The debate concerning law and morality philosophy essay

Experience, Human Nature

The debate concerning law and morality is often based on a proposed connection between the two, in that a law is described as embodying the majority’s notions of what is right and wrong. Although it is plausible that a general moral notion of what is right can arguably be said to exist in society, whether it can be enforced in the private lives of individuals is another matter. Whether it can also settle sensitive debates about what is right and wrong in hard cases is also doubtful. Decisions of the court, such as Bowers v Hardwick have claimed it to be in the interests of public policy to prevent harmful activities between even consenting adults. But is this an unnecessary (and unfair) imposition of what the majority considers to be ‘ right’ on private life? In other words, should the rules which govern society also be applied to govern people’s private lives, especially when the moral debate continues?

The response depends on the distinction which must be made between the paternalistic protection from legal harm and whether this should be able to impose on the private lives of individuals. JS Mill emphasised the liberal perspective with the harm principle, a view that has been supported by Hart. Accordingly, it is dangerous to impose opinions on others as ethical rules of conduct and the only justification for legal or moral intervention is to prevent harm to others. However, Stephen has criticised the Harm Principle as in the modern society no act is truly private and paternalistic legal interventions such as road safety are justified on this basis. Therefore, the legal function of the harm principle should not extend to the private sphere; the only element which brings this into play is its becoming public by causing harm to others.

Despite the criticism's of Mills theory it has received judicial support from Lord Mustills judgement in the case of R v Brown which involved the sexual act of sadism. Despite the appellants being convicted, Lord Mustill distinguished moral and legal standards and argued ' that the state should interfere... no more than is necessary to ensure a proper balance between private and community interest.'

Is Law a Moral Enterprise?

It is often claimed that the differing views between the naturalist and the positivist as to the basis of law often seeks to severely limit the extent to which the law can be said to be based on morality. Neither side completely disconnects law and morality; rather the distinction is between observing what law ought to be and what it is. Thus according to Legal Positivists the law does not have to include tacitly if not explicitly, a reference to morality or justice. ' The law...is not ideal but something which actually exists... it is not that which ought to be, but that which is'. This is what is referred to as expository jurisprudence (what the law is and how it works) and censorial jurisprudence (what the law ought to be) by Bentham and Austin.

Similarly, both seek to examine and justify the authority of law, and claim that an unjust law does not carry with it an obligation to be obeyed. The debate on what constitutes as legal validity was taken up between Hart and Fuller. As a legal positivist, While Hart claims that law can be valid but morally repugnant ' the existence of law is one thing, its merit or demerit is another', this point is not one of moral scepticism, but the idea of expository and censorial jurisprudence, and thus a law can be valid but morally

repugnant, Harts view is that to confront problems of evil laws we should say ‘ this is law; but it is too iniquitous to be applied or obeyed.’ The Nazi case of a woman informing on her husband who was sent to the Russian front illustrates this point, where Hart held that evil law is still law and that the moral duty to obey the law is a moral duty to disobey it. Fuller claims that morally repugnant law is not law and should not therefore be followed nor should judges apply it. Therefore, Fuller rejects Harts idea that applying retrospective law is unjust in the Nazi case, and agrees with the judge’s decision and argues that since these laws were not passed via any law procedural principle, it lacks internal morality. Essentially Hart and Fuller are claiming the same thing. Yet their proposed basis of morality as a form of ‘ checkpoint’ against which the law is to be assessed differs somewhat.

Devlin’s argument that the law is a necessary enforcing of morals in order to preserve public order has sparked much debate, particularly with Hart. Devlin’s social cohesion thesis consisted of four key elements; the cornerstone was that ‘ the law has a duty to enforce certain moral standards’. The first element is that society should be based on shared ideas on politics, morals and ethics, and without this, society cannot function; the second element is that since society is based on shared ideas the law should be used to preserve morality just as it is used to safeguard anything else essential to its existence; thirdly, moral judgement on society should be based on the ‘ man in the jury box’ i. e. a unanimous decision, which would lay down principles rather than making law. The fourth element to the social cohesion theory is that the law should tolerate that which is consistent with

society, which will vary from generation to generation. In the case of Shaw v DPP, the ladies directory case, Lord Hodson stated ‘ these eccentricities add nothing to the substance of the charge of conspiracy to corrupt public morals.[removed quote]

The most extreme notion of morality resides particularly in the early naturalists, who believe in the existence of universal moral rules which give posited law its validity, and which exist independently of our interpretations and opinions of it (Rousseau, Aristotle, Aquinas). While most positivists claim that moral ideology and law should be kept separate at least in the courtroom (Kennedy), this does not mean that they do not acknowledge the existence of morality within the law. Even Austin’s command theory acknowledges the existence of some form of natural rules, although he dismisses them as vague and deceptive. Hart, similarly recognises the core of truth in natural law doctrines, which causes the law to be something more than simply factual assessments and interpretations. But it is one thing to claim the existence of natural law and another to claim a connection between law and morality, and this is his reply to Devlin’s contention. Hart states that while society may possess some form of shared morality, this is not to state that its existence depends on this – there is simply no evidence of this. Honore similarly challenges such a connection, and turns to the existence of evil and corrupt laws as an example of this. Therefore, despite the fact that the law symbolises a suitable way to tell us what to do (just as morality did before the law), questions of right or wrong can indeed be decided separately from questions of what is law.

What is meant by morality and law?

John Austin defined law as a command issued from a sovereign power to an inferior and enforced by coercion. Morals are beliefs and values which are shared by society, or a section of society; they tell those who share them what is right and wrong. Hart claimed that the law is distinguished from morality by the state apparatus/institutions for making, changing and enforcing legal standards and by its (law's) claim to priority in the hierarchy of social rules. The authority of law has a special authority in that it provides us with exclusive reasons for acting, in the sense that we don't weight up rights as the law provides the answer – i. e. law supplementing moral duties. However, According to Honore the meanings of ' right, duty, obligation' are the same in both legal and moral contexts. The distinction is between formally recognised rights and duties and their informal, non-institutional equivalents.

Dworkin goes into further analysis into the meaning of Morality and distinguishes between Morals and Ethics. Accordingly, ethics is the science and study of morals, where as morals dictate on how we should act.

However, Natural theorists such as Finnis have argued that, law by its very nature must have distinctive moral aims such as an aim to serve the common good or to justify coercion.

Let it thus be presumed that a connection between law and morality can be found, but from where does this conception of morality derive? Raz claims that society contains certain criteria which assign rules the force of law and

thus enables them to be classed as law. Are these same criteria classable as morals, or moral codes? Let us consider a law which makes it illegal (or wrong) to steal, which is punishable by imprisonment. The elements which make this law a law per se are its passing by Parliament; its enforcement by punishment, and the authority of the bodies which have enacted it (Austin). John Austin, in Province of Jurisprudence, defined it as a command issued from a sovereign power to an inferior and enforced by coercion. But the core meaning of this law, the reasoning behind its content, is that it is morally wrong to take another's property which does not belong to us. Which of these two elements give the rule its basis? The answer could be seen as both: its legal basis is the characteristics which it possesses as a law and its moral basis is the moral principle that it is wrong to steal. Does this mean that the moral basis of the law is that of the majority? Indeed, it could be observed that the legislators and the judges all have a certain set of standards in mind when creating and interpreting the law; a set of standards perceived to be acceptable and non-acceptable by the members of a society. Dworkin takes pains to explain how judges take moral considerations into account when deciding hard cases, but that such moral considerations are part of the network of law, and fall into line with the general moral outlook of the law and thus society.

Morality in the private sphere

Supposing that the connection between law and morality is based on society's notion of right and wrong – can this necessarily be used to dictate to an individual what he must do in his private life? Positivists indeed claim

that moral debate cannot be settled, because disagreement will always exist on morality. Conceptions of what is right and wrong cannot exist on a universal level because such values can only be expressed in the form of different beliefs and attitudes towards values. If I pull a cat's tail, and another is disgusted by this, the notion that it is wrong to pull a cat's tail is based on the onlooker's view of this, not in the actual act of pulling the cat's tail. This does not making pulling a cat's tail wrong in itself. Thus, it cannot be said that even the majority's view that, for example, it is wrong to harm oneself even in the privacy of one's home makes the act in itself wrong. Even the soft positivist theory of Hart is steadfastly decided that referring to moral values when deciding on law does not necessarily ensure that the law will be good or just. This is evident in the dicta of judges in sensitive legal cases, the existence of which fuel the contention that there sometimes cannot be a simply right or wrong answer (for example Re: A (Conjoined Twins), Laskey v UK). But does this mean that judges should interpret the majority's moral outlook to the private sphere? Whether such moral concepts should be enforced in our private lives is the cause of heated debate. Why should I have to comply with the moral standards of the majority in my private life, if what I do causes others no actual harm?

Decisions such as that of Lawrence v Texas increasingly recognise the importance of the private sphere of individuals of a community. The realms of personal liberty are becoming ever-expanded in light of the freedom of private life provided for in various human rights legislation. Such advancements in the law indeed convey the growing conflict between

society’s outlook and individual behaviour. The very debate surrounding moral aspects of life proves the lack of consensus, and it seems to be the case that the courts are increasingly expanding the private sphere, and thus delineating the paternalistic approach to harm. The law is increasingly appreciating that what I choose to do in my private life, unless it seriously endangers the moral network of society, should be free from legal judgement. This does not mean that I am free from the moral judgement of others, but this itself is an embodiment of the freedom to express dislike with another’s (perceived immoral) activities. Indeed, Dworkin makes a stark contrast between personal morality and social morality, and respect for the former requires that the latter embark upon the moral ideal of respect for individual autonomy. If we view it in this respect, the law is not necessarily required to regulate individuals, for morality provides the necessary ‘ unwritten’ rules. Morality tells us that A may do as he pleases in his private life if it harms no others, but that also B may be morally abhorred by it if he harms no others in expressing his abhorrence.

The notion of a societal majoritarian moral rule in order to protect the private autonomy of individuals is arguably a paradox. If the very existence of individual autonomy is based on the majority’s moral acceptance of it, then is its very basis and purported disparity undermined? Not necessarily; rather it appears to strike a suitable balance between individual morality and societal morality, though the purported disconnection between the two as claimed by Dworkin is made doubtful by such a conclusion. Whatever the decision may be, it is apparent that where individual autonomy is concerned,

the very lack of consensus on difficult matters of moral reasoning provides ample evidence for the private sphere to remain free of majority’s notion of morality. In such situations, it seems that morality itself is enough to govern such relationships, but morality of the individuals concerned rather than assumptions of what society as a whole considers to be moral.