *The nature of Consciousness*. Cambridge, MA; MIT Press.

Rusell, B. (1927). *The Analysis of Matter*. London: Kegan Paul.

Ryle, G. (1949). *The Concept of Mind*. London: Hutchinson and Company.

Sacks, O. (1985). *The Man who Mistook his Wife for a Hat*. New York: Summit.

Salmond William John (1907). *Jurisprudence or the theory of law.* Stephen and Haynes.

Sarre, JP (1968) *Search for a method*. Tr. Hazel Barnes. New York: vintage Books.

Sartre, J-[P, (1988) *What is Literature?* (1948), Cambridge MA : Harvard university Press.

Sartre, J-P (1964) *Nausea*. Tr. Lloyd Alexander. New York: new Direction.

Sartre, J-P (1967) Baudelaire. T. martin Turnell. New York: new Directions.

Sartre, J-P (1976). *Critique of dialectical Reason I*: "Theory of Practical Ensembles (1960) Tr. Alan Sheridan-Smith. London: Version.

Sartre, J-P. (1968). " Existentialism is Humanism," in *Existentialism from Dostoevsky to Sartre*. Ed. Walter Kaufmann. Clevelland: Meridian Books.

Sartre, U-P 199). *Being and Nothingness*. T. Hazel Barnes. New York: Washington Square press.

Savigny Von F. *Of the Vocation on Our Age for Legislation and Jurisprudence (A. Hayward trans.*) London (1831) & Arno Press reprint 1975).

Schacter, D. (1989). "On the relation between memory and consciousness: dissociable interactions and consciousness." In H. Roediger and F. Craik eds. Varieties of Memory and Consciousness. Hillsdale, NJ; Erlbaum.

Schauer, Fred (1996), "Positivism as Pariah," in R.P. George, ed. *The Autonomy of Law*. Oxford: Clarendon Press.

Schneider W. and Shiffrin, R. (1977). "Controlled and automatic processing: detection, search and attention." *Psychological Review*, 84: 1-64.

Schrift, A. (1995) *Nietzsche's French Legacy: A Genealogy of Post structuralism*, New York: Routledge.

Seager, W. (1995). "Consciousness, infromation, and panpsychism." *Journal of Consciousness Studies,* 2: (272-88).

Searle, J. 1992). *The Rediscovery of the Mind*. Cambridge, MA: MIT Press.

Searle, J. R. (1990). "Consciousness, explanatory inversion and cognitive science." Behavioral and Brian Sciences, 13: 585-642.

Shallice, T. (1988). *From Neuropsychology to Mental Structure*. Cambridge; Cambridge University Press.

Shapiro, Scott (1988). "On Hart's Way Out," 4 *Legal Theor*y 469.Soper, Philip (1977) "Legal Theory and the Obligation of a Judge: The hart/Dworkin Dispute" 75 *Michigan Law Review* 473.

Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law,* Oxford & New York: Oxford University Press, 1-60.

Shear, J. (1997). *Explaining Consciousness: The hard Problem*. Cambridge, MA: MIT Press.

Shestov, L. (1969). *Kierkegaard and the Existential Philosophy.* GTr. Elinor Hewitt. Athens: Ohio University Press.

Shoemaker, S. (1975). "Functionalism and qualia," *Philosophical Studies*, 27: 291-315.

Shoemaker, S. (1981). "Absent qualia are impossible." *Philosophical Review*, 90: 581-99.

Shoemaker, S. (1982). "The inverted spectrum." *Journal of Philosophy*, 79: 357-381.

Shoemaker, S. (1990). "Qualities and qualia: what's in the mind," *Philosophy and Phenomenological Research, Supplement*, 50:)109-131).

Shoemaker, S. (1998). "Two cheers for representationalism," *Philosophy and Phenomenological Research.*

Sidgwick, Henry, *methods of ethics*, Indianpolis: Hackett Pub. Co., (1981).

Sidgwick, Henry, *Outlines of the History of Ethics*, Boston: Beacon Press, (1960)

Siewert, C. (1998). *The Significance of Consciousness*. Princeton, NJ: Princeton University Press.

Silberstein, M (2001). "Converging on emergence: consciousness, causation and explanation." *Journal of Consciousness Studies*, 8: 61-98.

Silberstein, M. (1998). "Emergence and the mind-body problem." *Journal of Consciousness Studies*, 5: 464-82.

Simmonds, N.E. (2004 "straight forwardly False: *The collapse of Kramer's positivism*, "Cambridge Law Journal 63:98

Simpson, A.W.B, *A History of the Common Law of Contract: The Rise of the Action of Assumption, Volume 1,* Oxford University Press, (1987).

Singer, P. (1975). *Animal Liberation*. New York; Avon Books.

Singer, Peter. (1993). *Practical Ethics* 2nd Edition, Cambridge, Cambridge University Press.

Singer, W. (1999). "Neuronal synchrony: a versatile code for the definition of relations." *Neuron*, 24: 49-65.

Sinnott-Armstrong, Walter, editor Moral Psychology Volume 1, *The Evolution of Morality: Adaptations and Innateness*, MIT Press, (2008).

Skinner, B.F. (1953. *Science and human Behaviour*. New York: MacMillan.

Smart, J. (1959). "Sensations and brain processes." *Philosophical Review*, 68: 141-56.

Soper, Philip, (1992), "Some Natural Misunderstandings about Natural Law," 399. *Michigan Law Review* 90:2393-2423.

Spiegelberg, H. (1984). *The Phenomenological movement*, 3rd ed. The Hague Martinus Nijhoff.

Stapp, H. 1993. *Mind, Matter and Quantum Mechanics*. Berlin: Springer Verlag

Stewart, J. (ed), (1998). *The Debate Between Sartre and Merleau- Ponty*, Evanston: Northwestern University Press.

Stoljar, D. (2001). "Two conceptions of the physical." *Philosophy and Phenomenological Research*, 62; 253-81.

Strawson, G. (1994). *Mental Reality*. Cambridge, Mass: MIT Press, Bradford Books.

Swinburne, R. (1986). *The Evolution of the Soul*. Oxford: Oxford University Press.

Taylor, C (1985.) " Self-Interpreting Animals" in *Philosophical Papers I: Human Agency and Language*. Cambridge UK: Cambridge University Press.

Taylor, C, (1989). *Sources of the Self: the Making of the Modern Identity*, Cambridge MA: Harvard University Press.

Thomson, J.J. and Dworkin, G., editors, *Ethics*, New York: Harper & Row, 1968.

Tillich, p., (2000). *The Courage to be*, New haven: Yale University Press.

Titchener, E. (1901). *An Outline of Psychology*. New York: Macmillan.

Toulmin, Stephen, *An Examination of the Place of reason in Ethics*, Cambridge Eng.} University Press, (1960)

Translated by J. Soothly. New York; Optical Society of America.

Translated by W. Boyce Gibson. New York: MacMillan.

Travis, C. (2004). "The silence of the senses." *Mind*, 113: 57-94.

Trendelenburg Friedrich Adolf, (1868), *Naturrecht auf dem Grunde der Ethik,* The University of Michigan, (2006).

Triesman, A. and Gelade, G. (1980). "a feature integration theory of attention."

Tye, M. (1995). *Ten Problems of Consciousness*. Cambridge, MA; MIT Press.

Tye, M. (2000). *Consciousness, Color, and Content*. Cambridge, MA: MIT Press.

Tye. M. (2003). "Blurry images, double vision and other addities: new troubles for representationalism?" In A. Jokic and Q. Smith eds., *Consciousness*: New Philosophical Perspectives. Oxford: Oxford University Press.

Unamuno, M. (1954). *The tragic Sense of life*. Tr. J.E. Crawford Flitch. New York: Dover.

Van Gulick, R. (1985. "Physicalism and the subjectivity of the mental."

Van Gulick, R. (1992. "Non reductive materialism and inter theoretical constraint."

Van Gulick, R. (1993. "Understanding the phenomenal mind: Are we all just armadillos?" In M. Davies and G. Humphreys, eds., *Consciousness: Psychological and Philosophical Essays*. Oxford: Blackwell.

Van Gulick, R. (1994. "Dennett, drafts and phenomenal realism." *Philosophical Topics,* 22/1-2: 443-56.

Van Gulick, R. (1995. "what would cunt as explaining consciousness?"

Van Gulick, R. (2000. "Inward and upward: reflection, introspection and self-awareness." *Philosophical Topical Topics,* 28: 275-305.

Van Gulick, R. (2003). "Maps, gaps and traps." In A. Jokic and Q. Smith eds. *Consciousness*: New Philosophical Perspectives. Oxford: Oxford university Press.

Van Gulick, R. 2004). "Higher-order global states HOGS: an alternative higher-order model of consciousness." In Gennaro, R. ed. *Higher-Order Theories of Consciousness*. Amsterdam and Philadelphia: John Benjamins.

Van Inwagen, P. 1983). *An Essay on Free Will*. Oxford: Oxford university Press.

Varela, F. 1995). "Neurophenomenology: A methodological remedy of the hard problem." *Journal of Consciousness Studies*, 3: 330-49.

Varela, F. and Maturana, H. 1980). *Cognition and Autopoiesis*. Dordrecht: D. Reidel.

Varela, F. and Thomson, E. 2003. "Neural synchronicity and the unity of mind: a neurophenomenological perspective."

Velmans, M. 1991. "Is Human information processing conscious?" *Behavioral and Brain Sciences*, 14/4: 651-668

Velmans, M. 2003). "How could conscious experiences affect brains?" *Journal of Consciousness Studies*, 9: 3-29.

Virtues and Vices, and Other Essays in Moral Philosophy, Berkeley: University of California Press, 1978.

Von Helmholtz, H. 1897/1924. *Treatise on Physiological Optics*.

Wahl, J., 1949. *A Short History of existentialism*. TGr. Forrest Williams and Stanley Maron. New York: Philosophical Library.

Waldron, Jeremy (1999), "All We like Sheep," 12 *Canadian Journal of Law and Jurisprudence 169*.

Waldron, Jeremy, 2001, 'Normative or Ethical) Positivism', in Coleman (ed.) 2001, pp. 410-433.

Wallace, G. and walker, A.D.M., editors, *The Definition of Morality*, London: Methuen 1970.

Waluchow, W.J. 1994. *Inclusive Legal Positivism*. Oxford: Clarendon.

Waluchow, Wil, (1994), *Inclusive Legal Positivism*, Oxford: Clarendon Press, 1958.

Warnock, Geoffrey, *The Object of Morality*, London: Methuen, 1971

Warnock, M. (1967). *Existentialist Ethics*, London: Macmillan and Co. Ltd.

Watson, J. (1924). *Behaviorism*. New York: W.W. Norton.

Wegner, D. (2002). *The Illusion of Conscious Will*. Cambridge, MA: MIT Press.

Westermarck, Edward, *Ethical Relativity*, Paterson, J.J.: Littlefield, Adams, 1960.

Wild, J. (1963). *The Challenge of existentialism* (1955), Bloomington: Indiana University Press.

Wildkes, K. V. (1995. "Losing consciousness." In T. Metzinger, ed. Conscious Experience. Paderborn: Ferdinand Schoningh.

Wilkes, K.V. (1988). "Yishi, duo, us and consciousness."

Wittgenstein, L. (1921/1961). *Tractatus Logico-Philosophicus*. Translated by D. Pears and B. McGuinness. London: Routledge and Kegan Paul.

Wren, T.E. editor, *The Moral Domain: Essays in the Ongoing Discussion Between Philosophy and the Social Sciences*, MIT Press, (1990).

Wundt, W. 1897. *Outlines of Psychology*. Leipzig: W. Engleman.

Zaner, R and D Ihde (eds), 1973. Phenomenology and Existentialism, New York: Capricorn Books.

SECONDARY SOURCES

--- (1979), *The Authority of Law*, Oxford: Clarendon Press.

--- (1986), *The Morality of Freedom*, Oxford: Clarendon Press.

-----(ed), (1996), *The Autonomy of Law: Essays on Legal Positivism*, Oxford: Clarendon Press

----(ed), (2003), *Natural Law* (The International Library of essay in Law and Legal Theory, Second Series), Aldershot and Burlington; Dartmouth Publishing and Ashgate Publishing.

-----, (1979), *The Authority of Law*, Oxford: Clarendon Press.

----,(1986), *Law's empire*, Cambridge: Harvard University Press.

---, (1991), *Natural Law*, vols. I and II (The International Library of Essay in Law and Legal Theory), Aldershot and New York: Dartmouth Publishing and New York University Press.

-----, (1994), 'Law, Authority and Morality', in J. Ra, Ethics in the Public Domain, Oxford: Clarendon Press, Chapter 9.

----, (1994), *The Concept of Law*, 2nd Ed, Oxford: Clarendon Press.

---, (1996), "The Truth in Legal Positivism," in 1996, 195-214.

---, (1997), "Commensuration and Public Reason," in change, Ruth (ed.),

---, 2000), "The Priority of Persons," in Horder, Jeremy (ed.), Oxford Essays in

-----(, 2001 *Positive Law & Objective values*, Oxford: Clarendon Press.

---,(2002,) "Natural Law: The Classical Tradition," in Coleman, Jules and Scott

---,(2003b), "Law and What I Truly Should Decide," *American Journal of jurisprudence* 48: 107-29. Ricoeur, p. (1970). *Freud and Philosophy: An Essay on Interpretation*, New Haven: Yale University Press.

JOURNALS AND REVIEWS

The American Law Register and Review ,Vol. 42, No. 6, Jun., 1894

The Monist, 68: 364-387.

Theory," 62 *Southern California Law Review* 913.

---, (1985), "On 'Positivism' and 'Legal Rational Authority'", *Oxford Journal of Legal Studies 5*: 74-90; also in Finnis 1991, II, 167-83.

…, *Incommensurability, Comparability and Practical Reasoning*, Cambridge, Mass: Harvard University Press, 215-233, 285-289.

---(1985), "Authority, Law and Morality," *Monist* 68:295-324

----(2001, *The Practice of Principle* Oxford: Oxford University Press

----(2004b), "The Big Bad Wolf: Legal Positivism and its detractors, *American Journal of Jurisprudence* 49:1-1-.

---(2005), "Law as Moral Idea, *University of Toronto Law Journal* 55:61

---2006), 'Legal Positivism: Still descriptive and Morally Neutral', *Oxford Journal of Legal Studies*, 26:683-704.

----2006), Evil Contingencies and the Rule of Law, '*American Journal of Jurisprudence* 51:179-189.

Wiles, K. V. 1984. "Is consciousness important?" *British Journal for the Philosophy of Science*, 35: 223-43.