

LAW AND MORALITY

Law and morality, there was no distinction between both of these in ancient times, we can say morality was law or law was morality.

But as time progressed, a difference was created between the meaning of both the terms.

In India - Mimansa (an examination of Vedic texts) made a distinction between obligatory and recommendatory rules. Later the distinction was established firmly by the time commentaries were written.

In the World - Greeks believed in the theory of natural rights, which was a foundation of morality for law. Romans believed in natural law, and used certain moral principles as basis of law. In Middle ages the Christian morals were considered as the basis of law.

Distinction of Morals and Laws.

This inter relationship of law and morality continued till 18th century, in 19th century John Austin maintained that law has nothing to do with morals and he defined law as the command of the sovereign.

He stated that law only is the subject matter of Jurisprudence. Austin was supported by many Jurists on this like Kelsen and Bentham.

The analytical school believed that all considerations including morals should be separated from the study of law.

But this school didn't deny the existence of morality. It just didn't agree that morals and law are the same thing. Austin differentiates them as 'positive law' and 'positive morality'

Bentham said *"Law has just the same centre as morals but it has by no means the same circumference."*

Sociological school though studies the various influences over laws, and that includes the influence of morals also, but still a distinction is made between law and morals.

Intention and motive

Legal rules require external conduct and are indifferent to the motives, intention of the person. Morals do not require external conduct and only require a good intention, motive or good will.

You can be free from moral blame if you didn't have the intention to commit an immoral act. Under legal rules a person might be punished even if he broke the rule without any intention and even after taking due care (strict liability, absolute liability)

Hart-Fuller Debate (Positivist vs Naturalist)

Hart - Hart unlike his predecessors did tilt towards morality as being not an integral part of law but at the same time he believed that morality had an influence on law and he called this **'the minimum content of natural law'**

Famous work of Hart

The concept of law

Law liberty and morality

Fuller - According to Fuller, certain moral standards, which he calls **'principles of legality'** are built into the very concept of law, so that nothing counts as genuine law if it fails to meet these standards. This in words of Fuller is called **'The internal morality of law'**

Famous work of Fuller

The Morality of Law

According to Fuller, all purported legal rules must meet eight minimal conditions in order to count as genuine laws.

- (1) sufficiently general,
- (2) publicly promulgated,
- (3) prospective (i.e., applicable only to future behaviour, not past),
- (4) at least minimally clear and intelligible,
- (5) free of contradictions,
- (6) relatively constant, so that they don't continuously change from day to day,
- (7) possible to obey, and
- (8) administered in a way that does not wildly diverge from their obvious or apparent meaning.

Hart criticises Fuller's work, saying that these principles are merely ones of means-ends efficiency; it is inappropriate, he says, to call them a morality.

Hart-Devlin Debate

After the Second World War there was a growth of public concern for decline in sexual morality.

The British government responded by setting up a Commission to examine offences connected with homosexuality and prostitution. The Wolfenden Report 1957 polarised juristic opinion because it recommended that homosexual liaisons between consenting adults be removed from the domain of criminal law. The Report noted that there must remain a realm of private morality and immorality which is not the law's business. Devlin opposed the philosophy of the Report.

Devlin's Arguments

According to Devlin there is a public morality reflecting shared opinions. If the bonds of common thought are too far relaxed, society will suffer. There is, therefore, a right to judge breaches of morality. Society may take steps to protect itself from this disintegration. Devlin urges that the judgment of 'the right-minded man' be taken into account. There should be toleration only up to that individual freedom that is consistent with society's integrity.

Hart's Response

Hart said that basis of Devlin's principles are unsound. There is no seamless web of morality which will be torn beyond repair by individual sexual deviancy. Single breaches of morality do not necessarily affect the integrity of society in its entirety. There is no proof that deviation from a moral code will lead to its utter destruction with harmful effects on society in general.

Hart warns legislators of the dangers of using general morality of a 'right-minded man' as a criterion for legislative. There is a special risk in a democracy, argues Hart, that the majority may dictate how all should live.

We can observe two things from Hart-Devlin debate

1. Hart had a very progressive approach towards homosexuality even in 1957.
2. Soon after the Wolfenden report homosexuality was removed from the category of criminal offence in Britain. But India took another 60 years to decriminalize voluntary homosexual acts. And the basis of it being a criminal act was a British made law.



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