

The issue of
legalising
homosexuality and
prostitution
philosophy essay



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The issue of legalising of homosexuality and prostitution was investigated by the Wolfenden Committee headed by Sir John Wolfenden. The Report claimed that it is not the duty of the law to concern itself with immorality.

This gave rise to a debate on morality and social norms. Lord Devlin and Professor Hart argued extensively attempting to define morality. Is society able to enforce its own morality or ought morality to be enforced by law?

Devlin appealed to the idea of society's "moral fabric." He argued that the criminal law must respect and reinforce the moral norms of society in order to keep social order from unravelling.

"Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government... the suppression of vice is as much the law's business as the suppression of subversive activities."

Devlin argued that immorality is what every right-minded person considered immoral. Devlin argued that there could be no theoretical limit to the reach of law; no acts are "none of the law's business". Breaches of the shared morality do not cause harm to other individuals in the way that murder and assault do, but none the less they harm society by undermining its moral structure. Even acts like homosexuality between consenting adults in private can threaten the existence of society, and therefore society has the right to suppress them. Devlin believed that "the limits of tolerance" are reached

when the feelings of the ordinary person towards a particular form of conduct reaches a certain intensity of “ intolerance, indignation and disgust”. If, for example, it is the genuine feeling of society that homosexuality is “ a vice so abominable that its mere presence is an offence”, then society may eradicate it.

Moral laws or enforcing morality is much wider than one thinks, if we base it on the survival of our society then what is classed a society? Individualism of individuals come together with common interest and form communities but not every community is common to each other. Although they might share common moral issues, there are still some immoral practises within their communities by which other standards might be considered moral. Professor Hart argued with Lord Devlin over issues of enforcing morality. Lord Devlin in his book, “ The Enforcement of Morals” in one of his essays quotes; “ it argues from the majority’s rights to follow its own convictions in defending its social environment from change it opposes”. Does this mean that the majority rules even if they are wrong? A society made up of like minded individuals being the majority, there, “ must be toleration of the maximum individual freedom that is consistent with the integrity of society”. Is Lord Devlin saying that society consists of the majority of like minded individuals and that the majority enforces their morals on every other individual that would not otherwise take part in the thinking of the majority Rule, forcing individuals to think in the same way as the majority of society. Going back to the question of whom and what is a society? Is Lord Devlin referring to the powers that have been given to certain individuals that represent society (Not necessary the majority) to enforce morality?

Taking South Africa for example during the Apartheid era were a minority class enforced immorality on its majority. Lord Devlin believed that society is entitled to preserve itself without vouching for the morality that holds it together. Professor H. L. A. Hart responded to Lord Devlin, “ If one holds anything like a conventional notion of a society, he said, it is absurd to suggest that every practice the society views as profoundly immoral and disgusting threaten its survival”, Professor Hart went on to say “ that this so silly as arguing that society’s existence is threatened by the death of one of its members or the birth of another”. Professor Hart goes on to say that Lord Devlin’s argument fails whether a conventional or an artificial sense of “ society” is taken. Lord Devlin in response to Professor Hart comments, “ I do not assert that any deviation from a society’s shared morality threatens its existence any more than I assert that any subversive activity threatens its existence. I assert that they are both activities which are capable in their nature of threatening the existence of society so that neither can be put beyond the law.”

The two main issues that are argued between Lord Devlin and Professor Hart is firstly the freedom of choice and secondly the privacy of morality. Lord Devlin’s is of the opinion that you can not have Law without morality “... destroys freedom of conscience and is the paved road to tyranny”. Devlin’s argument centres on what he regards as an important function of the criminal law in enforcing the generally shared moral values of a society which are associated with its important institutions. The case for the law’s enforcement of society’s shared morality is based on several different considerations, most of which are embodied in two doctrines which Hart has

labelled the “ disintegration thesis” and the “ conservative thesis” respectively.

According to the disintegration thesis, a shared morality is what holds a society together, and hence the enforcement of this morality is necessary to prevent society from collapsing, or at least weakening. On the other hand, the conservative thesis maintains that “ the majority have a right to follow their moral convictions that their moral environment is a thing of value to be defended from change”. Lord Devlin in his works refers to man reason or reasoning. Is man able to be rational? This I find is important and integral makeup for human beings to be moral. Unfortunately both Devlin and Hart in their arguments are attempting to establish or determine what the “ glue” is that holds society together? Where Professor Hart is being more liberal and believing in the very nature of man, Devlin being more conservative saying that man is not capable of being rational.

Drinking, drug-taking, homosexuality, abortion, suicide and fornication may cause serious social problems if they are indiscriminately practised. But so also would birth control, or the very practice of having very large families, or even, as Devlin himself acknowledges, celibacy. It is therefore not breaches of the shared morality that certain activities can become harmful to society, and hence their being harmful does not in any way support Devlin’s disintegration thesis.

Devlin writes of harm to society as opposed to harm to individuals, On this account “ harm to individuals” is constituted by injury to specific individuals such as is caused by acts of homicide, assault, and robbery. On the other

hand, “ public harm” consists of the “ impairment of institutional practices and regulatory systems that are in the public interest.”

Devlin’s disintegration thesis, with its notion of harm to society, is really an application of the public harm principle that coercion is necessary to prevent public harm. If this is the case, then there is no disagreement of principle between Devlin and Mill, for Mill’s principle of harm, embraces both private and public harm. If Devlin’s claims are correct, then even on Mill’s liberty principle there is a case for the legal enforcement of the shared morality.

Devlin’s disintegration thesis, the harm which justifies legal intervention is not identical with the mere feelings of “ intolerance, indignation and disgust” which arise when the majority in a society learn that their moral values have been breached. However, when one moves from his disintegration to his conservative thesis, the notion of public harm is either dropped, or else it is transformed in such a manner as to be indistinguishable from the mere feelings of intolerance, indignation, and disgust in the majority. In either case the conservative thesis is incompatible with Mill’s liberty principle.

Hart warned against the dangers of “ populism”. Why should the conventional morality of a few members of the population be justification for preventing people doing what they want?

This is based on the theory that most people’s views are coloured by superstition and prejudice.

Hart reiterated Mill’s “ harm principle”, Hart pointed out that societies survive changes in basic moral views. It is absurd to suppose that when such a change occurs, to say one society has disintegrated and been succeeded
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by another. Both Hart and Devlin raise important issues. Devlin's view is practical and focused on the majority rule. Harts is more human and individual. Dworkin suggests that we should abandon the Hart-Devlin debate and concentrate of Liberties. If a behaviour is a Basic Liberty like sex, this should never be taken away, even if someone has a different way of 'doing' sex e. g. R v Brown (1993) HL, general liberties could be restricted if they cause harm. But, it is not clear how you tell the difference between a basic and a general liberty?

Thomas Hobbes explains that morality is determined by reason and that reason has as its goal self-preservation seems to lead to the conclusion that morality also has as its goal self-preservation. But it is not the self-preservation of an individual person that is the goal of morality, but of people as citizens of a state. That is, moral virtues are those habits of persons that make it rational for all other people to praise them. These habits are not those that merely lead to an individual's own preservation, but to the preservation of all; i. e., to peace and a stable society. Thus, " Good dispositions are those that are suitable for entering into civil society; and good manners (that is, moral virtues) are those whereby what was entered upon can be best preserved." In the state of nature, people have no education or training, so there is " continual fear, and danger of violent death, and the life of man, [is] solitary, poor, nasty, brutish, and short." But real people have been brought up in families; they are, at least to some degree, civilized persons, and how they will behave depends on how they are brought up. Hobbes does not say that society is a collection of misfits and that this is why we have all the trouble that we do – a position congenial to

the psychological egoist. But he does acknowledge that “ many also (perhaps most men) either through defect of mind, or want of education, remain unfit during the whole course of their lives; yet have they, infants as well as those of riper years, a human nature; wherefore man is made fit for society not by nature, but by education.” Education and training may change people so that they act out of genuine moral motives. That is why it is one of the most important functions of the sovereign to provide for the proper training and education of the citizens. I believe that this is by far more relevant than attempting to impose laws on society to control individuals or communities.

Law as Morality is just one of the many laws that differentiate between state to state but this one also differentiates from person to person. Law as morality is a law that comes from what you think is morally correct. Morality is the choices we make, and the actions we take. Moral people behave according to personal and public ethics. Immoral people deviate from established behavior. Since the purpose of laws is to condone one type of behavior and condemn another, the making of laws impacts our actions. In a situation such as a set of twins whom are connected at birth and one is going to have to die to save the other. The only thing is, is that one of the twins is healthier than the other, so which one do you kill? Law and morality play a large role here, mainly because there is a legal issue and a moral issue associates with the predicament. The reason law has a part is that after the decision is made; it will be examined legally and must be accountable for the consequences. Morality has its place because many will find it morally wrong to take one’s life despite any justification. Morality is based off of right and

wrong and good and evil and people have different opinion as to what is right and wrong due to their different upbringings and socialisation.

Summary

If, like Hobbes, we regard morality as applying primarily to those manners or habits that lead to peace, then his view seems satisfactory. It yields, as he notes, all of the moral virtues that are ordinarily considered such, and further, it allows one to distinguish courage, prudence, and temperance from the moral virtues. Perhaps most important, it provides, in almost self-evident fashion, the justification of morality. For what is it to justify morality but to show that reason favours it? Reason, seeking self-preservation, must favour morality, which seeks peace and a stable society. For reason knows that peace and a stable society are essential for lasting preservation. This simple and elegant justification of morality does not reduce morality to prudence; rather it is an attempt, in a great philosophical tradition stemming from Plato, to reconcile reason or rational self-interest and morality.

To summarize Hobbes's system: people, insofar as they are rational, want to live out their natural lives in peace and security. To do this, they must come together into cities or states of sufficient size to deter attack by any group. But when people come together in such a large group there will always be some that cannot be trusted, and thus it is necessary to set up a government with the power to make and enforce laws. This government, which gets both its right to govern and its power to do so from the consent of the governed, has as its primary duty the people's safety. As long as the government provides this safety the citizens are obliged to obey the laws of the state in all things. Thus, the rationality of seeking lasting preservation requires <https://assignbuster.com/the-issue-of-legalising-homosexuality-and-prostitution-philosophy-essay/>

seeking peace; this in turn requires setting up a state with sufficient power to keep the peace. Anything that threatens the stability of the state is to be avoided.

Margaret Thatcher once declared, “ There’s no such thing as society, there are individual men and women and there are families.”

Civility is not just good manners; it is part of democracy and respecting people that are different from ourselves with whom we differ maybe even very sharply. But maintaining a balance in which we can have respect for the rights of other people who have different views.