WHY JUDICIAL DISCRETION MATTERS: A CLOSER LOOK AT HART'S ARGUMENT IN THE CONCEPT OF LAW

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ABSTRACT

H.L.A. Hart's one of the most discussed and challenged arguments from *the Concept of Law* that judicial discretion is both necessary and inevitable, aligns differently from the very idea of limited judiciary.[1] For Hart, the importance of judicial discretion lies in the inherent indeterminacy of the law of the system. However, he identifies limits to such discretion by emphasizing that judicial discretion ought to be limited and guided by the established legal norms and principles. The article examines why Hart was right in acknowledging judicial discretion to be both necessary and inevitable in a legal system. To a judge performing adjudication, the aspect of discretion helps in employing the best of his faculties to address the inevitable ambiguities in law and give a definite resolution to a situation of conflict. Exercise of judicial discretion is important to facilitate the utilization of certain existing norms and principles in the process of judicial decision making, especially when there are ambiguities in codified law. While interplay of discretion in unprecedented cases could yet times result in different judicial outcomes depending upon the interpretation of the judge, as long as the adjudicating criteria stay loyal to the recognized goals and values of the particular legal system, maintaining a certain degree of coherence in judicial outcomes is achievable.

Keywords: H.L.A. Hart, The Concept of Law, Judicial Discretion, Adjudication, Codified law, Precedent, Limited Judiciary

[1] HLA Hart, The Concept of Law (2nd edn, Clarendon Press 1994) 135.

INTRODUCTION

The debate over judicial discretion and its legitimate limits is age-old. Political instabilities and rights activism have made it difficult to think of judiciary as a limited organ.[2] Venturing into the traditional jurisprudential debates is one way to understand questions regarding the supposed role of judiciary in law making. H.L.A. Hart's one of the most discussed and challenged arguments from *the Concept of Law* that judicial discretion is both necessary and inevitable, aligns differently from the very idea of limited judiciary.[3] While positivism has always laid substantial emphasis on the role of judges in law making, Hart's version stands out with several of its postulates on judicial discretion being distinct from the tenets of traditional positivism. He acknowledges the limitations of the rule book model of law, and emphasizes the need for judicial discretion guided by certain established norms and principles.[4] Challenges to these notions from both rule-sceptics and formalists, and the corresponding defenses made the theory more relevant and responsive to the ever dynamic debate on judicial law making.

I support Hart's assertion that judicial discretion is both necessary and inevitable, by furthering two arguments aligning with the philosophy of his theory. Upon drawing a brief picture of what Hart's *Concept of Law* entails as to judicial discretion, I would venture into examining **(1)** why judicial discretion is necessary to effectively deal with the ambiguities in codified law; and **(2)** how judicial discretion is important for the utilization of norms and principles to guide judicial decision making, when there are ambiguities in codified law. I would also discusses certain perspectives of criticism to Hart's theory, wherever relevant.

HART ON JUDICIAL DISCRETION

Hart's prepositions on judicial discretion could be explained in two parts- its importance as Hart proclaims, and its limits as Hart identifies. For Hart, the importance of judicial discretion lies in the inherent indeterminacy of the law of the system.[5] However, he identifies limits to such discretion by emphasizing that judicial discretion ought to be limited and guided by the established legal norms and principles.[6]

[2] J Doe, "The Limits of Judicial Review in Constitutional Democracies" [2018] 25(2) IJCL 367.
[3] HLA Hart, The Concept of Law (2nd edn, Clarendon Press 1994) 135.
[4] ibid (26).
[5] Hart (n2) 128.
[6] ibid 204.

Hart's prepositions on judicial law making stand against the rule book notion of law. His theory explains that a legal norm is essentially identified by a social act which could be an "individual directive, a legislative enactment, a judicial decision, an administrative ruling, or any social custom."[7] He argues for the inevitable necessity of judicial discretion claiming that social acts are incapable of setting out absolutely wholesome legal standards which could resolve all conceivable issues.[8]

Hart argues that ignorance as to future requirements and unpredictability of prospective scenarios leave law inherently inadequate to address all possible contingencies.[9] Though he acknowledges the guiding authority of legislation in case of ambiguities, he reaffirms that the 'open textured nature' of the language of law might itself raise certain discrepancies.[10] He argues that, general language has some natural limitations owing to which certainty is not always possible.[11] He adds that in certain cases, one cannot be sure as to the applicability of the general provisions of law, though the same could be, in an outright manner, be applied for certain very similar cases.[12] For Hart, even precedents are not adequate to settle all the ambiguities as they themselves set conflicting standards and the required degree of similarity is not always possible.[13] Owing to the above reasons, he proclaims that the existing rules of conduct need to be supplemented with the aspect of judicial discretion so that the indeterminacy can be settled in a reasonable manner compliant with the general principles of the system.[14]

Coming to the limits set out by Hart to identify the permissible extent of judicial discretion, he emphasizes that a judge should be guided by the existing legal norms and principles while exercising discretion.[15] For him, a judge's limited law creating discretion ought to operate while dealing with unprecedented cases where the law is indeterminate. In other words, while he warrants judicial discretion, he also clarifies that it is only allowed to the extent of indeterminacy in law, and only in the manner guided by the existing legal principles.[16] For him, such principles and norms are based on a rule of recognition which is a touchstone criterion

[7] ibid 142-143.
[8] Ibid 3.
[9] Hart (n2) 128.
[10] ibid 126.
[11] ibid 127.
[12] ibid 135.
[13] ibid 136.
[14] ibid 156.
[15] ibid 204.
[16] ibid 274-75.

that attributes validity to all the legal rules in the system. According to Hart, such rule of recognition is also a social act.[17]

Harts theory was opposed by both formalists and rule sceptics, albeit for different reasons. While formalists understood it as a deviation from the conventional rule book approach, rule sceptics viewed it as an attenuated model of the same rule book approach of which they were critical.[18] Both the alleged criticism, and the perceived merit of his theory owe to the fact that Hart tried harmonizing two juxtaposing views by accepting both inadequacies of the rule-based mechanism, and acknowledging the importance of legal norms and principles in a broader context.[19] Herewith, I argue why Hart was right in acknowledging judicial discretion to be both necessary and inevitable in a legal system.

JUDICIAL DISCRETION – Its functionality in addressing the ambiguities in law

Harts asserts that judicial discretion is necessary in a legal system since law has certain inherent ambiguities.[20] I strongly agree that discretionary aspect to judicial duty provides a facility to perform judicial duty in cases where there is no other established authority of guidance. In fact, lack of discretionary powers to remedy the lack in legislative guidance could leave judges incapable of performing their judicial duties.

In established legal systems, there is a legitimate expectation that a judge establishes some degree of finality while settling the rights of the parties.[21] Though the state in general is duty bound to its citizens, expectations on judiciary tend to be particularly prominent owing to the fact that judicial remedies are accessed ex post to violation of rights.[22] In most human rights cases for instance, we rarely contemplate about whose duty it is to remedy the violation, and assume that the judge must be the one to safeguard our rights. Judges are expected and obligated to adjudicate in favour of either of the parties, and establish clarity in place of chaos, conflict, or injustice.

In order to effectively fulfil their obligations towards the state and citizens, Judges tend to rely

[17] Hart (n2) 157.
[18] Greenawalt, "Indeterminacy in constitutional theory" [1987] 6 Law and Philosophy 45.
[19] Ibid 80.
[20] Ibid 128.
[21] M Gleeson, "The Ethical Judge" [2009] International Journal of the Legal Profession, 16, 171
[22] ibid 180.

on their own wisdom beyond the letter of the law, which operates as an aspect of discretion. [23] A judge will have to weigh numerous relevant factors, besides obliging to the guidance of a statute or statutory principles, in the course of determining damages in a civil case. In a criminal case more importantly, while sentencing a criminal, he ought to consider the impact of the judgment on the society whether in terms of deterrence or reformation.[24] It is an unavoidable inference that as a matter of practice, a judge is not merely guided by codified law, but is also bound by several conventions specific to the legal system. It is during the course of making these relevant considerations as a part of judicial duty that the aspect of discretion unavoidably enters the arena of adjudication.

Discretion becomes more integral while adjudicating 'unprecedented cases' about which the law is either ambivalent or silent. Complex societies often deal with disputes not envisaged, solutions to which might either be too vague or be entirely absent in the existing law.[25] In such cases, lack of discretionary powers to remedy the lack of legislative guidance, could leave judges incapable of performing their judicial duties.[26] The judge would neither be exonerated from his duty of adjudication (owing to the lack of framework or precedent), nor would he be able to perform the said duty if not for the application of a certain degree of discretion.[27] For instance, with the recent spike in AI technologies, a judge may have to take up unprecedented issues as to adducing and determining liability for AI-generated harm. Similarly, he may have to decide on the risks associated with latest crypto-currencies despite of a potential lack of regulating law at domestic or international levels. Judges in cases as such are not left with much of choice, but to apply their judicial wisdom beyond the codified law.[28] In other words, in order to fulfil their judicial obligations, they must, yet times, transcend beyond the limits of the letter of law by acts of guided discretion. In unprecedented cases, that would be the only way to fulfil the duties of adjudication and resolution.

One objection against this line of argument (application of judicial discretion in an unprecedented situation) is that, it results in retrospective application of judicially enacted

[23] L Stuesser, "Judicial Discretion and the Common Law Tradition" [2016] Oxford Journal of Legal Studies, 36(4), 789.
[24] A Shinar,"Judicial Discretion and Sentencing Behavior: A Critical Review of the Literature" [2012] Journal of Criminal Justice, 40(6), 476.
[25] J Lindgren, "Judicial Discretion and the Problem of Uncertainty" [2014] 33(6) Law and Philosophy 703.
[26] S Kagan, "Presidential Administration" [2001] Harvard Law Review, 114(8), 2245-2385
[27] Ibid 2254.
[28] L Epstein, "The Modern Concept of the Judicial Duty to Follow Precedent" [] Virginia Law Review, 90(7), 1691-1740.

rules.[29] I agree that judicial rule making appears to effectuate retrospective application of law. However, it is important to note that as long as the judge does not generate an entirely new law with no precursor in the existing legislative framework (or custom or precedent), the issue of retrospective law doesn't effectively arise. In other words, any aspect of retrospectivity will be removed by virtue of the operation of a pre-curser in the established legal regime. Moreover, in most jurisdictions with separation of powers, such tendencies (of liberal judicial law making) are barred by settled rules of law and a learned judge seldom creates law.[30] Alleged retrospectivitiy resulting from Judicial discretion is therefore not essentially a vitiating factor as long as the decision is guided by certain existing line of reasoning as required by Hart, and is not entirely alien to the philosophy of the legal system.

To summarize the argument in the above section, the performance of legal duty of adjudication in a case (especially a hard unprecedented case) is impossible without exercising judicial discretion. Having neither an escape from adjudicating duties, nor the power to exercise discretion to settle the ambiguity is an awkward situation for a judge, and such restraint could compromise the efficiency of the judicial system in the long run.

JUDICIAL DISCRETION – A means to effectively utilize legal principles in judicial decision making

In the above section, I argued why judicial discretion is important to fill in the absence of a guiding authority to the judges, particularly in unprecedented cases. In this section I substantiate my stand further by defending against one major criticism faced by Hart's line of argument- 'judicial discretion is unwarranted where the law as supplemented by principles of moral or institutional importance is adequate to guide judicial decision making'.[31] I argue that, principles other than codified rules of conduct do not enjoy the status of finality or legitimacy to single-handedly guide judicial decision making. Even if they operate to contribute to the process of judicial decision making, the discretionary aspect should inevitably operate to produce reasonable judgments.

Critics strongly argue against the practice of going beyond the boundaries of the existing laws,

[29] Ronald Dworkin, Law's Empire (Harvard University Press 1986) 132.
[30] Paul Craig, "The Separation of Powers and the Human Rights Act" [2002] Public Law 222.
[31] Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1977) 28.

while performing judicial functions.[32] It is argued that law provides adequate guidance when read with principles of moral, political, or institutional importance.[33] While I partially agree with the usefulness of such principles for adjudication purposes, I do not find any valid reason to confer them the status of finality like an enacted law enjoys.

Principles whose legal recognition is conditioned solely on moral or political perceptions cannot perform the function of supplementing the inadequacies in codified law, since they themselves do not have the legitimacy or finality. Not even public acknowledgment or popular support will render them adequately legitimate or final to render them an equivalent status to law. Firstly, popular acknowledgment doesn't necessarily mean popular confidence; and secondly, tacit public sentiments tend to wither away with social changes, if not by legislative enactments.[34] Further, in individual cases where liability is imputed by mechanically relying on moral or political principles, parties tend to challenge their validity to escape the penal obligations.[35] Thus, when an adjudicator solely and blindly relies on principles of moral or institutional importance, their ambiguous status as to legitimacy and finality might lead to greater incoherence and chaos. Therefore, designating certain moral or political principles as authoritative supplements to law is not a sound idea.

Consequentially, an inference could be drawn that judicial mind is necessary to carefully harmonize various dimensions of equity, legality, and broader socio-political environment. In an immigration case, for example, even if there arises an absolutely valid claim under the rules of the immigration law, a judge may have to consider various aspects like the potential impact of immigration on the domestic environment, or even make equitable considerations when contemplating deportation of the individual back to his home country. To make a point here, judicial discretion should operate to harmonize distinct principles in law, polity, and society and produce rational outcomes of sound legal status.

Judicial authority is a constitutional authority.[36] However, the authority to settle legal indeterminacies does not derive solely from legislative delegation. Instead, it is also supplemented by the *ex post facto* acknowledgment and acceptance of judicial decisions in a

[32] Dworkin (n30).
[33] ibid.
[34] Rozee L Brooks, "Changing Public Opinion through Legislative Action" [2018] 99 Social Science Quarterly 983, 43
[35] Brooks (n33) 44.
[36] John Rawls, A Theory of Justice (Revised Edition, Oxford University Press 1999) 10.

socio-political community.[37] Even in case of altered precedents or creative decisions, there seems to be an understanding about the 'inherent powers' of the courts of law.[38] In fact, a pious fiction operates by virtue of which there is a certain degree of public confidence in the judiciary,[39] conferring it a predominantly unquestionable status as a legitimate source for legal rules and resolutions. Therefore, even if discretion operates, as long as it is limited, and fulfills the legitimate expectations of the public, challenges as to arbitrariness or legitimacy are not likely to arise.

Acknowledgment of certain principles as authoritative guidance to judicial duties doesn't simply vitiate the requirement of judicial discretion. Rather, it further justifies the necessity of judicial discretion for successfully utilizing such principles so as to produce equitable and rational outcomes of sound legal status.

CONCLUSION

H.L.A Hart rightly argued that judicial discretion is both necessary and inevitable in judicial processes. It is pertinent to mention that he faithfully stood his ground even in his postscript which reaffirms his analysis of discretion to be an integral and indispensable part of judicial adjudication.[40]

A judge, by virtue of the office he holds, and the set of duties he performs, ought to enjoy discretionary powers. To a judge performing adjudication, the aspect of discretion helps in employing the best of his faculties to address the inevitable ambiguities in law and give a definite resolution to a situation of conflict. Further, there is no merit in how critics criticize Hart's argument relying on the functionality of certain institutional and moral principles to guide judicial adjudication in case of ambiguities. Such principles are incapable to singlehandedly form the legal reasoning for a judgement, owing to fact that they do not have the required status of finality and legitimacy. In that light, exercise of judicial discretion is necessary for successfully utilizing such principles to produce equitable and rational outcomes of sound legal status.

[37] Hart (n2) 101.
[38] Reza Beheshti, "The Inherent Powers of Courts and their Constitutional and Statutory Limits in Common Law Countries" [2012] 7(1) Asian Journal of Comparative Law 1.
[39] ibid 23.
[40] Hart (n2) 272.

That being said, interplay of discretion in unprecedented cases could yet times result in different judicial outcomes depending upon the interpretation of the judge.[41] A rather unique solution might not exist to this challenge. However, as long as the adjudicating criteria stay loyal to the recognized goals and values of the particular legal system, the difference in judgments would not be very costly in terms of overall coherence.

To conclude, it is important to acknowledge that the exercise of discretionary powers is both incidental and integral to the performance of judicial duties. At the same time, the operation of judicial discretion should be guided by recognized principles of socio-political importance.

[41] Hart (n2) 151.

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