



HART ON JUDICIAL DISCRETION: SUSTAINING CITIZENS' CONFIDENCE IN THE LAW

Ngozi Chukwuemeka Aja (Ph.D)

Senior Lecturer, Department of Philosophy, University of Port Harcourt

Abstract: The paper examined Herbert Lionel Adolphus Hart's conception of judicial discretion, showing how it could help in sustaining citizens' confidence in the law. Thus, this study envisages the role of judicial discretion going beyond filling of the vacuum left by legislation, to being the basis of citizen's unmitigated obedience to the law. It is argued in this paper that Hart's idea of judicial discretion being a source of law treads a middle course between legal formalism and rule-skepticism, the two evils of the legal process. These extreme positions on legal reasoning that portray judicial discretion as mere arbitrariness in decision-making with which judges unleash their whims and caprices on ordinary citizens, are refuted by Hart's argument that judicial discretion is validated by the rule of recognition. It then means that judges apply discretion just as they apply laid-down rules and precedents. Thus, citizen's than seeing judicial discretion as an anomaly should clamour for expansion of the judge's discretionary powers and also be concerned with dictating when that power is abused.

Key words: Citizen, Confidence, Discretion, Judicial Discretion

1. Introduction

This paper is attracted by wanton disobedience to laws witnessed in Nigeria nowadays. This ugly trend if unchecked, can lead to violent revolution with its unpalatable consequences. Citizen's lack of confidence in the law is the major cause of disobedience to law. This paper will adopt the textual analytical method to explore H. L. A. Hart's idea on judicial discretion in arguing that lack of confidence in the law can result from a misunderstanding or misconception of the nature of the judicial discretion which is an essential aspect of the judicial process or adjudication. Thus, clearing such misunderstanding and misconception can help in subsisting citizen's confidence in the law. Scientific laws operate uniformly in nature, but that is not the case with the laws governing human societies, which are enacted, interpreted and applied by human beings. Positive law reflects the ideas and orientations of the law-giver, but its interpretations and application are guided by judges' understanding of the law and their convictions manifest in judicial discretion. Sometimes, and worrisomely too,

judicial discretion create apparent discrepancies between the obvious expectations of court rulings and actual court verdicts. Most non-initiates, ordinary people, understand such verdicts as outcome of arbitrariness on the part of judges, which from Hart's position, amounts to a misunderstanding and misconception of judicial discretion. This paper relying on his position seeks the subsistence of Nigerian citizens' confidence in the law. It is my belief that this paper can spur further research on the possible effects of citizens' lack of confidence in the law.

The paper is divided into four main sections. Section one is the ongoing introductory part. In section two, the meaning of discretion and consequently, the meaning of judicial discretion is explored. Section three dwells on Hart's conception of judicial discretion while in section four, how Hart's conception of judicial discretion can help in sustaining citizens' confidence in the law is explored. Then, what follows is the conclusion.

2. The Concept of Judicial Discretion



Discretion means the power and ability to make decisions. It implies the concept of freedom of choice. The concept of discretion and freedom of choice is omnibus such that without conceiving a possible limit to that freedom, the whole idea makes no meaning. Perhaps, that is why the use of the term ‘discretion’ tends to be restricted to the legal field where actions are strictly dependent on authoritative rules and guide lines. Even the use of the term in other fields adduce to the use of it in law. Thus, discretion is usually defined as the latitude granted officials to act under a formal set of rules and in a public capacity. Acting under a set of rules implies that the rules guide the exercise of discretion thereby setting limits for it. Limits do not divulge the idea of freedom rather, freedom is exercised, albeit, in a stipulated manner. According to McGregor (1996), discretion can only be interpreted as those decisions that made with lawful authority rather than decisions made for illegal reasons. Furthermore, the individuals within an institution must have lawful authority to make the decisions and must operate under the constraints acceptable to others within the organization or profession.

In the legal context, discretion accords officials the authority to act according to the dictates of their own judgment and conscience. Discretion is abused when the official’s action is arbitrary, fanciful, or unreasonable. The most popular use of discretion is law enforcement and in criminal law. Thus, we hear of police discretion as well as discretion in sentencing. However, judicial discretion being an aspect of legal reasoning, occurs in the judicial process whether in criminal law or in other areas of the law. To put it directly, judicial discretion is applied by judges during reasoning to decide legal matters. If the plaintiff or the defendant thinks that the trial court judge has abused judicial discretion, the party can appeal the case. The appellate judge’s task is essentially to review whether the trial court judge has acted properly and correctly applied the law. If reasonable men could differ as to the propriety of the

action taken by the trial court, then it cannot be said that the trial court abused its discretion.

3. Hart on Judicial discretion

Hart agrees with the definition of judicial discretion as the latitude given to judges to decide cases based on their experience and conscience. However, he conceives judicial discretion as a source of law just like legislation and precedents. According to him, judicial discretion becomes a source of law in occasion of indeterminacy of either laid down rules or the rule of recognition itself. What he means is that judicial discretion furnishes the legal system with principles to serve the purpose of legal rules in the determination of cases when legal rules run out of their ‘core of settled meaning’. Hart is actually referring to the uncertainties that surrounding the application of laid down rules such that ordinary people, the non-initiate, could hardly predict the outcome of the judicial process. It works this way: if, as section 325 of the Nigerian Criminal Code stipulates, a person commits the offence of manslaughter and is imprisoned for life, there would be no question of whether the judge exercised discretion in arriving at the judgement. This situation manifests what Hart refers to as ‘core of settled meaning’ of a particular laid down legal rule. Let us call this case A. However, if one commits the offence of manslaughter and the court did not sentence him to life imprisonment, call it case B. The court’s decision in case B, will raise the suspicion of the ordinary man, who, perhaps, has witnessed the decision in case A. His expectation would be that since case A and case B are similar, the court ought to arrive at the same decision in the both cases. As Hart argues and as it is also evident in numerous outcomes of the judicial process, situations of case A, hardly characterize legal reasoning. Rather in every case the court is likely to arrive at decisions that can shock ordinary citizens. Misunderstanding this likelihood as part of the law itself erodes citizen’s confidence in the law.

Hart argues that to every legal rule, there is a core of settled meaning and an ‘open texture’. He means by ‘open texture’, the indeterminate nature of human



language. According to Hart, the uncertainties which arise in the course of communicating general standards through precedents and legislation depend on what he calls ‘open texture’ of human language. The choice which is being made in order to resolve such indeterminacies is what he refers to as ‘discretion’. In trying to show that judicial discretion is indispensable in the determination of borderline cases, Hart argues:

Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions, (125).

The two connected handicaps are what Hart refers to as relative ignorance and indeterminacy of aim. According to him, relative ignorance follows from the fact that man cannot conclusively predict the infinite feature of the world. Indeterminacy of aim, Hart says, follows from the unpredictable nature of the world which makes it difficult for man to achieve all that he has planned or set out to achieve. According to Hart, these handicaps are the reasons why different legal systems or a particular legal system at different times make provision for judicial discretion. He condemns the attitude which he calls formalism and which according to him, aims at strict adherence to the verbally formulated rules in such a way that the use of judicial discretion would be disguised or diminished.

Hart attempts to account for indeterminacy in the rule of recognition by conceiving rule of recognition as a presupposition. Thus, in addition to Kelson’s rule of recognition which is equivalent to the constitution of a state validating all other sources of law in the legal, Hart argues for another rule of recognition, the existence of which is a presupposition. Invariably the constitution as the first rule of recognition validates legislation and precedents as well as judicial discretion when there is ‘open texture’ of the first two sources. Then, when there

is indeterminacy in the application of the constitution itself, the rule of recognition as presupposition, which validates the constitution, also validates judicial discretion to remedy the inconstancy of the constitution. On why the rule of recognition as presupposition is also law, Hart asserts that:

The case for calling the rule of recognition ‘law’ is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of a legal system, and so itself worth calling ‘law’; the ease for calling it ‘fact’ is that to assert that such a rule exist is indeed to make an external statement of an actual fact concerning the manner in which the rules of an ‘efficacious’ system are identified, (108).

It is obvious that Hart imports the idea of rule of recognition as presupposition in order to secure the legal system against destruction either by violent or peaceful revolution. He is well aware that judicial discretion in situation of indeterminacy of the constitution would automatically amount to a change in the legal system. However, in practice, it is difficult to imagine situation of indeterminacy of the constitution. Moreover, the idea of rule of recognition as presupposition contradicts Hart’s positivist leaning. Nevertheless, his account of the rules of recognition validating judicial discretion as a source of law is germane for sustaining citizens’ confidence in the law.

4. Sustaining Citizens’ Confidence in the Law

The major cause of citizens expressing lack of confidence in the law is retroactivity. Retroactivity occurs when a punishment is meted for an act not recognized as deserving such punishment by the existing law. Such punishment not deducible from the existing law then results from the act of the judge making reference to factors extraneous to the existing law. The factors could be previous legal order, moral principles as well as public policy. These factors are imported into the existing law through judicial discretion. Judicial discretion or legal discretion, according to the *Black’s Law Dictionary*, is, “The exercise of judgment by a judge or court based on what is fair under the circumstances



and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right" (534). When a litigant is not entitled to demand a certain act as a matter of right describes a situation whereby the law makes no provision for an act to be actionable in court. In other words there is no enacted rule to be applied in resolving the matter for which the litigant seeks justice in court. According to Hart, even though a situation of non-justiciability indicates the indeterminacy of the rule of recognition, principles to be applied in deciding cases are validated by the rule of recognition. Hart argues that:

... in general the issue is not one regarding the manner in which judges do or should come to their decisions; rather it concerns the standards they respect in justifying decision however reached. The presence or absence of logic in the appraisal of decision may be a reality whether the decisions are reached by calculation or by an intuitive leap, (Hart 1983:105).

What Hart means by calculation is the determination of cases following laid down rules. Intuitive leap, for him, means judicial discretion, especially, exercising discretion when the rule of recognition is indeterminate. The standards courts respect in justifying decisions are already validated by the rule of recognition such that in exercising discretion, judges whose roles are defined by the standards, ultimately respect the rule of recognition. The Hart-Dworkin Debate portrays the misgivings people have for retroactivity in law. Dworkin used the case of *Riggs v. Palmer (1889) 22 N. E. 188*, to stress the injustice of retroactivity. The facts of this case are that Francis Palmer in his will made a provision for part of his properties to be transferred to his grandson, Elmer E. Palmer. Elmer, believing that his grandfather was going to revoke the will and alter the provisions to his disadvantage, murdered his grandfather by poisoning him. Upon the death of Frances Palmer, his two daughters brought a suit to court contesting the will. Even though the fact of Elmer murdering his grandfather was not contended by the plaintiffs, the judge, invoking what is now known as the 'Riggs principle', '*Injuria*

propria non cadet beneficium faciantis' meaning 'No benefit shall accrue to a person from his own wrongdoing' denied Elmer the right to the properties provided for him in the will. Looking at the facts of this case and the decision reached, even Dworkin himself could not help but admit that allowing Elmer to possess what is provided him in the will for which he murdered his grandfather, would amount to the law perpetrating injustice. What the analysis presented here shows is that the issue of retroactivity in law presents us with a dilemma, the dilemma of choosing between two ineliminable injustices. This amounts to a situation in which justice can only result from choosing the lesser injustice. In making such a choice, what is considered, is not the provisions of the law *per se*, but the overall purpose of law as an instrument of social cohesion. The decision in *Riggs v. Palmer* is not to the effect that the law will no longer recognize the right of individuals to inherit properties willed to them, but to the effect that people will continue to inherit the properties willed to them so long as they abide by the law. Thus what results is that the law is being strengthened, rather than being devalued, by situations of retroactivity. Strengthening the law implies enhancing the conception of justice attainable through the law.

Kenneth Kress in offering what he calls the 'ripple effect' argument shows that retroactivity is unavoidable in law even if Dworkin's position on right thesis or right answers is to be adopted. He observes, "Retroactivity is more serious defect for Dworkin than for Hart", (Kress 1984:371). Hart equally offers a convincing argument on the issue of retroactivity in law. Relying on the retroactive application of the Nazi law to the issue of a woman who procured the deprivation of her husband's liberty during the Third Reich, the 'Nuremberg case', Hart shows that retroactivity accords with the function of the courts to settle disputes. He feels that instead of courts to fail in their function, it is better to resort to retroactivity. According to him, retroactivity occurs in situations in which the court is faced with the option of choosing between two evils. In the 'Nuremberg case', the



court faced the options of either punishing the woman, which will amount to depriving her of her right under the existing law, or allowing her to go free thereby paying deaf ear to the principles of natural justice. The principles of natural justice refer to the fundamental human rights which usually find expression in most constitutions and in this case, protecting the right to liberty, which the Nazi regime neglected by punishing the grudge informant's husband, is at stake. Hart argues that in convicting the woman, the court only chose the lesser evil which is ensuring the protection of people's right to liberty. He argues:

Odious as retroactivity in criminal legislation and punishment may be, to have pursued it openly in this case would have had the merit of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems, (Hart 1983:106).

Now, it will be odd for anybody to see reasons to disagree with Hart. The fundamental human rights are usually considered overriding to other pieces of legislation. Therefore, even the law demands that they be given preference whenever they are at issue. This boils down to saying that any issue of retroactivity that borders on ensuring the protection of these rights, ought to be justified.

Hart's argument for judicial discretion is to the effect that in exercising discretion, judges only rely on the rule of recognition in converting extra-legal principles to law. He adduces to the legal maxim 'Discretion is to discern through law, what is just'. A misunderstanding of the nature of judicial discretion springs from the fact that the law, imbued with generality and precision, allows citizens and litigants forecast and even predict the outcome of the judicial process. Thus when the court decision thwarts their prediction, they become disappointed in the court ruling and consequently lose confidence in the law. They tend to resort to the position of Oliver Wendell Holmes' 'bad-man', who no longer believes in the existence of the law but for what the

courts could do in fact. A vast array of citizens is ignorant of the nature of the legal process such that they think legal reasoning is mere deduction from laid down rules. Legal formalism best describes the layman's idea of legal reasoning. Consequently, they tend to view the exercise of judicial discretion as mere arbitrariness engaged in by judges who which to impose their self-interest on litigants. This is the position of the legal realist equivalent to that of the 'bad-man'.

Hart identifies as the problem of legal reasoning, legal formalism, which represents the position of hard positivism; and, rule-skepticism, implied in legal realism. In this way, Hart contributes to the effort at maintaining stability in law. His discovery of judicial discretion as a remedy for indeterminacy of legal rules is therefore an advancement over legal formalism which neglects the open texture of legal rules. It is equally an improvement on scepticism of legal realism which ordinarily could lead to utter arbitrariness in legal reasoning. Hart's position that judicial discretion occurs only at the fringes of the law when legal rules run out of applicability presents a middle course between the two extreme positions of legal formalism and rule scepticism. His position accords with Aristotle's idea of the 'mean' which for him is a measure for justice.

Conclusion

In conceiving judicial discretion as a source of law, Hart defaults the legal formalist's and the rule-skeptic's view that judicial discretion amounts to utter arbitrariness in law. The legal formalist's position informs the layman's understanding of legal reasoning and is grossly responsible for the misgivings he has about judicial discretion. On the other hand, the rule-skeptic's argument is intensifies the disobedience of laws because, people feel that the laid-down rules no longer matter. Thus, they, like the 'bad-man' tend to believe that anything can happen in court, as they cannot predict which way the judge's discretion could be swayed. Hart's conception of judicial discretion gives hope for citizens' unremitting obedience to law. When citizens understand that judicial discretion is part and parcel of



the law and that it is not arbitrary, their confidence in the law would be sustained. They would understand that through judicial discretion, the existing law could be reformed for better delivery of justice. Above all, they would be disposed to positively assess the legal practice in order to detect when judges abuse judicial discretion.

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