

**Examine the relationship between law and morals and consider whether the law should support and protect moral values**

Law and morals have historically always been in conflict with each other. Before trying to define them as a relationship we must define them separately.

It is possible to describe law as the body of official rules and regulations, generally found in constitutions, legislation, judicial opinions, that are used to govern a society and to control the behaviour of its members. Therefore Law is a formal mechanism of social control and Legal systems are particular ways of establishing and maintaining social order. A moral is a principal of right or wrong behavior sanctioned by or resulting from one's conscience or one's ethical judgment. A Moral code is dynamic; it is constantly changing to reflect society's attitudes and current social circumstances. The term morality can be used either descriptively, to refer to a code of conduct put forward by a society or, some other group, such as a religion, or accepted by an individual for her own behavior. It can also be referred to as prescriptive or normative as it specifies what ought to be done and delineates acceptable and unacceptable behavior. Recent years have seen a vast and rapid change in almost every sphere in our life, thus changing morality or moral attitude over time. Such changes may be in light of new scientific and medical knowledge and also social development. Examples of this can be seen in attitudes towards abortion, it could be argued that abortion is now more accepted in society, but also medical advances have made this more easily accessible. Morals differ in different societies due to the vast cultural, ethical and socio-economic status differences in modern society in which we live in. As described by **Emile Durkheim** it is difficult to describe a set of values shared by all. An example of a moral code that could be agreed by all is that the killing of a human being is morally wrong. However in some instances a killing of another can be morally right an example of this could be seen in the **Terri Schiavo case**. The Terri Schiavo case was a seven-year long legal case that revolved around whether Terri Schiavo who was diagnosed as being in a persistent vegetative state for several years could be disconnected from life support. The local court's decision to disconnect Schiavo from life support was carried out on March 18, 2005, and Schiavo died at a Pinellas Park hospice on March 31.

The relationship between law and morality is not an easy one. The legal system accepts a certain amount of morality, because if law is not essentially moral there is no easy explanation of the obligation to obey. But the two are not the same: there are some legal rules that are not moral rules, and vice versa. Laws as mentioned before are made by some formal institutions such as parliament, whilst on the other hand morals evolve as a feeling within society and no formal creation exists. Laws can be instantly made yet can also be instantly cancelled. On the other hand Morals form slowly and change slowly with society's opinions and attitudes. There is usually a slow transitional period this can be shown in society's attitude towards pre-marital sex. Generally, a law either exists or it does not exist. Its existence can be established. Morals however are much vaguer in their definition. Even though society is generally in accordance that certain activities are immoral, such as murder or theft on many other issues society's opinions are divided an example of this is opinions on euthanasia or gay marriage. Breaching of a moral may lead to some form of social condemnation, but the state is not involved however a breach of the law leads to some form of punishment or remedy enforced by the state. Laws are rule to which society's attitudes are irrelevant. A law may still be set in place even when the vast majority disobey it, although often the law will eventually be changed in such circumstances e.g. poll tax. Morals are rules which reflect society's values and beliefs. Therefore those values and beliefs are vital for the existence of morals.

One of the major problems which arises when law attempts to take the above approach with regard to morality is the dynamic nature of any moral code. It will consistently change with time, to reflect a change in attitudes, and the law must attempt to stay abreast of the

situation. An example of this can be seen in *R v R*, which changed the law, so that rape within marriage became a crime. Previously, the law had seen this as impossible, since the wife was legally seen as being almost the property of the husband via the marriage agreement. Morally, this view had long been seen as outdated and wrong, yet the law was slow in adapting. This problem can further be seen in the area of embryology, where scientific advances have happened so swiftly that the law has trouble keeping pace with the new moral issues raised by in vitro fertilisation, cloning, stem cell research etc. In *R v Human Fertilisation and Embryology Authority ex parte Blood*, the Court of Appeal forced a change in the law, due to circumstances unforeseen at the time the relevant statute was passed, providing another example of disparagement between the law and contemporary moral views. Different groups have different attitudes, and as Jock Young pointed out, these attitudes are value judgements based on what an observer sees as being normal in society, and will, like all morals, change over time. The law often takes a long time to catch up with current social thinking and whilst morality is dynamic, the law can appear to take its time catching up. However it is not always the case that the law necessarily lags behind morality in this way. At times the law can bring about changes in the way we think about a subject. An example of this can be seen on drink driving laws in this country and also laws on fox hunting. A leading academic, Oliver-Crona argued that law creates morality rather than morality creating law. The law has an influence on us from childhood, where morality is shaped.

Law and morals are inextricably linked but there are differences. An example of this can be seen when we look at adultery. Adultery in the UK is not illegal but many would argue that it is immoral. Parking offences are also illegal, but few would argue that they are immoral. This is demonstrated by Salmonds model.

If the law is to enforce morals, then it is faced with the problem that what one person considers immoral, another might not, so which viewpoint should it sanction? This can be seen in the case of *Gillick v West Norfolk and Wisbech Area Health Authority*, where Mrs Gillick sought a declaration that what she saw as an immoral activity (making contraceptive advice and treatment available to girls under the age of consent) was, by the nature of its immorality, illegal. There was great moral conflict, as some saw this as immoral (as it would encourage underage sex) whilst others felt that it was moral (as underage sex would occur anyway, but the measures would prevent unwanted pregnancies). The question for the law was which moral viewpoint it would support. After a protracted battle, the House of Lords ruled 3-2 against Mrs Gillick, but stated that they acted due to what was legal under the relevant statutes, rather than because of moral arguments.

There are various theories on what the relationship between law and morals should be and how far the law upholds the moral values of society. The first theory to be looked at is that of natural law, espoused by *St Thomas Aquinas*, and more recently *Professor Lon Fuller*. This states that there is a higher law (reflected possibly by a moral code to which law must conform. Therefore we should disregard a law which is at odds with this natural code, unless doing so would lead to social unrest. The problem arises in establishing what this higher code is, although it would seem to be based on human rights. Aquinas saw it as coming from God, whilst Fuller in 'The Morality of Law' stated that a legal system would only conform to this higher order if it followed eight principles; Generality (using rules rather than random judgements), Promulgation (making the rules known), Non-retroactivity of rules, Clarity of rules, Consistency, Realism, Constancy, and Congruence. On the hand *Jeremy Bentham* denounced natural law as "non sense upon stilts". Another theory was first proposed by the lawyer, *Jeremy Bentham*, and later refined by *John Stuart Mill*. This theory, utilitarianism, proposed that the moral action was the one that produced good for the many, even if it was at the expense of the one (i.e. 'the greatest good for the greatest number'). Mill's refinement of the idea argues that whilst this idea is true, the individual should not have to follow

society's morals, and should be free to act as they wish, provided their acts do not harm others. Problems arise, however, in defining who these others are (do they include embryos for example) and what is defined as harm (does it have to be direct interference)? An extension of this idea can be seen in the 'victimless crimes' debated by **Edwin Schur** in *Crimes Without Victims*. He argues that criminal acts such as homosexuality (illegal when he was writing), abortion, and drug abuse do not harm innocents, only those who partake of their own free will. Since prohibition only pushes such activities underground, they should be decriminalised and left alone. A major criticism is, however, that not only can the nature of harm and others be questioned (as with utilitarianism) but it is difficult to argue that someone with a powerful drug addiction, for example, is acting of their own free will.

The debate over the relationship of law and morality was brought to the fore in the famous Hart/Devlin debate, which followed the publication of the **Wolfenden report** in 1957. The committee behind the report contained **Lord Devlin**, a prominent judge, and the academic **Professor Hart**. The report recommended the legalisation of prostitution and homosexuality on the particularly utilitarian basis that the law 'should not intervene in the private lives of citizens or seek to enforce any particular pattern of behaviour further than necessary' to protect others.

Lord Devlin recognised that morality is essential to society's existence. Thus limiting liberty in order to protect the fabric of society is justified. He sees morality as 'the cement of society'. Devlin argues that there should be some kind of basic common morality, favouring a less liberal approach than Hart. He believed in an 'objective morality' society should tolerate what the reasonable man would tolerate, and where conduct is so immoral that the reasonable man would feel disgust, society would ban that activity. Laws should therefore be concerned with the minimum standards, not the maximum standards and this can be shown in the case of **Shaw v DPP**, this is where the defendant published a 'ladies directory' which was a list of prostitutes with photos, some of prostitutes and information on the type of sexual behaviour they were prepared to participate. The defendant was convicted of conspiring to corrupt public morals. Also in **Brown & Others** a group of men engaged in various homosexual sadomasochistic practises in private. They used genital torture and inflicted injuries, willingly and enthusiastically participating in the commission of acts of violence against each other for the sexual pleasure it engendered in the giving and receiving of pain. House of lords ruled their behaviour was in breach of the criminal law of assault and couldn't claim defence of consent to excuse their acts. Even so, Devlin's theory has been criticised. The first critic is in relation to the argument that 'morality is the cement of society'. This statement can be seen as assumed and unqualified. He has not proven that every act of immorality threatens the survival of , there is no evidence to support this. Secondly, the 'objective morality' is also difficult to ascertain. Historically, it can be seen that the morality of the masses may not be sound e.g Nazism and apartheid. Thirdly the development of society may be held back by laws that are protecting a particular moral rule.

On the other hand Hart developed Mill's harm to others principle as to include physical harm to oneself as well as others as a ground for legal intervention. The law may intervene not because the conduct is wrong, but because it is harmful. Hart acknowledged the problem of defining harm and stated that it did not include moral harm to oneself. He focuses on the individual, while Devlin focuses on society. As well as devlin being criticised Hart has also been criticised. The argument that the law is entitled to show a 'paternalistic' interest and decide for others what is in their best interests could be legitimately extended to showing a 'paternalistic' interest in the morals of society. Also the issue of 'harm' arises, it is not clearly defined in Hart, yet the involvement of the law depends on it.

In conclusion then, we can see that there are various theories on how law and morality should relate to each other. Whether or not the law should uphold the moral values of society

is still debated, and is made more difficult as, in a pluralist society, it is difficult to know what moral values should be supported, or should the issue be left alone to preserve individual liberty? The current approach by the legal system seems to be that a common morality, based on traditional, 'right-minded' values should be maintained by the law, as espoused by Devlin. This may be due to a backlash against the liberalising values of the Wolfenden report. Cases such as *Shaw v DPP* and *Knulier* made use of the offence of conspiracy to corrupt public morals (which had not previously been used since the nineteenth century) and signalled that the law would attempt to uphold society's 'moral values' according to Devlin's doctrine. This approach has continued, as the more recent case of *R v Brown* shows. The defendants had willingly consented to various sado-masochistic practices, and none of them had complained to the police. Nevertheless, they were prosecuted, and their convictions were upheld by both the House of Lords and the European Court of Human Rights, based on public policy to defend the morality of society. The law is therefore seen to attempt to uphold what it considers to be public morality, even if some may dispute the correctness of that moral code.