

## **THE SEPARABILITY THESIS**

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### **INTRODUCTION**

Blackstone says ethics and natural law are synonyms and natural is the highest source of authority and of obligation.

There has always been confusion amongst legal philosophers regarding the appropriateness of the separability thesis, as to whether or not law and morality have a connection? The connection between the two concepts establishes an important idea as to whether the law should be followed according to moral standards or should be followed as it is without lawyers and judges being burdened with the responsibility morality. Usually, any legal legislation or law does not agree with the moral compass of a small group of people, but the major issues arise when the moral code of a majority population is violated by a law.

The following essay is going to discuss the link between law and morality and the link between legal positivism and morality. This essay will further outline two objections placed by natural theorists on the separability thesis and out of those two objections we will analyze which is more convincing, that is which objection is justified and which is not.

### **WHAT IS MORALITY AND WHAT ROLE DOES IT PLAY IN THE LEGAL SYSTEM**

Every individual abides by some values either instilled by their parents or they learnt themselves. There are certain values which are recognized universally in the society and based on those values, laws are made to protect the moral standards of the society. Values are very

powerful as when they change, law also changes with it and the attitude of the law makers and judges also changes.<sup>i</sup>

In the past morals were considered as laws and there was no distinction between them. In Hinduism it was believed that there exists a moral code and on the violation of the moral code the perpetrator is punished. Law derived its authority from the moral standards of the society. In the case of *Queen v Dudley and Stephenson*<sup>ii</sup> the principle of morality and law was laid. In this case there were 4 passengers were stuck on a boat in the middle of an ocean, they had run out of food and water, three out of four passengers were seamen and one a young boy who had fallen sick, three days of being stuck the seamen decided that they need to eat one of the onboard passengers in order to survive. The seamen chose the boy because he was already sick and might die till, they reach the surface and also the boy had no family whereas the passengers had someone waiting for them back home. When they were rescued and prosecuted in the court of law the seamen were found guilty of murder as it is against morals to kill anyone for any given reason.<sup>iii</sup>

It was much later during the 19<sup>th</sup> century when Kant's theory of strict separation between law and morals became popular. The foundation of the criminal law is still instilled in the morals of society. Laws against fraud, murder are grounded in the moral code of individuals which is proved by the case *Donoghue v Stevenson*<sup>iv</sup>.

Mrs. Donoghue's acquaintance purchased her a ginger beer from Paisley's Well meadow Café in 1928. She drank about half of the bottle, which was made of dark opaque glass, and poured the rest into a tumbler. The decomposed shell of a snail floated out at this location, allegedly causing her shock and acute gastroenteritis. Since Mrs. Donoghue was not a party to any contracts, she was unable to assert a claim for breach of warranty. She successfully filed a lawsuit against Stevenson, the manufacturer, and was awarded hefty consideration. This is the first case where a moral obligation was turned into legal obligation where it is the moral and legal responsibility of the manufacturer to serve clean, hygienic, and healthy products to the public at large.

Values are extremely prized in India, and they are embedded in the constitution of India in the preamble for example freedom of religion and speech, these values are primarily upheld by the society. The values find their way in the religious scriptures like Vedas for Hindus, Quran for

Muslims and the Bible for Christians lay down principles and rules that an individual must follow.<sup>v</sup>

## **LEGAL POSITIVISM AND MORALITY**

According to Legal positivism law is determined by the source of authority recognized by the government and society and this can be legislation, judicial decisions, and customs. Anything that is immoral, unfair, and unwise cannot be enough ground to oppose the law. Law is what is ordered and practiced. Philosophers of Legal positivism following the article by Hart on “Separation of Law and Morality” believed that there exists certain separations and distinction between law and morality, and they cannot be the one and the same thing<sup>vi</sup>. Hart is usually criticized for his theory of Separation of Law and morality on the basis that on some levels laws are derived from morality and reflect the moral code of a society, and example is in the difference of law for women in Afghanistan, Syria Iraq (the law is authoritative and restrictive) and on the contrary for women in United States and United Kingdom (the law is equal for men and no specific restrictive laws are placed on women). The Separation Thesis, comes under legal positivism, it asserts that deciding what the law is need not be based on moral or other pre-conceived notions about what a law should be in the particular circumstance.

## **THE SEPARABILITY THESIS**

The separability thesis along with the pedigree thesis forms the foundation of legal positivism and some of the most influential philosophers of the thesis are John Austin and Jeremy Bentham and Hart.

The separability thesis proposed by legal positivist Herbert Lionel Adolphus Hart. Legal positivism has a point of view in which law is ‘social construction’ and is a ‘contingent’ matter. The thesis proposed by positivists claims that law and morality are two different entities. They are two entirely different concepts that need not form conformity with each other. According to the thesis, the legal right to do something does not make it a compulsory moral obligation to do so. The Positivists believe that law should be fair and just for everyone, but the law cannot

always meet the requirements of morality which might differ individual to individual and group to group.<sup>vii</sup>

The separability thesis which is proposed and accepted by legal positivists, is not completely favored by the natural theorists and that is because Natural theorist come from the point of view that morality in law holds a lot of importance and the two concepts are incoherent rather than being separated, according to the natural theorists, for the law to exist it needs to meet with the standards of morality and hence natural theorist reject the separability thesis, Natural theorist and legal positivist have very opposing views of “what is regarded as law” and “how is it related to morality”. Therefore, the biggest critique of the separability thesis is natural theorists like Ronald Dworkin.<sup>viii</sup>

## **OBJECTION**

Now we are going to discuss two important objections placed by the natural theory critiques on the separability thesis.

### ***First objection***

*“Some critics think that positivists are saying that law and morality never coincide”*

Critics believe that positivist through their separability thesis is trying to say that the law exists without meeting any sort of moral standards and it is far away from moral norms. According to the critic's positivists believe in the following law as it is no matter how barbaric as it doesn't conform with moral standards.

The critics believe that positivists see law and morality as two distinct concepts which are never ever bound to meet each other, in other words, the critics are saying that positivists idea of law is far away from the concept of morality as they diverge into different directions, even natural theorist Fuller argues that law and morality are somehow interrelated. Therefore, natural theorists imply that positivist believes that law might be immoral and be followed even if it is unjust.<sup>ix</sup>

The above objection shows that natural theorist lacks a certain understanding of legal positivism as the positivist view is completely contrary to the natural theorist's criticism. Legal

positivists believe that law should not be immoral and must be just in its existence and execution. Hart believes that morality should be a part of the legal system but the law cannot always be morally “defensible” which means that any action has the moral defense behind it and so Hart says that law cannot always provide a moral reason for themselves. According to Hart law and morality are in very close connections but they can’t be interrelated or even interdependent on one another. Hart gives an example to further explain his point of view, there was a mad king of Transylvania who called upon his subjects and asked them to jump into a huge vat of acid which would kill them instantly, his subjects followed the king’s order and jumped inside the acid and then the king himself jumped after the subjects. This story according to Hart shows that justice has been carried out morally because after asking the subject to commit suicide the king also did so but it still exactly grounded the system as the king wasn’t punished for his doing neither he was told that he was wrong and hence logical principles are needed in such cases and hence I believe that Hart is correct that morality is definitely important in law but cannot always be confirmed with law, for example in the modern world taking someone’s life is considered as the most immoral act yet some grievance offences like terrorism, child rape do have their punishment like death penalty, which has no moral defense behind it but anything less than that won’t be justice for the victim or the society. Hence law without morals can also function well and provide people with justice. Hence, I believe that this criticism of the natural theorist is weak in its stance and that’s why not convincing at all.

### ***Second objection***

*“Some critics think that positivists believe that judges should never decide cases on moral grounds”*

In this criticism, the natural theorist thinks that the adjudication system is the ongoing process of applying the law to the facts. According to Dworkin judges should make new decisions in different cases be it hard cases, they should create new decisions but these decisions should comply with two factors:

- one of which is concerned with interpretation
- the next one is considered with the standards of morality and justice in the decision.<sup>x</sup>

According to Dworkin, the judges should follow principles of morality in all cases including the hard cases. Hence, he rejects discretion by judges, Dworkin gives the example of how the Supreme Court should along with other principles follow the principles of morality. For Dworkin, the right way of deciding cases (which is by conforming with the principles of morality is important)

The above objection is defended by Hart by claiming that hard cases don't have proper solution they have gap in their laws which leads them to multiple answers, to explain further Hart gives with an example if a supreme orders to eat a giant apple, the rest of the apples are its alternative similarly in hard cases here are many alternative answers leftover which provides uncertainty, so according to Hart in penumbral cases the only logical option a judge is left with discretion. In harts, sense principles don't have much discernible role to play because principles become the reason behind a certain decision whereas rules always bring result.<sup>xi</sup>

Harts sees the legal system as open and incomplete due to the oblivious languages of the legislatures whereas Dworkin sees the law as having a single correct answer including the hard cases. Dworkin contrary to Hart sees principles as the protectors of human right which leans the judges in one direction of taking a decision. Dworkin states that all legal decision have a legal authority linked to it who's source can be found in the principles of morality or the social factors. According to Dworkin when decisions are justified, they show respect towards the community which allows the judges to develop a theory which is best available and suitable for all. Dworkin draws a symbolism between judges and Hercules because he considers the judges task to be equally difficult as to become Hercules and hence the judges can make mistakes come up with wrong interpretations but that doesn't mean that the right interpretation which comprises of following of principles, protection of human rights and consistency with morality does not exist, even in hard cases.<sup>xii</sup> At least according to Dworkin, the judges are obliged to find the right interpretation of the law and then make a decision based on it. Dworkin disproves Hart's claim that law is with gaps and rather draws an analogy which is basically that judicial decision are like reading a series of chain novel in order to come to the conclusion.<sup>xiii</sup>

### ***Third objection***

*“Legal systems and Moral order regulate human behavior by imposing coercive sanctions on certain behavior”*

Natural theory believes that law by its character and nature is moral and the punishment of violating morals is imposing punishment or sanctions and similar system is followed by the legal system where sanctions are imposed as forms of punishment and therefore making them same. Kelsen( a legal positivism theorist) defends this criticism by pointing out that sanction imposed on morals are non-coercive whereas punishment for breaking the law and coercive and do not come under moral order. Further Kelsen adds that laws are formed from various sources and have Therefore an authority whereas moral conducts are those which are approved or disapproved by the society, but laws cannot be formed based on approval or disapproval of norms.

## CONCLUSION

It is concluded that the two mechanisms of social control are morality and law. The incorporation of morality and the ethical dimension into both legislative and judicial lawmaking were never be left out. The notion of separating morality from law did not apply to the study of law. Rules of law can be influenced by moral factors.

I would like to argue that this objection present by the natural theorists is a strong one as Hart does not provide enough explanation regarding it and Dworkin explains himself well enough, that judges can make better decisions if they comply with the principles rather than with the pressure from the political structure. Therefore, this would be a very convincing objection to the separability thesis.

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## ENDNOTES

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