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# **‘A CRITICAL ANALYSIS OF HOW MORALS INFLUENCE LAW WITH NEXUS TO THE HART FULLER DEBATE’**

AUHTORED BY - AARYA SHRIVASTAVA  
& SEEMA SHRIVASTAVA

## **INTRODUCTION**

### **BRIEF OVERVIEW:**

Rule of Law is the supreme principle that commands that neither the people nor the State is superior to law and that contrasts the tyrannical power of a sovereign with the caprice of despots.<sup>1</sup> The rule of law is a concise conceptual understanding of the qualities, characteristics and contents of law itself. It ables society to come up with norms and legal requirements that guide people towards harmonious cohabitation while refraining from imposing undue cognitive demands of compliance.

Paton defines morals as that tool of social ordering which ensures the supreme good. It is inclusive of all manner of regulations, benchmarks, codes, principles or norms by which men restrain, guide and influence their relationships with themselves and with others. Morals are the true and most original lodestar of virtuous human existence.

Primitive societies demonstrate that morality, in conjunction with divinity, was used to regulate human activities and served as a code of conduct for people. Hence, this paper will be an examination of the rule of law with nexus to our notions of morality and virtue and answer whether it is morals that the State uses to formulate laws by putting regulated sanctions and legitimizing them in the form of hardbound text.

### **STATEMENT OF PROBLEM:**

To what extent the Rule of Law is Morally inclined?

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<sup>1</sup> Rule of law - By Naomi Choi - Nov 2, 2022

RELEVANCE OF STUDY:

The connection of law and morality has been much discussed since the revival of the scientific study of jurisprudence, but the question has not yet been resolved, and may never be. This paper attempts to clarify, with practicality, the impact of morals on law.

LITERATURE REVIEW:

**Positivism and Fidelity to Law: A Reply to Professor Hart**

*Lon L. Fuller*

Source: Harvard Law Review, Feb., 1958, Vol. 71, No. 4 (Feb., 1958), pp. 630-672

Stable URL: <https://www.jstor.org/stable/1338226>

**Positivism and the Separation of Law and Morals**

*H. L. A. Hart*

Source: Harvard Law Review, Feb., 1958, Vol. 71, No. 4 (Feb., 1958), pp. 593-629

Stable URL: <https://www.jstor.org/stable/1338225>

RESEARCH METHODOLOGY:

The kind of research conducted in this paper is doctrinal in nature. Sources like books, articles, research papers, and websites have been referred to.

RESEARCH OBJECTIVES:

- To jurisprudentially analyse the concept of Rule of Law and Morals.
- To bring out the affinity between the two supported with the views shared by HART and FULLER

HYPOTHESIS:

Law is majorly influenced by the moral values of man.

RESEARCH QUESTIONS:

- I. What is meant by the Rule of Law and why Man needs it?
- II. What is our notion of morality, ethics and values?
- III. Is the Rule of Law Morally inclined?

# I. WHO ARE WE AND WHY WE NEED LAW?

## CRITICALLY ANALYSING THE HUMAN MIND

The most urgent question that lies before us, even so, all our lives, is ‘Who are we?’. What is the purpose and construct behind our existence? Have we a motive to fulfill or a wrong to right?

Jurisprudentially, an individual is defined by the choices it makes. Individualism relates to our basic values that dictate the choices we make. These choices reflect who we are and what we value.<sup>2</sup> Human nature is a rather difficult puzzle to solve. Philosophers and psychologists have, over the years, attempted to decipher the long bothering enigma of individualism and uniqueness. Human beings are both sociable and analytical on the one hand and radical and self-seeking on the other.

Humans can be argued to have a dire need for social affiliation because it is in language that the essence of humanity is reflected. This humanity mirrors their basic sociability and rationality. And without language, there lies no scope for forming groups or communities.

But aren't humans equally selfish and bounded by innate thought guided by decisions based on ‘survival of the fittest’? Humans are engineered with a natural boundary or bubble that isolates them from the rest of the beings. They, at least at one moment in life, have and most certainly should think about nothing but themselves. This forms their ability to be unique and it is the such notion of individuality that enables them, with the passage of time, to outgrow sociality and become increasingly enunciated.<sup>3</sup> Because in a world of scarcity man is bound to get overpowered by his thoughts of self-preservation and supercede all values in order to survive. This is bound to affect the group's harmonious mechanism. Rationality suggests that a coping instrument to resolve this anticipated dispute, as and when it arises, leads to one's desire for societal being and possibly cohabiting in communities.

Had the man been a creature of everlasting virtue freed from corruptibility and ignorance he would been called God and the concept of the supreme lord would have been left unventured. To our dismay,

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<sup>2</sup> Shahram Heshmat Ph.D. - University of Illinois at Springfield

<sup>3</sup> S. Letwin, *The Gentleman in Trollope: Individuality and Moral Conduct* 63 (1982).

man became corrupt the day he committed the original sin when he plucked and gulped the forbidden fruit. Since then, it has become the face of the truth that man needs law and law needs man. Another side of the coin propels that humans have the distinct ability of reasoning. But even when drawing conclusions from the store of our knowledge and values the power of reason and inference can end up being imperfect.<sup>4</sup>

### WHAT IS RULE OF LAW:

It is for this reason that the rule of law is perceived to be the most accurate and desirable tool, born from a cluster of values, for the purpose of institutionalizing manhood. This concept was first given word by Aristotle, in 41 BC when he distinguished 'the rule of law' from that made 'by an individual.' He went ahead to call them the system of rules inherent in the natural order. The same was highlighted in the noble works of Plato - 'Complete Works of Plato'<sup>5</sup>

To understand the concept int concisely it is often signified by stating that the Rule of Law ensures that no legal person can enjoy rights/ privileges extended to all; nor can such a person be subject to sanctions, not imposed on all. With the signing of Magna Carter in England and the efforts of Professor Paine in America, the concept began taking form all over the world. A constitutional lawyer going by the name of Albert Venn Dicey deserves true credit for the conceptualisation of rule of law. He propounded three principles to base his theory of 'None above Law'

- **Supremacy of law:** The Rule of Law forbids the government or public officials from exercising arbitrary or discretionary powers. It implies that a man can be punished for a violation of the law but not for anything else. According to the legal procedure, an alleged offence must be proven before the ordinary courts.
- **Equality before the Law:** According to Dicey, it emphasises the impartiality of the law. It means that there will be no distinction between rich and poor, officials and non-officials, majority and minority, and no one will be degraded or upgraded. Everyone receives equal justice under the law.
- **The predominance of Legal spirit:** The written constitution is widely assumed to be the source of citizens' legal liberties. It is not true, however, because Britain has an "unwritten Constitution." Legal spirit is the real source of law in England. Its customs, conventions, and

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<sup>4</sup> J. Lucas 'My discussion of human nature. The Principles of Politics at 1ff. (1966).

<sup>5</sup> Complete Works - Plato - John M Cooper (Edited)

judicial decisions reflect the legal spirit. Dicey believes that individual liberties and rights are better protected in the United Kingdom than in France.

The philosophical view of some jurists discredits the validation of the Rule of Law that the overall quality of single Privy Council judgments has been inferior in terms of developing the law in comparison to the more diverse House opinion. A single lapidary judgement supported by four brief concurrences can give rise to ongoing interpretation issues that could have been avoided if the other members had summarized, however briefly, their reasons for agreeing. A well-constituted committee of five or more people can bring a wealth of professional and jurisdictional experience to bear in shaping the law.<sup>6</sup>

Hence, there can be two major caveats added to the concept of the Rule of Law to concretize its foundation and future application. First, regardless of the diversity of opinion, judges must recognise a duty, which is not always fulfilled, to strive for a clear majority ratio. Without that, no one will know what the law is until Parliament or a subsequent case establishes a clear rule. Second, and without questioning the value or legitimacy of judicial development of the law, the sub-rule under consideration, in my opinion, precludes excessive judicial innovation and adventurism<sup>7</sup>. It is one thing to shift the law's path by a few degrees; it's quite another to send it in a completely different direction. The one is most likely foreseeable and predictable, which a prudent person would allow for, whether the other is.

## II. HOW DO WE CONCEPTUALIZE MORALITY, ETHICS, AND VALUES?

### **HISTORICAL TRAIL OF MORALS:**

The doctrine of natural rights was developed by the ancient Greeks to provide a theoretical moral foundation for law. Greek ethical philosophy was used in Rome during the classical period. The Roman jurists sought to discover and declare the content of natural law. They gave us an ethical philosophical natural law in the form of idealised Roman legal precepts. Natural law was given a

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<sup>6</sup> Lord Reid, "The Judge as Law-Maker" (1972) 12 Journal of the Society of Public Teachers of Law 22 at pp, 28-2

<sup>7</sup> The distinction between a legitimate development of the law and an objectionable departure from settled principle may of course provoke sharp differences of opinion: see *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 A.C

theological foundation in the Middle Ages, and Christian morals were considered the foundation of law.<sup>8</sup>

Natural law theories, which had a rational moral foundation, became very popular in the seventeenth and eighteenth centuries. In England, with the rise of the court of chancery and the development of equity and ethical ideas from the casuist/sophist literature of the sixteenth century and the general notions of right and wrong held by chancellors were made liberalizing agencies<sup>9</sup>. In the continental Europe of the seventeenth and eighteenth centuries, the philosophical ideas of juristic writers upon the law of nature were used in the same way. Thus, moral duty was turned into legal duty. The individual human being as the moral unit became the legal unit. It was conceived that moral principle was to be also a legal rule and consequent progression of moral ideas into legal ideas. It clearly shows how once a moral principle became an equitable principle and then a rule of law in all legal systems of the world. At the end of the eighteenth century, Kant replaced the rational foundation with a metaphysical natural law used to demonstrate the obligatory force of the legal order as it is. The analytical jurists argued that no foundation was needed for law as the law stands upon its own basis as a system of precepts imposed or enforced by the sovereign. Down to Kant, positive law had been contrasted with a body of ideal moral law on the one hand and natural law on the other. Kant, instead, set over against positive law the immutable principles governing the making of law, by which law and law-making must be judged<sup>10</sup> Kant goes on to mention that laws, under positive schools are to be considered as brain-child of wise and sapient men.

### **LAW AND MORALITY: THE AFFINITY**

According to Roscoe Pound, moral values are relative and individual in application, only devoted in reference to circumstances. While legal precepts stand to be deployed generally in absolute form. A relationship between the two must be established before the distinction is made. As we trace the development of moral or ideal thinking among humans we discover that the concept of morals preceded that of law. *In the beginning, the concepts were one, conjoined not at the hip but at the heart itself.* In ancient Hindu Philosophy there were no distinctions made, only later did they make amends

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<sup>8</sup> Pound, Interpretation of Legal History 98-9

<sup>9</sup> Day v. Slaughter, Prec Ch. 16 (1690); Fursakar v. Robinson, Prec. Ch. 475 (1717); Chaman v. Gibson, 3 Bros. C-C 229 (1791). For details see, Roscoe Pound, Law and Morals 31-9

<sup>10</sup> public; Boswell, Life of Johnson II, 258 (Croker ed. 1859)

in their thought and created room for obligatory and recommendatory injunctions. Morals are born from religion that found its source in conscience. In the seventeenth and eighteenth centuries jurists such as Socrates, Aristotle and Plato propounded the affinity of Morality and Law-making. This received severe criticisms in radicalist responses in the eighteenth century when philosophers like Austin and Bentham, who borrowed from Hobbes stated that 'Law is as it is *posited*.'

Austin's jurisprudence theory is a work of fiction. It is founded on an examination of the law as it is, and at its core is the concept of sovereignty that he received from Hobbes via his neighbour, Bentham. Austin, like his great masters, regards a state's sovereign power as absolute, possessing unlimited authority, and not subject to any law. He treats this power as an existing fact, an ultimate datum beyond which the jurist is not required to pursue his investigations. The origin of positive law is found in the exercise of that power, not in any decree of the Deity or any natural law. Law is a general command imposed upon the subject by the unlimited sovereign authority of the State, and this command is enforced by sanction.<sup>11</sup>

Austin's fictitious concept of value-less Legal norms sourced from the absolute sovereign was challenged in the works of Henry James Sumner Maine. From a historical lens, every proposition made by Austin was false or only partially true. Maine's work showed how societies without any political authority bowed to habitual obedience and that law may not always possess legal sanctions or be labelled as commands of the sovereign. He laid down, on the ashes of John Austin's faux theories, the ultimate truth and established that the essence of Law lay nowhere but in Morals itself.

Moral principles are embodied in the law; its force is dependent on those principles, and they hedge around and control the sovereign authority as thoroughly as they control the actions of the most humble subject.

"Law would not be really imperative, we know, unless behind the sword of the magistrate, the bulk of mankind felt the weight of social obligation, the irresistible burden of custom, of immemorial tradition, and the like, a social, and even a religious sanctity"<sup>12</sup>

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<sup>11</sup> The Conception of Morality in Jurisprudence - T. W. Taylor, Jr. - The Philosophical Review, Jan. 1896, Vol. 5, No. 1 (Jan. 1896), pp. 36-5

<sup>12</sup> Harrison, " English School of Jurisprudence." Fort. Rev., vol. XXX, p. 488.

**LAW AND MORALITY: THE DISTINCTION**

The goal of the law is to subject the individual to the will of organised society, whereas morality tends to subject the individual to the dictates of his conscience. Law is concerned with men's social relationships rather than individuals, whereas ethics is concerned with individuals rather than societies. Although ethics consider motive and law emphasise conduct, man's ethical duties cannot be considered without considering his obligation to his fellows or his place in society.

These are few distinctions that can be drawn out between Law and Morality:

- In law, man is considered a person because he has free will. In morals, humans comprehend the will towards the good.
- Law considers man only in so far as he lives in community with others; morals give a guide to lead him even if he were alone
- Law has to do with external acts (*Actus reas*), and morals look to the intention- the inner determination and direction of the will. (only thinking good for others entails the blessing of God but doing wrong is punishable under religious precepts and law)
- Law governs the will (external behavior) morals seek a free determination towards the good.
- Law talks about strict liability *i.e.*, even if there is no fault but morals excuse the person if there is no fault.

**III. IS THE RULE OF LAW MORALLY INCLINED?**

For the purpose of this paper let us examine one of the most controversial and arguably interesting academic debates in jurisprudence and also because it exemplifies the divide between positivist and natural philosophies of law regarding the role of morality in law: *THE HART AND FULLER DEBATE*

**VEIWS OF PROFESSOR HART:**

Because Hart is a positivist, he does not believe that there is a necessary link between law and morality. While he acknowledges that there is a close relationship between law and morality, he does not deny that morality has had a significant influence on the development of the law. He does not, however, believe that they are mutually dependent.<sup>13</sup> As a result, he believes that a distinction should be made between what law should be and what law ought to be. The fact remains that moral criticism

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<sup>13</sup> HLA Hart, *The Concept of Law*, Revised edition, Oxford University Press Publications, 2002 at p. 185-200

of a law does not render it unconstitutional. Hart believes that officials should be truthful about the law by focusing on what it says rather than what one wants it to say.<sup>14</sup>

Hart defines the law as having primary and secondary rules. Primary rules are laws that impose rules on citizens and have legal ramifications. Secondary rules are laws that grant authority and describe how laws should be recognised, adjudicated, or changed. According to Hart, these rules are the heart of the legal system, and the rule of recognition is the glue that holds the legal system together. As a result, Hart argues that moral conformity is not required for the existence of a legal system. Hart admits that law and morals are bound to intersect at some point, such as when a case arises where the wording of the relevant statute is insufficient to give effect to the purpose of the law (problems of the penumbra), Hart says that such cases can be solved through judicial interpretation. A decision can be made about what the law should be, and moral factors play an important role in deciding such difficult cases.

#### **LON FULLER'S VIEWS:**

Fuller is a naturalist who sees laws as a means of achieving social order by regulating human behaviour. He believes that our legal systems are derived from morally based justice norms.<sup>15</sup>

He argues that for a law to be valid, it must coordinate with a certain moral function test and here are eight desiderata set out by Fuller; (i) Rules (ii) published (iii) prospective (iv) intelligible (v) not contradictory (vi) possible to comply with (vii) reasonably stable through time (viii) followed by officials.

Fuller urges legislators to consider all of the above factors when determining whether a law is valid. Fuller goes on to divide morality into two categories: the morality of aspiration and the morality of duty. The morality of aspiration refers to the desired standard of human behaviour that promotes his or her best interests. The morality of duty describes the standards that people follow to ensure that society runs smoothly. Fuller also discusses the "internal morality of law" and "external morality of law" as forms of morality. The former is concerned with the procedure of lawmaking, whereas the

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<sup>14</sup> HLA Hart, *The Concept of Law*, Revised edition, Oxford University Press Publications, 2002 at p. 219-223

<sup>15</sup> Lon Fuller, *The Morality of Law* (Yale University Press c 1964) 33 – 91

latter is more concerned with the substantive rules of law that are applied in decision-making.<sup>16</sup>

Fuller rejects the positivist approach to law and argues that society's goals can be achieved by other means rather than relying solely on the law.<sup>17</sup>

### **THE REASON BEHIND OUR AFFINITY TOWARDS LAW?**

Upon a proximate examination of either view, the reader may wonder why is it that we obey the law. Is it because we are bound by legal sanctions backing the retrospective concept of law or is it because the law is the only convenient prospect of a modern organised society? Can a human being refrain from committing rape even when it is not punishable?

The answer to all my questions can be sought from different points of view and that is why we have scrutinised two distinct yet collateral philosophers: Hart and Fuller. From the lens of a student of jurisprudence, I stand to confer the credit for obedience and compliance with the law in the moral nature it possesses. These morals shape us and are born from our perspectives of right and wrong. What we believe is right we obey because it coincides with our moral precepts more than anything else.

This brings me to the end of my paper where I shall discuss the laws imposed by an immoral state with an illustration of Nazi Laws.

“A German woman denounced her husband to the authorities in accordance with the anti-sedition laws of 1934 & 1938. He had made derogatory remarks about Hitler. The husband was prosecuted and convicted of slandering the Fuhrer, which carried the death penalty. Although sentenced to death he was not executed but was sent as a soldier to the Eastern front. He survived the war and upon his return instituted legal proceedings against his wife. The wife argued that she had not committed a crime because a court had sentenced her husband in accordance with the relevant law of the time. However, the wife was convicted of ‘illegally depriving another of his freedom’, a crime under the Penal Code, 1871 which had remained in force throughout the Nazi period. The court described the Nazi laws as “contrary to the sound conscience and sense of justice of all decent human beings”

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<sup>16</sup> Benjamin C Zipursky, „Practical Positivism versus Practical Perfectionism: The Hart Fuller Debate at fifty“, [2008] Vol 83, New York University Law Review at p.1170- 1212

<sup>17</sup> supra note 4.

According to Hart's positivist viewpoint, the Court's decision was incorrect because Hart believes that no matter how heinous the Nazi laws were, they were in accordance with the Enabling Act passed by the Reichstag and were valid. It, therefore adheres to Hart's rule of recognition. Fuller, on the other hand, recognized the Court's decision because it created respect for law and morality, and Fuller claims that all Nazi laws were illegal by using his *8 desiderata*. This explains why the courts ignored the earlier 1934 Act and upheld the wife's conviction. The courts would have had to acquit the wife if they had not used a moral concept in their application of the law.

According to Hart, the Courts had only two options to preserve the integrity of the judicial decisions: either let the wife go free because the statute protected her, or make a retrospective law repealing the statute under which she claimed protection and declaring the perpetrators of such atrocities criminals.

## CONCLUSION

I can safely conclude that I am in agreement with the views of Fuller and I think that Hart is mistaken because his arguments fail. In my opinion, the grounds on which Hart himself becomes inconsistent are when he concedes to the fact that his rule of recognition requires only a minimum of morality in law. However, Impartiality in the application of a rule is a moral standard which is necessary for any legal system<sup>19</sup>

Furthermore, I have extended my arguments to a pluralistic world like ours where morals transgress into varied shapes and forms as one moves from one land to another. The most crucial argument to my analytical conclusion can be the ambiguity of moral precepts; that morals cannot be put under an objective microscope of exhaustive definitions because there is nothing more change-worthy than the ideals, values and morals of humans. I have used this to aid my case along with an example. For instance, sexual intercourse that goes against nature was once criminally punishable in India. However, as societies evolved and so did human thinking, this led to the landmark decriminalization

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<sup>18</sup> Stephanie Patron, "The Inner morality of law- An analysis of Lon L Fuller's Theory", [2014], Glasgow University Law Society Law Review

<sup>19</sup> Steven Shavell, "Law versus morality as regulators of conduct", [2002] Vol 4, no. 2, American Journal and Economics review at p. 227-257

of section 377 of the Indian Penal Code, 1860. This just goes to show the influence of our notion of morality on the law we obey. Something that used to be considered as immoral was once illegal but is now legal for it no longer oversteps the bounds of our extended and enhanced notion of morality. The uniqueness of man intertwined with that of his beliefs is what makes him abide by the law of the land.

Therefore, it can be stated without suspicion that morals have a firm and substantial influence not only on law-making but also the compliance of the same.

*“That a law is valuable not because it is ‘the law’ but because there is ‘right’ in it and laws should be like clothes; the Laws should be tailored to fit the people they are meant to serve.”<sup>20</sup>*

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<sup>20</sup> Forsythe v DPP and the AG of Jamaica