THE RELEVANCE OF THE HART & FULLER DEBATE RELATING TO LAW AND MORALITY - A CRITICAL ANALYSIS

Sonali Banerjee¹

Abstract

The Hart-Fuller debate is perhaps one of the most interesting academic debates of all times that took place in jurisprudence. It demonstrates the divide that exists between the positivist and the natural philosophy of law regarding the role of morality in law. While, Hart argued that law and morality are separate from each other and they can be termed as mutually exclusive. Fuller was of the view that there exists a deep connection between law and morality and the authority of law is derived from its consistency with morality. The researcher in this paper attempts to study the relationship that exists between law and morality with reference to Hart-Fuller debate. The Researcher has followed doctrinal methodology for undertaking this research, and has collected the materials from various books, articles and websites.

¹ LLM, 1st year, ILS Law College, Pune
1. **Introduction - About law and morality**

Law and morality can be understood as concepts, but any attempt made to define them becomes difficult. Laws are concerned with legal rights and duties which are protected and enforced by the State. They are backed by sanction, and therefore if one disobeys the laws of the State, they are liable to be punished. Morality categorizes human behavior as good or bad. The canons of morality however are based on moral duties and obligations. If one does not adhere to the standards of morality that is prescribed, he cannot be held legally liable. However, morality involves incentives of sorts. When we do the right thing, we experience virtue and enjoy praise and when we do the wrong thing, we suffer guilt and disapprobation. Both, law and morality channel human behavior.²

While morality is concerned with regulating both the internal and external conduct of men, law is concerned only with regulating the external affairs of men. Time and again, we have been perturbed by the connection that exists between law and morality. While it can be said that, law brings within itself some reflection of public morality, it is also true that certain things may not be illegal according to law, but maybe unacceptable to morality. Therefore, we are often intrigued with questions about whether or not morality should be enforced by law or whether laws would still be binding if they do not reflect moral principles or whether it is morally justified disobeying bad laws?

2. **Prof Hart’s view on Law and Morality**

Prof HLA Hart was a legal positivist and a critical moral philosopher. As a legal positivist, he states that it is not necessary that laws have to necessarily satisfy certain demands of morality. While acknowledging the close relationship that exists between law and morality, he does not believe them to be inter-dependant on each other. He states that the existence of law cannot be judged by its merits or demerits. A law happens to exist, irrespective of our likes or dislikes.

Whether the law confirms to a set of minimum moral standards is not a pre-requisite for existence of a legal system. It is not essential that a legal system must exhibit some conformity with morality. Laws simply do not cease to exist on the ground of moral criticisms.

Unlike the other legal positivists, Hart does not deny that the development of law has been profoundly influenced by morality. Hart acknowledges that law and morals are bound to intersect at some point. Therefore, it becomes necessary to distinguish between what law is and what law ought to be. According to Hart, legal interpreters should display the truthfulness or veracity about law, by concentrating on what it says rather than focusing on the aspect on what one wishes it to be.³

Hart says that the essence of law consists of two different kinds of rules, i.e. the primary and secondary rules. Primary rules are the duty imposing rules that have legal sanction which imposes certain duties on the citizens. Secondary rules are the power-conferring rules that prescribe the manner in which the primary rules are to be recognized, changed and adjudicated. Secondary rules can be said to be rules about primary rules. Together the primary & secondary rules form the heart of the legal system. And, the principle of justice or the rule of recognition is the ultimate rule that binds the legal system as a coherent whole.

Hart acknowledges the problem that might occur due to lack of precision in the words used in language of a statute, which he refers to as the core of the law. Not all cases might exactly fall within the core of the law. Sometimes standard instances of the words may not be sufficient to give proper effect to the law. Prof Hart calls these as the problems of the penumbra. It then becomes necessary that the meaning of the words in a statute is decided first while applying legal rules to the facts of the case. Hart believes that the problems of the penumbra can be easily solved by way of judicial interpretation. In solving the problems of the penumbra, Hart talks about the necessary intersection between law and morals. The criterion which at times, makes a decision sound in such cases is when a moral judgment is made about what the law ought to be, and in such circumstances, morals can be of an influential factor in deciding cases in penumbra.⁴


3. **Professor Fuller’s view on law and morality**

Professor Fuller defines law as a particular way of achieving social order by guiding human behavior according to rules. It is the enterprise of subjecting human conduct to the governance of rules. According to Fuller, our legal procedures are built out of norms of justice, which have a moral aspect. The procedures which are embodied in a legal system are morally important in determining whether a set of rules count as a legal system. He believes that for a law to be called a law in true sense, it must pass a moral functional test. If a rule or a set of rules fails to conform to this function, it does not count as law.  

While explaining the concept of morality, Fuller categorizes the term morality into two different set of components. One set comprises of “morality of aspiration” and “morality of duty”. Morality of aspiration connotes a desired norm of human conduct which would seek to promote his best interest. Morality of duty describes the standards which are followed by human beings at given time and place, so as to ensure smooth functioning of the society.

The other set of moralities consist of what Fuller calls as the “external morality of law” and “internal morality of law”. Internal morality of law is concerned with the procedure involved in making law. Internal morality of law can be said to be a morality of aspiration rather a morality of duty. And, external morality of law denotes the substantive rules of law which are applied in decision making.

Fuller rejects the positivist approach to law. He urges the law makers to realize that there exist other ways and means to attain society’s end rather than relying only to law. He believes that if the law makers realize this, then they can make efficient use of law as an instrumentality to regulate our society. Fuller asserts that not all mandates which have the power to compel compliance can be rightfully treated as law.

Fuller prescribes eight standards, and says that for a principle to be acceptable as law, it must be measured in terms of these standards.

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6 Ibid
1. The principle must be expounded in a manner so that it can be generally applied.
2. Law must always be promulgated, i.e they must be communicated to the people to whom they are directed.
3. Newly formed principles of law, should always be applied in a prospective manner. Retrospective application of law should only be permitted on rare occasions depending upon exogenous circumstances.
4. There should be clarity in law.
5. Law should be free from contradictory mandates.
6. Laws should not impose on individuals impossible standards of action.
7. Abiding by previously announced norms, i.e stare decisis is desirable according to Fuller, as the individuals are spared of the changes that they are otherwise subjected to in case frequent alteration of laws.
8. According to Fuller, for a law to attain its objectives, it must satisfy the requirements of what he terms as “congruence”, which is the conformity with the prescribed norms and the actions of individuals.

According to Fuller, the lawmakers should consider each of the eight tests in determining whether a law is validly acceptable or not. Even though, Fuller is a natural law philosopher, unlike the other natural law philosophers, he does not believe that certain principles can be traced back to the commands of a supreme beings and so they are universally correct rules which govern human conduct. Fuller says that law is terrestrial in its origin and application. Law is made by man to suit the needs of mankind. Therefore, a law has to have a unity of purpose for regulating human behavior for attaining society’s objectives.7

Fuller questions whether substantive rules of law can be neutral, i.e devoid of any relationship to morality. And, answers it in negative. He states that substantive rules have to necessarily be moral for promoting objectives of mankind. (External morality) A law should be fluid enough to adjust to the dynamic nature of mankind. And, it is only possible if it takes into consideration the

nature of man. Law according to Fuller should be used to bring people together for fostering their best interest.

4. The Hart-Fuller debate surrounding law and morality

The Hart- Fuller debate demonstrates the opposing views of positivism and natural law, particularly in the context of Nazi laws. Gustav Radbruch, a Jew by birth, and a firm believer in the positivist doctrine, had changed his belief and became a staunch supporter of natural law theory, post seeing the atrocities perpetrated by Nazi regime on the Jews under the Nazi Laws, and encouraged everyone to discard the doctrine of laws and morals. This prompted Hart to initiate the discourse on law and morality. He delivered Holmes lecture at Harvard Law School in April 1957, titled “Positivism and the Separation of Law and Morals” which got published in the Harvard Law Review in 1958. The reply was given by Fuller in his article titled “Positivism and Fidelity to Law: A reply to Prof. Hart” which also got published in the Harvard Law Review in 1958. This marked the beginning of the famous debate that took place between them.8


The difference in ideologies resulted in this discourse between Hart and Fuller. While, positivism holds that to be a valid law, all that is required is that it should have been issued from a competent legislator after following the prescribed process, natural law theory holds that there exists certain ideal principles or values to which the law should correspond, if it is to be regarded as a genuine law.

The existing conflict between law and morals can be better understood by way of discussing a case famously known as the Grudge Informer case. The said case was discussed at length by both Prof Hart & Fuller. Facts of the case are such that the wife of a German had reported her husband to the Gestapo for criticizing Hitler’s conduct of war. The husband was tried and sentenced to death, but later on his sentence was converted to service as a soldier on the Russian front. The husband survived the war, and after the war instituted legal proceedings against the wife.  

The wife in her defense contended that she had reported her husband because her husband had committed an offence under a Nazi statute of 1934. The basic principle of the Nazi law was laid down by the Enabling Act of July 12, 1934 passed by German Reichstag, which had amended the German Constitution by permitting Hitler to issue decrees inconsistent with the Constitution. It declared the law and will of Hitler to mean one and the same thing.

The German Courts faced a serious dilemma. On one hand, there was a moral duty to obey law. On the other hand, there was a moral duty to do what people thought was right and decent. Then, there was also the need to restore respect for law and justice. They agreed that it was not possible to declare all the laws made by the Nazi regime and the actions of citizens in conformity with such laws to be illegal, as it would result in total destabilization of the society. However, they felt that some of the laws made by the Nazi regime were so repulsive to human morals, that there was a need for disapproving actions taken in conformity with such laws, so as to assure people that the new regime did not approve of such twisted laws. Accordingly, the Court held the wife to be liable for having acted in a contrary manner to sound conscience and sense of justice of all decent human beings, and stated that they did not consider such which were so repulsive in nature.

In light of the facts of the above case, Hart argued that the decision given by the Court was wrong, because no matter how hideous and monstrous the Nazi laws were, they were in accordance with the Enabling Act passed by the Reichstag, and were valid laws. It satisfied Hart’s rule of recognition. According to Hart, the Courts were left with only two options to

9 Ibid
preserve the integrity of the judicial decisions, either to let the wife go free because the statute protected her, or make a retrospective legislation repealing the statute under which she claimed protection, and declaring the acts of the perpetrators of such atrocities as criminal. Even though Hart did not personally favour the retrospective application of criminal statutes, he believed that Hitler’s regime could have been considered as an exceptional case for retrospective application of laws, if the Courts feared that Hitler’s accomplices would go free. Hart strongly criticized the Court’s decision to introduce the concept of morality and holding that the statute under which she claimed protection was no law at all.  

Fuller accepted the Court’s verdict because it creates respect for both law and morality, by making unlawful laws illicit, achieving fidelity to law. Fuller states that all Nazi laws were non-laws. He contended that the Nazi regime was so detrimental to morality, that there was nothing in the system that could qualify to be called a law. He stated that the Nazi laws lacked internal morality required in law making process, which gives laws respect and makes them obligatory to follow. Fuller believed that unless the Nazi laws were treated as non-laws, the perpetrators of atrocities under the Nazi regime would go unpunished.

Hart has been criticized on the ground that he himself becomes inconsistent when he concedes to a minimum content of natural law which includes human vulnerability, approximate equality, limited resources, limited altruism, and limited understanding and strength of will. Hart’s rule of recognition requires a minimum morality of law. Impartiality in application of a rule is a moral standard which is necessary in any legal system. Fuller believes that Hart is aware of the internal morality, only he calls it justice in the administration of laws.

In order to justify his arguments that morality is not always necessary or relevant when it comes to application of rule of law, Hart, presents us with a hypothetical illustration. Supposing a legal

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11 Supra note 2
A plain reading of the term vehicle would imply that auto-mobiles are prohibited from being brought in the park. However, in absence of any clear definition of the term vehicle, would bicycles, roller skates, toy automobiles, airplanes qualify to be vehicles? And, would the rule of prohibition be equally applicable on them? Legal rules have settled meaning, which Hart terms as hard core of standard instances. However, occasionally the judges have to interpret the words, where the established meanings of the statute do not serve the purpose or seem to be obsolete. The problem that arises outside the hard core of standard instances is referred to as the problems of the penumbra, by Hart. Problems of the penumbra can be solved by way of judicial interpretation. It requires some intersection between laws and morals, because the problems of laws and morals cannot be solved by logical deduction alone, and one has to take into consideration of what the rule is from what it law ought to be. Hart attempts to distinguish application of a rule at what Hart called the rule’s core from the hard cases at a rule’s edge, which he referred to as the Penumbra. According to Hart, people tend to confuse the litigation problems of the penumbra as the operation of law itself, which is the core. Hart emphasizes that interconnection between what the law is and what the law ought to be in the penumbra does not depict how the law actually functions at the core.¹²

Fuller challenged Hart’s idea of a language determined core of legal rules, by giving a counter illustration. Supposing a group of patriots wanted to climb a pedestal on a military truck as a war memorial. In such a circumstance, would the military truck be counted as a vehicle and rule of prohibition be applicable on it? Fuller contended that it was not possible to determine whether the truck qualified to be called a vehicle in context of this particular rule, without looking into the purpose behind the said rule. By sharing this illustration, Fuller wanted to say that it was not possible to determine if a rule applied to a given situation, without understanding the purpose that the rule was supposed to serve by referring to the objectives of entire provisions of law rather than seeking to find meaning of individual words. He identifies the problem as one of interpretation of words and not an issue of core and penumbra as claimed by Hart. Fuller

emphasizes that fidelity to law can be only achieved if the law is in consonance with morals at all stages, be it at the time of making of the law (core) or its application by the court (penumbra of law). People will comply with the law only if they are convinced that the law is based on strong moral foundations enacted for their common good.  

Fuller further criticizes Hart’s definition of law which insists that law and morality needs to be separated. Fuller contends that there cannot be a specific definition of law. Likewise, even morality cannot be defined precisely. Therefore, Fuller argues that because is no precise definition for law and morality, it is futile to argue that both of them are separate.  

5. Critical Analysis

I agree with Prof Fuller, when he criticizes the strict positivist approach, citing the atrocities that were committed during Nazi regime. Hart himself concedes to morality when he says that his rule of recognition must have minimum moral standards. Law and morals have many elements in common, because they both lay down desirable behavior expected from human beings. I believe that, if law has to be accepted by the people then it should conform to the behavior standard that people desire. These standards are decided largely by morals. We can find a great deal of similarity between what Fuller has written about procedural natural law and the writ of habeas corpus. Similarly, the approach taken the Supreme Court of the United States in reference to the procedural requirements of the due process clause is based on Fuller’s idea of law and morality.

Also, practically, it is not feasible to separate law from morals. The concept of morality keeps on changing, as society progresses. New legislations are brought about to accommodate those changes. For instance, the practice of Sati was considered to be an immoral practice, and

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14 Supra note 6

15 A writ requiring a person under arrest to be brought before a judge or a court, especially to secure the person’s release unless lawful grounds are shown for their detention

16 Brought about by the 14th Amendment to the US Constitution
accordingly legislation was passed which prohibited such practices.\textsuperscript{17} Similarly, the giving and taking of dowry was considered to be immoral, and according legislation was passed which prohibited such practices.\textsuperscript{18} Progressive judgments given by the judiciary, recognizing the principles of live in relationships\textsuperscript{19}, and consensual sex among adults among same sexes\textsuperscript{20}, show how the judiciary have interpreted law taking into account the changing social values in our society.

6. Conclusion

While Hart believed that there is no necessary relationship between a legal system and the ideas of morality. Fuller maintained that law and morality could not be divorced from each other. The two belonged to opposite schools of thought, and both of them defended their ideologies. However, they both did agree that an unjust and immoral legal system would not stable and long lived. Legal systems aim at achieving justice, which is grounded in morality. Legitimacy of a government is derived from morality. A vast majority of society will not confirm to law’s dictates if they don’t feel any sense of moral obligation. A system which lacks morality and justice will have to depend upon repression. And, when a repressive regime falls, its system falls with it.

\textsuperscript{17} The Commission of Sati (Prevention) Act, 1987
\textsuperscript{18} The Dowry Prohibition Act, 1961
\textsuperscript{19} D. Velusamy v D. Patchaiammal, 2010 (10) SCC 469
\textsuperscript{20} Naz Foundation v Government of NCT of Delhi, 2009 (160) DLT 27
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