

Law and morals

There have been many different views expressed by theorists regarding the relationship between law and morals, and these views have influenced many legal reforms. It is useful to begin with an explanation of the characteristics of, and distinctions between, legal and moral rules, before proceeding to explore areas of coincidence and areas of divergence.

Law was described by Sir John Salmond as 'the body of principles recognised and applied by the state in the administration of justice'. Breach of legal rules will result in state sanctions and procedures. In criminal law there are sanctions such as imprisonment. In civil law the wrongdoer is usually ordered to compensate the victim. Other characteristics of legal rules are that they take effect at a precise time and require compulsory compliance by all members of society. An example is the Offences Against the Person Act, which has applied to everyone since 1861.

Society's code of morality is defined by Phil Harris as a set of beliefs, values, principles and standards of behaviour. Unlike legal rules, compliance with moral rules is voluntary and enforcement is informal, usually through social or domestic pressure. Moral rules develop usually over long periods of time, as conduct becomes increasingly acceptable or unacceptable. In a pluralistic society, however, such as that in the UK, the moral duties of individuals vary. For example, while some individuals regard abortion or homosexuality as immoral, others do not.

The relationship between legal and moral rules can be described as two intersecting circles. The intersection represents the coincidence of law and morals, and the areas outside the intersection represent areas of divergence.

Long-established rules, for example those prohibiting murder or theft, can be traced back to a moral source, this being the Ten Commandments. However, there are many ways in which legal and moral rules may come to coincide.

Judicial reform of the law may be influenced by public morality. In the criminal law, the House of Lords decision in *R v R* (1991) was influenced by the moral rule that a husband should not force his wife to have sexual intercourse. In contract law, the equitable remedy of promissory estoppel, developed by Lord Denning in *Central London Property v High Trees House* (1965), was influenced by the moral rule that promises should not be broken.

Legislative reform may be also influenced by public morality. Legislative reforms of the 1960s could be said to reflect the moral ideas of that decade. As public morality has shifted toward a greater acceptance of homosexuality, the legislature has responded. The Sexual Offences Act 1967 legalised homosexuality between consenting males over the age of 21. In 1994 the age was reduced to 18 and in December 2000 it was reduced to 16.

In turn, it can be argued that legislation is sometimes introduced with the aim of educating the public to consider certain behaviour morally wrong. An example is the discrimination legislation, which aims to educate the public not to discriminate on the basis of sex, age or disability.

While there is considerable overlap of legal and moral rules, the pluralistic nature of society means that the coincidence is partial. Britain has a population of mixed cultures and races, of mixed political ideals and of differing religious followings. It can perhaps be argued that there is no public consensus on any moral issue. Cases in which the judiciary has had to consider differing moral positions include *Gillick v West Norfolk and Wisbech Area Health Authority* (1986), *Re A (Children)* (2000) and *ex parte Dianne Pretty* (2001).

Statements reflecting the pluralistic nature of society can be found in the Hart-Devlin debate. The Sexual Offences Act 1967 was introduced following recommendations made by the Wolfenden Committee in its 1957 report. The report prompted the debate. Professor Hart drew on the work of Professor John Stuart Mill, who in his essay 'On liberty', stated: '...the only part of the conduct of anyone, for which he is amenable to society, is that which concern others... Over himself, over his own body and mind, the individual is sovereign.' Hart and Mill believed it was immoral to make the minority conform to the will of the majority when in private. They recognised the pluralistic nature of society and the importance of individual liberty. Lord Devlin's views are more reflective of the late nineteenth-century criminal judge Sir James Stephen. Devlin believed that the loosening of moral bonds would lead to the disintegration of society. The law should punish acts which offend the common morality, whether done in public or in private.

Sir John Wolfenden followed the views of Mill and Hart. Their views were reflected in other reforming legislation of that decade including the Obscene Publications Act 1968 and the Divorce Law Reform Act 1969. The majority of the House of Lords in *Gillick v West Norfolk and Wisbech AHA* (1986) also adopted the Mill and Hart approach.

However, the influence of Stephen and Devlin can be seen in a number of judicial decisions. Perhaps the most significant recent decision is that of the House of Lords in *R v Brown & others* (1993) and the European Court of Human Rights in *Laskey, Brown & Jaggard v United Kingdom* (1997). The House of Lords held that the defence of consent could not be used in respect of sadomasochistic acts, which in this case were conducted in private. The European Court of Human Rights upheld the decision. Infringement of Article 8, the right to respect for private life, was justified by the need to protect health or morals.

The broad overlap of legal and moral rules is perhaps due to the characteristics they share. Both are concerned to impose certain standards of conduct without which it is difficult of society to exist, and both employ normative language. Laws, as Harris states, 'are found side by side with moral odes of greater or less complexity'.

There are, however, areas of divergence. There appears to be little moral justification for tobacco and alcohol consumption being legal and smoking of cannabis illegal. Similar arguments are raised by the legal requirement for pubs to close at 11 p.m. There are also moral rules which are not reinforced by legal rules. An example is the moral duty to help people who are in danger. The general position (there are exceptions) is that there is no legal liability for failing to act.

Natural law theorists would argue that legal rules which have no moral connection should not be afforded the status of law. According to Lloyd, the common thread running through the different views expressed as to what natural law is, is 'the constant assertion that there are objective moral principles which depend upon the nature of the universe'. Aristotle believed that the laws of nature constituted the natural law. St Thomas Aquinas believed that natural law was the divine law. In the mid-twentieth century, Professor Lon Fuller referred to the inner morality of law. To be valid the law had to conform to certain procedural requirements including consistency and being prospective.

In contrast, the positivists believe that whether a law is good or bad it is still valid. The origins of John Austin's command theory, whereby law is a command from a sovereign and enforced by a sanction, can be traced to Jeremy Bentham and Hobbes. Jeremy Bentham rejected natural law theories as 'nonsense on stilts'. Natural law was based on unprovable principles. What the law is, and what the law ought to be, should be treated as different issues.

Professor Hart also subscribes to the positivist view. From 1958 to 1967, a debate took place between Hart and Fuller. This was sparked by views of the German philosopher Gustav Radbruch. According to Radbruch and Fuller, the Nazi laws which permitted atrocities should not have been regarded as valid. This was the view later adopted by the German courts. Hart, however, considered that the laws were legally valid but should have been challenged by people prepared to take the legal consequences.

In conclusion, it can be seen that there is a close relationship between legal and moral rules. A substantial body of English law is based on moral rules. The extent to which law should be influenced by morality remains topical. While it can be argued that a significant section of society has come to adopt the view taken by Professor Hart, there nevertheless remains a widely shared belief that weakening of the moral basis of law is dangerous.