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Law vs Morality: An Overview from Hart and Devlin's Debate

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ABSTRACT

This essay explores the possibility of a connection between morality and law. The Hart-Devlin dispute is also extensively covered in this article's analysis. This allows one to determine whether a relationship exists or not. This article also examined the R v. Dudley and Stephens case to bolster the following claim. From a very liberalistic perspective, we should disregard this ongoing discussion rather than simply upholding the letter of the law.

I. INTRODUCTION

This article will examine the existential connection between the ideas of morality and law. Due to the correlation between the subject of law and morality, many scholars think the relation between Law and Morality is deeply questionable, and several arguments have been on this subject. The discussion between Hart and Devlin will also be discussed about the subject, the paper will also touch on several case laws such as Regina v. Dudley and the Stephens case. Should the law remain as it is, or may morality have an impact? Should morality and law be combined or not? These are the basic questions that come to mind.

Natural law and Legal positivism are the two theories that are in question here and have created a controversy. Some say that they both have a correlation and are infused together, and some believe they are completely different. Laws are formal rules that describe what actions are right or not. They are implemented by the legislative and judicial branches to create a basic and enforceable code of behaviour. On the other hand, morality refers to a broad set of principles, beliefs, customs, and ways of living. Although morality cannot be compelled by legislation, it is socially expected. The two systems are the sole factors by which humans in a society behave.

*“The issue of determining the prerequisites for a normative statement or behaviour to qualify as the law has traditionally dominated discussions about the interrelationship between law and morality. The discussion has become a fight between two broad ideas about what law is now as a result of this focus.”*² Both theories hold the belief that the law's legitimacy cannot, even in theory, derive from within or only be understood in the context of one specific legal

¹ Author is a student at Jindal Global University, India.

² Bickenbach JE, “Over, the Law as It Is Seems to Be the Product of Social Forces Too” (JSTOR December 1989); <https://www.jstor.org/stable/3504589> accessed March 22, 2023

normativity. *“In other words, the normative dependency of the law has historically been assumed in the jurisprudential discussion of the link between law and morality. The law is thought to provide a complex and dynamic structure for the establishment, development, refining, and application of specific norms as a normative system made up of a collection of distinct and recognisable activities and institutions. Legal positivists and natural lawyers dispute regarding the fundamental or inherent moral substance of those norms, but both seem at ease with the idea that these norms require extra-legal evaluation when the jurisprudential issues of validity, authenticity, and jurisdiction are at stake.”*³

In the early stage, there was no distinction between Law and Morality. The jurists who belonged to ancient India never drew a boundary between the two. *“Dharma was regarded as morality and law in India. For instance, the Vedas and Smritis—which were fundamentally the people's values—were the primary sources of Hindu law. Yet over time, Mimansa developed several ideas that made a clear distinction between recommendatory rules—which are advised because they are beneficial if implemented and would contribute to morality—and required rules, which are regulations that must be obeyed and are regarded as the law.”* Derivation of morals is different; morals were derived from religion and conscience and law is from the state. *“Judges, jurists, and lawmakers were never allowed to be creative in the process of making the law, not even in its actual formation, according to historical jurists. They also forbade jurisprudence from taking ethical issues into account. The historical jurist recently found that norms of customary action rather than moral principles were the ideal universal standards to which positive law must attest.”*⁴

The two ideas of law and morality might contradict for several reasons, but they share one shared characteristic: they both impact how we live our lives. Law and morality are nebulous notions with no clear definitions. The two above concepts have changed as new ones have surfaced over history. It seems that people's concepts of morality are beginning to vary in today's society. This implies that morality has grown into a relative issue; what could be considered morally wrong for one person may be morally right for another. Enacting legislation that will secure justice necessitates a modern perspective, that might or might not be consistent with morals.

II. HART-DEVLIN DEBATE ANALYSIS

In this paper, there will be a brief discussion of the debate between the two most influential

³ Bickenbach JE, “Over, the Law as It Is Seems to Be the Product of Social Forces Too” (JSTOR December 1989); <https://www.jstor.org/stable/3504589>; accessed March 22, 2023

⁴ Reddy AR, “Role of Morality in Law-Making: A Critical Study - JSTOR” (JSTOR April 2007); <https://www.jstor.org/stable/43952105>; accessed March 22, 2023

authors, HLA Hart and Patrick Devlin. the argument will be supported with the help of the Harm Principle (*the notion that individuals ought to have the ability to act however they like as long as it does not damage other people*)⁵. Several jurists or philosopher also gave their input about law and Morality. Among the most significant political and juridical thinkers of the 20th century was Hart. Hart's "Positivism and the Separation of Law and Morals," where he claims that there are five major viewpoints which appear to be connected with legal positivism, is a useful place to start;

- *“That laws are orders from people.*
- *That there is no necessary link between morals and the law.*
- *A legal framework is a closed conceptual model in which proper judgements may be inferred logically from established rules.*
- *Thus, as opposed to critical analysis and sociological and historical research, the investigation of legal principles is worthwhile.*
- *The idea is that moral conclusions cannot be proven to be true.”*⁶

Like positivism, the phrase "natural law" is utilized in a variety of ways by different persons at different points in time.

- Principles that direct the administration and evolution of law.
- A fundamental moral principle in law that forbids a complete division between "is" and "ought."
- The process for determining the ideal and society-appropriate law.
- Reason can be used to infer the substance of perfect law.
- The prerequisites are necessary for the establishment of law.

Hart and Devlin’s debate is the discussion between Law and Morality, regarding the decriminalization of homosexuality and prostitution. In society, these two words are frowned upon and as a result, have been criminalized by the law. Morally, it should not be criminalized to be a person who comes under a spectrum, it is no sin, and it is one’s own choice. Devlin's legal moralism philosophy approaches the function of legislation in society from an idealist

⁵ “Harm Principle” (Ethics Unwrapped); <https://ethicsunwrapped.utexas.edu/glossary/harm-principle>; accessed March 22, 2023

⁶ Ltd AA, “Concerning the Hart and Dworkin Debate” (Law Teacher July 27, 2022); <https://www.lawteacher.net/free-law-essays/constitutional-law/concerning-the-hart-and-Dworkin-debate-constitutional-law-essay.php>; accessed March 22, 2023

perspective. According to Devlin's legal philosophy, regulations prohibiting immoral private as well as public behaviour should be enforced based on the wisdom and experience of the community. Devlin said that to put an end to behaviour that hurt the sentiments and emotions of people, the law was necessary there.

The study looks into the conflict between morality and the law as it developed in England in the middle of the 19th century and affected regulations throughout many Western nations in the decade that followed. In this argument, the most crucial question is whether morality should be enforced through the use of the law. There are two perspectives on this issue: yes, by the authoritarian perspective, and no, by the libertarian one. The Hart-Devlin argument focused on "positive" morality, or the moral principles that the society at large currently accepts.

When **John S. Mill** released his renowned work "*On Liberty*" in the year 1859, the debate in the usually conservative England of the 19th century began. "*He promoted the harm principle and maintained that if a person with a deviant attitude is damaging to society, such conduct ought to be illegal. Hence, since private actions do not affect society, society should not make them illegal. He believed that drug use and homosexuality were bad for the individual but not for society as a whole.*"⁷ Lord Patrick Devlin referred to the "moral foundation" of society. He claimed that to stop or inhibit the breakdown of social equilibrium, criminal law should uphold and respect societal ethical principles. He believes that the morality of a society is one of if not the most important, factors holding it all together.

Devlin argues that social structures break down internally more frequently compared to being ripped apart by external pressures. History shows that the weakening of moral bonds is typically the first element of collapse, therefore society is reasonable in attempting to adopt the same measures to protect its sense of morality as it does to uphold its governance. "*The law should be concerned with both the marginalisation of vice and the silencing of hostile acts. Devlin contends that the government is entitled to defend both moralities as well as treason and compares the two. He claims that "[T]he arm of the law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one.*"⁸ Devlin refers to broad guidelines that lawmakers have to be mindful of in passing legislation to uphold morality.

"Humans do not label something as unlawful unless we wish to indicate that an individual must

⁷ Munir M, "The Hart-Devlin Debate: Should Law Be Used to Enforce Morality?" (SSRN May 14, 2022); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094895; accessed March 22, 2023

⁸ Munir M, "The Hart-Devlin Debate: Should Law Be Used to Enforce Morality?" (SSRN May 14, 2022); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094895; accessed March 22, 2023

be penalized in some manner for committing it; if not by law, by the judgement of his fellow beings; if not by judgment, by the condemnations of his consciousness," says Mill."⁹ Mill integrates the concepts of justice and evil and retribution. The relationship takes on a conceptual quality as a result.

According to **Hart**, all individuals possess an inherent right to freedom, and they are not allowed to use that right when it violates the rights of others. There is no type of injury from which the community must protect itself when social structures are altered. Society should only have the legal authority to intervene in cases of real, immediate injury rather than hypothetical, long-term harm. Hart sees freedom as a fundamental human right. *"Humans are unique, and also being able to show that uniqueness in one's decisions and behaviour is crucial to one's overall well-being. Humans also have sociability in addition to their individualism. The majority of individuals don't merely live in (bigger or smaller) communities or belong to a variety of overlapping and interconnected organisations."*¹⁰ Humans rely extensively on those networks of affiliations, as well as on their interactions with one another.

Devlin's argument was put more weightage because when this debate happened, there was no acceptability of homosexuality and prostitution like it is in the modern era. Patrick Devlin and Professor Hart engaged in a debate. Homosexuality is an individual preference, homosexuality ought to be acceptable, according to the justification. The committee's suggestions were based on utilitarian notions. People's lives are not expected to be impacted by the law to change conduct. According to Devlin, the laws that are driven by morality are essential as they protect both people individually and the community throughout its entirety. He contends that the sustaining of laws that safeguard religious freedom and reduce the risk of tyranny is a condition precedent to morals. Every action can be destructive even if it is not legally prohibited, he stated. He thought that to control behaviour, morality should come second to law. On the opposing side, Hart argued that the law should not follow popular ideals. The consensus, in Devlin's opinion, can occasionally be appropriate. We cannot refer to their views and ideals as core elements because they are frequently tainted by mysticism and intolerance. Hart provided evidence for his claim using John Stuart Mill's harm principle.

Hart disagreed with Devlin's claim that morality ought to be guided and constituted by legislation. He agreed with the committee's findings to decriminalize both homosexuality and

⁹ Munir M, "The Hart-Devlin Debate: Should Law Be Used to Enforce Morality?" (SSRN May 14, 2022); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094895; accessed March 22, 2023

¹⁰ Munir M, "The Hart-Devlin Debate: Should Law Be Used to Enforce Morality?" (SSRN May 14, 2022); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094895; accessed March 22, 2023

prostitution, relying on Mill's viewpoints. Hart believes that enforcing an ethical code is pointless, unpleasant, and morally wrong. He argued that doing so would violate one's right to personal freedom and impede the development of moral codes.

The controversy of the argument reemerged in the 1950s as thousands of men were jailed for engaging in homosexual behaviour. As stated in the John Wolfenden-led Committee's 1959 Report, private morality should not be a legal topic. Patrick Devlin, who supported legal reform but believed that the repression of vice is just as much the responsibility of the law as the repression of nefarious activities, was somewhat hostile to this. Hart agreed with the libertarian stance that Mill as well as the Wolfenden Committee were promoting. *“The Sexual Offences Act of 1967 was enacted by the English Parliament, allowing homosexual acts performed in private by informed adults. The rulings of England's higher courts in the cases of Shah v. DPP (1962), R v. Brown (1994), and Lee v. Asher (2018) proved that the judges took an authoritarian stance.”*¹¹

III. CASE LAWS

*R v. Dudley and Stephens (1884)*¹² One of the most well-known rulings that address the oldest-ever conflict between morality and law is *R v. Dudley and Stephens*. Cannibalism, which had been considered to be wholly unethical and disgusting conduct, was discussed in the case that it might be committed under situations of extreme need and despair. In the case's facts, four men were implicated, who were stranded in a vessel in the ocean's middle, far from civilization. Having no access to food or water or any other means of communication with those on land, the guys were marooned in the boat. The ship's captain, Thomas Dudley, managed to come up with an immoral and unethical solution. He suggested that one of the four guys would have to surrender his life so that the other three can survive, who would then eat flesh to continue living. Edward Stephens agreed despite Ned Brooks' opposition to the plan and the fact that Richard Parker, a crew member, was not notified. Dudley and Stephen ultimately killed the child, and the three men later swallowed the boy's remains.

After just being rescued, the two men were charged with the heinous murder that they had committed. Although it appeared that a crime was committed at first, the case centred on whether the man should be spared prosecution since he was acting morally upright at the time by defending his own life or if he must suffer the law's wrath. Nonetheless, a clear distinction was made between morality and the law, and it was underlined that killing someone for your

¹¹ Munir M, “The Hart-Devlin Debate: Should Law Be Used to Enforce Morality?” (SSRN May 14, 2022); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094895; accessed March 22, 2023

¹² Regina v. Dudley and Stephens 14 Q.B.D 273 (1884)

benefit or in an attempt that could save your life did not constitute an acceptable excuse. However, some of the theorists' regard morality as everything because after all the law has derived from morality itself, or we can say that law is there and exists to keep a check on society and save itself from chaos and dismantling.

This is an instance where one can see that law is prevalent in a lot of many matters, it is the enforcement of nationality that can be seen in one case. In the particular instance of *Shyam Narayan Chouksey v. UOI*¹³, the Indian Supreme Court ruled in 2016 that cinemas must play the national anthem before showing movies, and all patrons must rise at this time. This was perceived as forcing nationalist as well as patriotic feelings on the populace. The CLS (Critical Legal Studies) School of Jurisprudence will indeed view the court's ruling as a continuation of the political environment that the administration had established. As a result, the verdict would represent a continuation of the justices' conservative views. According to CLS philosophers, the majority uses the law as a tool to keep things as they are in the community because it benefits other individuals. *"They contend that the rule of law is not impersonal and is subject to political influence and goals. They contend that judges lack objectivity and that this makes it impossible for the court to be independent because there is no political neutrality among the judges. The judges' choices cannot be regarded as unbiased because they are impacted by the social backdrop. CLS contends that political and other values should have no bearing on the law."*¹⁴

IV. CONCLUSION

There is no denying of the fact that the close relationship between morality and also the law. Several believe that morality has a significant influence on the law. It is true; however, the importance of rules and regulations in society can also be seen, although their strictness might make individuals doubt their legitimacy. People will then start discussing whether morality and the law are both right. The discussion might take a gory turn. It should also be noted that these laws and regulations were created for the benefit of society and are intended for people to abide by in order to prevent social unrest between those who value morals and the rule of law. It is clear from the aforementioned remark that there is a relationship, but morality has no bearing on the rules.

Contrary to morality, the law ought to function as the appropriate tool to alter how people think about the world. It is important to recognize that morality and law should work together rather

¹³ Shyam Narayan Chouksey v. UOI Writ Petition (Civil) No. 855 of 2016\

¹⁴ Bose A, "Analysing the Concept of Morality in Law from the Perspective of Critical Legal Studies" (iPleaders September 20, 2021); <https://blog.iplayers.in/analysing-the-concept-of-morality-in-law-from-the-perspective-of-critical-legal-studies/>; accessed March 22, 2023

than compete to determine which is more helpful to society as a whole. Law and Morality have their significant essence through which they are persisting. Laws are derived from this morality only to keep a check on what is right and what is wrong. through the Hart-Devlin debate, it can be concluded that law and morality clearly have a relationship, but one cannot blindly follow the law when it comes to morality. Although, that time was the sole reason that Devlin's argument was accepted at that time. Hart's argument will be accepted here as he took a liberal view Morality is vast and not exhaustive, but the law is the complete opposite, it is restrictive. However, if they are infused together, it will lead to the expansion and betterment of the legal system in a beneficial way as one will not blindly follow the black letter of the law but will also think from his conscious mind before committing an act. There can be no hard and fast rule or uniform methodology that could decide whether or not the law should indeed be utilised to enforce and promote morality. It is only reasonable to conclude that the severity of moral norms is situation dependent. If necessary, the law could well be utilised to impose good morality in those situations where it harms humanity.
