
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**JURISPRUDENTIALLY UNDERSTANDING WELL-BEING THROUGH
THE LENSES OF LAW AND MORALITY**

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Abstract:

Within the pedagogy of Jurisprudence, law perhaps enjoys a multi-faceted identity as a result of the various Jurisprudential approaches to defining law in light of its own fundamental set of reasoning. This feature of law is also evident in various types of legislation, wherein no straitjacket conformity can be established about a specific statute or a rule strictly belonging to a particular school or concept. Every observation is debatable. Perhaps it is the nourishment of these conflicting ideologies that tend to enhance health of the law. Likewise, one such significant debate within Jurisprudence is in regularizing the role and meaning of morality in law. In this regard, this paper will commence with Positivist Hart's argument of Law's self-sufficient functioning and thereafter deal with Fuller's naturalist viewpoint. The focus will then shift towards Bentham's consequential approach of determining morality. Lastly, with the analysis in hand, the paper will critically comment on how the Supreme Court's decision in the Shreya Singhal's case could possibly have been more balanced by considering both the therapeutic and anti-therapeutic implications through David Wexler's modern concept of Therapeutic Jurisprudence.

Introduction:

The Jurisprudential discovery in defining law has allowed for "law" to posit a multi-faceted identity that has been constructed based on diverse sources and ideas. For instance, from Austin's endorsement of law as a command of sovereign, to Kelsen's position that law is based on Grundnorm² and many other prevalent concepts. Herein, the previously used term "multifaceted identity" is deliberate for it signifies that each jurisprudential school enjoys its

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² In Jurisprudence Parlance, grundnorm means fundamental norms upon which a valid law is based.

own identity and continuity in defining law. Furthermore, no straitjacket conformity can be established about a specific statute or a rule strictly belonging to a particular school or concept. Every observation is debatable. Perhaps it is nourishment of these conflicting ideologies that tend to enhance health of the law.

Likewise, one of the many pivotal debates is regarding the role and meaning of morality³ in law⁴. On this note, this paper will concisely comment on some of the varying opinions. Firstly, it will deal with Positivist Hart's strong argument of Law's independent functioning without influence of morality, followed by Naturalist Lon Fuller's mandatory moralistic approach to law. Thereafter, comment on Bentham's emphasis on procedurally determining morality based on consequential action of the law i.e., hedonistic calculus. Lastly shed light on the modern concept of therapeutic jurisprudence which is arguably reflective of Bentham's Utilitarianism.

H.L.A Hart: Law is “what is” and Morality is “What ought to be”

To begin with, Hart belongs to the Positivist school of law, wherein legitimacy and validity of law is largely determined by the source and process of its derivation and does not depend on morality. Truly the presence of morality makes a law valid, however so does the absence of morality. Hart claims that the citizens are subject of the sovereign and so long as the law is a product of due process, citizens will obediently abide by it. Admittedly, this is also where Hart criticizes Austin's theory of command on the ground that, it is not necessarily the deterrence created by sanctions that compel citizens to abide by the law. Arguably, abidance flows out of obedience. Hart furthermore explains the functioning of law through the divided components of Primary and Secondary rules, also addressed as “heart of legal system”. Primary rules impose duty upon citizens to perform in the expected manner. Otherwise, they will accrue legal sanctions. For instance, in public wearing of masks were mandatory during COVID-19. On the other hand, secondary rules provide power to regulate the Primary rules. It is divided into rules of recognition i.e., what is to be recognized as a law within the system, rules of change i.e., procedure to repeal or alter law, and lastly rules of adjudication i.e. dealing with the process of applying the law based on circumstances. Perhaps, by preaching the presence of such a robust structure, Hart is justifying that the Positivist system of law is an independent ecosystem and self-sustaining. Therefore, it does not necessarily require the influence of foreign concepts such

³ Morality compromises of Moral values i.e., formed through internal sources of human conscience and tend to morally control the behaviour of person.

⁴ Law comprises of the rules and regulations enforced by (state) upon its citizens. Legal control is majorly based on deterrence i.e., sanctioning for violation.

as morality.

Furthermore, although Hart endorses for the law to be precise and unambiguous, he simultaneously admits that words might lack accurate meaning and the available resources may be inadequate to derive the meaning. This is called the problem of penumbra.⁵ In such situations of “what ought to be”, the judge would discover the new meaning of the word even by moving out from the ecosystem of legal positivism and seek the influence of morality. While Hart argues that “what ought to be law” does not imply going outside law, rather it is a procedure of discovering the meaning from within the legal framework and attempting to find the contextual meaning. This argument implies two things: Firstly, Hart is an inclusionary Positivist unlike Bentham and Austin. Secondly, Hart does not prohibit the entrance of morality in making of law, rather it must be used at the minimum for the survival of the internal consistency of the law. In fact, the Hartian approach instructs to follow the law as it is, rather than morally framing the law based on what people expect.

Lon L. Fuller:

On contrary, Naturalist Fuller argues that morality is an intrinsic part of law which plays a primary influence in its construction. Contradicting or absence of morality will inevitably render the law invalid. According to Fuller, law is “*the enterprise of subjecting human conduct to the governance of rules*”.⁶ Furthermore, while Fuller also categorizes morality into “morality of aspiration⁷” and “morality of duty⁸”, however, for the purpose of relevancy, categorization on internal and external morality will be focused upon. To define, external morality refers to the substantive laws and internal morality or procedural morality refers to the process of constructing the law.⁹ In this regard, he strongly endorses for subjecting the law-making process to procedural morality as he believed that, to curb injustice in the society and attain social order, it becomes essential to limit the power of lawmakers. The rule of law should be morally valuable. For this, Fuller formulated eight requirements (refer to footnote) which act as a

⁵ HLA Hart, „Positivism and the separation of law and morals“, [1958] Vol 71, no. 4, Harvard Law Review at p. 593- 629.

⁶ Lon Fuller, ‘Morality of Law’ rev. ed. (New Haven: Yale University Press, 1969)

⁷ The fundamental norms to be followed by humans that can provide maximum happiness and good life.

⁸ These are the basic norms that will channel society to achieve moral aspiration.

⁹ Kenneth Himma, ‘Natural Law’ (Internet Encyclopedia of Philosophy) <<http://www.iep.utm.edu/natlaw/>> accessed 16 April 2022.

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mandatory threshold to meet the criteria of rule of law. ¹⁰Failure to meet the requirements will be tantamount to the same being deemed as “not a law”. Fuller furthermore maintains that law should not be vague or ambiguous since that will discount the practicality of the law, i.e., citizens will be unable to comprehend a clear meaning and instruction of the law. Eventually, citizens will be unable to predict the consequences of their conduct and might end up violating the law. Therefore, for citizens to channel their behaviour and live harmoniously, it is essential for law to be clear. In the event of any ambiguity, judges can invest their personal and professional interpretation in establishing a clear meaning.

Secondly, while challenging the Positivist approach of Hart, Fuller is a strong believer of Overlap Thesis¹¹. He argues that the notion of morality and law are inextricably linked. These internal principles comprise morality where law’s moral worth can be seen in two ways: (1) it contributes to social order, and (2) it does so while respecting personal autonomy since norms guide action. Morality, according to him, serves as a limitation on the existence of a legal system. He believed that even substantive rules of law cannot be devoid of morality. Like internal principles promotes mankind, the objective behind substantive rules should also be to seek the best interest by following the moral standards to which he termed “external morality of law”.

Collective analysis of Hart and Fuller in light of Sec. 66A, IT ACT, 2000¹²:

In brief, Sec. 66A criminalizes a large purview of online activity, including practices like cyber bullying or even texting grossly offensive/false messages. On this note, the following space will be dedicated to how positivist Hart and Naturalist Fuller would respond to this law.

In the context of Fuller, his fundamental argument would be based on identifying whether the law meets the eight principles of internal morality. While the provision is based on establishing a more secure virtual environment, however, relevantly at the prima facie it is apparent that words like “annoying”, “inconvenient”, “insulted” and “hatred” are not only left undefined and but are vague. The statute can easily be misused to a great extent as it leaves a lot of discretionary power to Judges. This also stands in violation of freedom of speech and expression and thus, contradictory in nature. Therefore, from the Fuller Lens it is an invalid

¹⁰ Lon Fuller, ‘Morality of Law’ rev. ed. (New Haven: Yale University Press, 1969)

Law must be- general, promulgated, prospective, clear, non-contradictory, must not ask the impossible, relatively constant, and congruent.

¹¹ Supra (n6).

¹² Section 66A, IT ACT, 2000 (India)

law.

On the other hand, in Hart's context, he would primarily emphasize on the authority that created the law and whether there was competent procedural compliance. Therefore, presuming that the parliament rightly amended the respective law and complied with all necessary procedure. In that case, notwithstanding the moral value of the law, it will be treated as valid.

Bentham's Utilitarianism, David Wexler's Therapeutic Jurisprudence¹³, and well-being:

From Hart's defence of positivism to Fuller's naturalism, it could be clearly inferred that morality in both platforms captures a significant area. While withstanding the above-mentioned arguments, we have come to a legal society wherein Hartian Approach is used with a naturalistic justification by state to frame laws. Thereby skewing towards law's outcome to evaluate morality. While the obvious stretch is towards Bentham's Utilitarianism¹⁴ and Hedonistic calculus that determines morality based on the law's outcome. However, this paper will utilize David Wexler's Therapeutic Jurisprudence which is fundamentally reflective of Bentham's idea of pleasure and pain, and the rising importance of mental health.

In this regards, Prof. David Wexler in his theories highlighted the concern on emotional and psychological well-being attached to law¹⁵. The impact of law which has the potential to reduce the pain and agony will have some therapeutic value and thus should be promoted. The unintended consequence that may arise with application of a law can be beneficial and sometimes harmful to the mental well-being and the same cannot be neglected. He determined well-being based on the law having therapeutic and anti-therapeutic implications. On this note, in sec. 66A, it can be observed that: Positively this could curb trolling and bullying over internet. On the negative aspect, it can be greatly misused by the state as the criminalization is based on vague terminologies. Therefore, it has both therapeutic and anti-therapeutic implications.

Analysis and Conclusion:

¹³ David B. Wexler, 'The DNA of Therapeutic Jurisprudence' (2020). Arizona Legal Studies Discussion Paper No. 20-43, Carolina Academic Press. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731574 > accessed on 16 April 2022.

¹⁴ William Sweet, 'Jeremy Bentham' (Internet Encyclopedia of Philosophy) <<https://iep.utm.edu/jeremy-bentham/#SH6a>> accessed on 16 April 2022.

¹⁵ Supra (n 12).

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The above-mentioned arguments holistically explored the relation between morality and law. However, given the current dynamics of misusing the law in unforeseeable ways and the new system of victimization, it is essential to equally emphasize on the consequences created by the law. Hence, the shift is towards therapeutic jurisprudence. Finally, it was arguably found that consequential well-being can be a determinant of morality or validity of law in general.



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