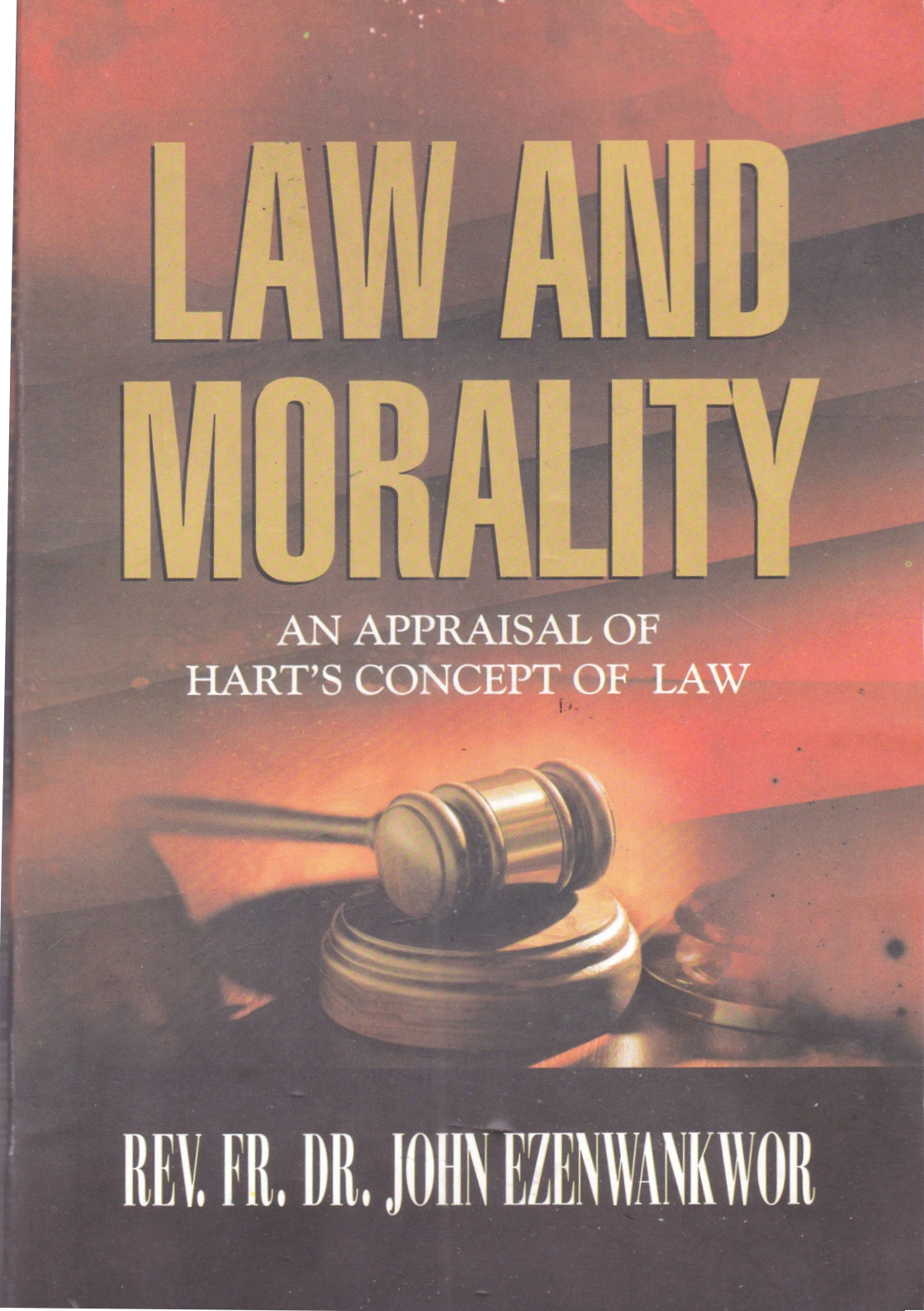
LAW AND MORALITY

AN APPRAISAL OF HART'S CONCEPT OF LAW



REV. FR. DR. JOHN EZENWANKWOR

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An Appraisal of
Hart's Concept of Law

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❖ DEDICATION ❖

To my superiors;
C. Ihedoro, G. Nzeh,
W. Madu and S. Nwobi.
And
to the memory of my parents
Simon and Mary Okafor

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❖ FOREWORD ❖

Our survival as humans in a society is essentially determined by our attitude to law and morality. In this part of the world, Law is regarded as the most potent instrument of class struggle because laws are made by the ruling class in order to solidify their class position in society. This is made possible by the fact that the legislative organs of the state are dominated by powerful politicians of diverse interest groups or parties. These legislators promulgate, amend and tinker with fiscal legislation, budgets and fiscal reviews, in their own interests before the people's interests are addressed, if ever. Hence our system of promulgating laws could be said to be corrupt and immoral.

Naturally, morality is imbedded in the consciousness of what is just and proper, what is adjudged as right or wrong behaviour. This consciousness imposes a moral obligation and a duty to exercise moral judgment, which may not be necessarily enforced, by legal compulsion. But our present society's decadent morality and epicurean disposition call for a legal control of the moral life of its citizens. Unfortunately, our laws are violated with impunity by the very people, who should enforce them. As soon as human memory is overcast by other happy events, we lower our guard and pursue pleasurable things that last momentarily. Thus we can confidently admit that every society needs legal norms, its own jurisprudence, which is aimed at societal control, in order to maintain societal peace and correct delinquents and mal-adjusted citizens, when they err.

Therefore, in pursuit of this marriage between law and morality, Dr. John Ezenwankwor publishes this book, Law and Morality: An Appraisal of Hart's Concept of Law. In it, he delves into a critical analysis of the works of a British legal philosopher, Herbert Lionel Adolphus Hart (1907-1992), who made landmark contributions to the moral and legal questions surrounding human actions or conducts. Incidentally, as an erudite scholar, Fr. John surpasses his master, Hart, in this book, by correcting his mistaken and poor consideration of the influence of morality in holding the society together and his dismissal of legal enforcement of morality.

In order to posit his arguments logically and coherently, the book is divided into five chapters. After the general introduction of Chapter One, the book starts from Chapter Two by situating the discussion at the very heart of major arguments on law and morality by some famous legal philosophers like Lord Delvin, John Austin, Kelsen, Lon L. Fuller, R.M. Dworkin, J.S. Mill, Joel Feinberg, etc. Basing himself on the questions raised by these philosophers on law and morality, Fr. John meticulously plunges into the analysis of Hart's own teaching on law and morality in Chapter Three. And from the flaws gathered from Hart's teaching on law and morality, Fr. John moves into Chapter Four to expose the fundamental issues in morality with regard to legal limitation of liberty. Finally, in Chapter Five which is the last chapter, he evaluates and applies the principles of Hart's teaching on law and morality to our contemporary society.

Doubtlessly, Fr. John has demonstrated laudable intellectual courage and perspicuity in resolutely delving into the sturdy waters of current moral issues of abortion, prostitution, homosexuality, individual liberty etc. The book is practical in

it approach and written in simple language comprehensible to all and sundry. Therefore, I recommend it highly for students of philosophy, law and those who have great flair for speculations on current legal and moral issues in the society.

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❖ PREFACE ❖

One is often overwhelmed by the various distinctions over the discussions and debates on the relationship between law and morality. Specifically, the debate between Lord Devlin and H.L.A. Hart springing from the Wolfenden report on sexual morality was a prime issue for which a strong intent for this research was born. Since the Wolfenden report in 1957, much literature has appeared either as a critique or as a defence of the enforcement of morality. As many as there have been these authors, the problem still remains; there has not been up till the present time an agreement on whether the criminal law should be used to enforce morality. The arguments seem more complicated by the day and so there has not been a general agreement on either side of the argument. The arguments of the proponents of the enforcement of morality like Lord Devlin, Lon L. Fuller, and R.M. Dworkin seem to be at variance with each other. In the same way, the arguments of those who insist that the criminal law should notbe used to enforce morality such as H.L.A. Hart, J.S. Mill and Joel Feinberg differ also from each other. The different arguments are thrilling as well as interesting but leave the clapam omnibus (man on the Street) more confused than enlightened. Following this situation, there will be no end to further discussions and debates on the enforcement of morality until we come to a clear agreement on the continuously raging issue.

The moral and legal questions surrounding human actions or human conduct are experienced practically on daily basis by most people living in societies dominated by different political, cultural and religious as well as conservative and liberal orientations. For example, while some people will

want trivial moral offences considered as sin to be committed to criminal sanctions, not many people would want to be obligated by the criminal law to perform supererogatory acts. Few also would want the intervention of the criminal law in the private affairs of individuals as well as sexual affairs of consenting adults. There are also others probablyin the minority who may not want total limitation of liberty but certainly will want the criminal law to limit some moral harm that affects society. The 21st century democratic societies are awash with problems over the enforcement of morality with the criminal law resulting in widespread denunciation of various forms of laws hitherto commonplace in some societies. For example, in England the blasphemy law has since 2008 been jettisoned for liberty and is now consigned to the private sphere. Under the greatest attack is the sexual morality where most liberals reject the inclusion of such acts as homosexual acts between consenting adults, abortion, use of marijuana or other hard drugs and prostitution into the criminal statutes. People argue that such actions are not socially harmful and so should not be the concern of law'[1]

What should concern the law in relation to morality is therefore the basic problem of the modern society. We will consider this problem in the proceeding pages through the lens of the important works of the English legal philosopher, H.L.A. Hart. The law's concern in relation to morality has not only been given much consideration by Hart, but some other philosophers and jurists of his time have given much time to this issue which remains ever unsolved and undecided. Among the outstanding jurists and philosophers who bothered themselves with the relationship between law and

[1]G. Gels, Not the Law's Business?: An Examination of Homosexuality, Abortion, Prostitution, Narcotics, and Gambling in the United States, (Rockville, MD: National Institute of Mental Health, 1972), p. III.

morals, two opposing groups are distinguishable: the liberals and the conservatives. We will consider the basic questions raised by liberals that argue for the strict individual liberty and therefore jettison any feeling for morality as part of considerations in limiting individual liberty. We will as well highlight the views of conservatives that argue for the enforcement of morality (legal moralism) and therefore consider the limitation of individual liberty inevitable when they are morally harmful.

Following the problems noted above, this work is an attempt at an exploration of the legal and moral language with special focus on the writings of H.L.A. Hart. It is centrally focused on the two works of Hart, namely The Concept of Law and Law, Liberty and Morality. His other writings, especially his classic: Essays in Jurisprudence and Philosophy are also taken into consideration.

While focusing on a detailed consideration of Hart's views, other notable philosophers and jurists of distinction in the debate over law and morals are noted and examined. The contributions of such notable jurists and philosophers like Wesley Hohfeld, Carl Welman, John Austin, Ronald Dworkin, Patrick Devlin, Joseph Raz, Joel Feinberg, Lon L. Fuller, Hans Kelsen etc. are importantly examined as forming part of the overall considerations over the debate over the legal enforcement of morality. Using legal and moral language, we try to show that the analysis and elucidations of Hart about the concept of law as well as the relationship between law and morality are laudable but fail in addressing properly the issues that bother on moral harms. He is therefore accused of over extolling individual liberty in considerations of legal limitation for moral harms.

It is hoped that our attempt to clearly state Hart's and other legal philosophers' views on law and morals will help to further highlight the on-going issue in further ways that we hope will be more clarifying and clearer to the clapam omnibus and therefore leave him in better situation for proper choice on the raging issue. It aims to properly highlight and analyse some basic terms in legal philosophy, points of agreement and disagreement in the debate over the enforcement of morality as well as to make a proposal for further considerations of conducts that are morally harmful in relation to the criminal law. It further tries to show that the clarifications and analysis of H.L.A Hart in his works, The Concept of Law and Law Liberty and Morality are foremost steps in understanding the concept of law as well as in the discussions of the relationship between law and morality though not without some flaws. Hart's views in the Concept of law is one of the most influential in jurisprudence of the 20th and 21st centuries and will probably remain that way many years to come. He remains a giant of English jurisprudence especially in his ability to surpass Kelsen and John Austin. Where they failed, he was triumphant. For example, he transformed Kelsen's basic norms into a more complex analysis of law that distinguishes two kinds of rules. He further tried to explain (what Austin failed to do) "...how we can coherently explain the development from the primitive to "evolved" legal systems."[2] H.L.A. Hart's arguments in the relationship between law and morality are the most referenced in our time for its sturdy arguments.

[2] Philosophy of Law Spring 2009, http://www.hku.hk/philodep/courses/Law/Hart%2Ohnd05.htrfl, February 8 2011.

[3] T. Lickona, "Critical Issues in the Study of Moral Development and Behaviour," in Moral Development and Behaviour, Theory Research and Social Issues, Ed. T. Lickona, (New York: Holt, Rinehart and Winston, 1976), p. 3.

While positively noting his epoch-making intervention in the concept of law and his sturdy arguments in its relationship with morality, this piece is intended to show that Hart was mistaken in his poor consideration of the influence of morality in holding the society together. His blanket dismissal of legal enforcement of morality is considered here, a mistaken and contradictory position especially when considered alongside his endorsement of legal paternalism.

It is axiomatic that in every field of enquiry, good questions are needed to get good answers. In this light therefore, we intend to identify the reasonable questions that have occupied many people in the society about the conflicts between law and morality; the legal limits of liberty in a democratic society especially as it concerns moralistic considerations. Particularly, we are going to explore the liberal legal limits that can be placed on people's liberty when their actions are considered harmful to others, offensive to others, harmful to self as well as actions that are considered to harm no one (harmless wrongdoing or legal moralism). Our considerations of the general legal limiting principles will put us in proper position to consider Hart's repudiation of legal moralism.

While carefully exploring the notable works of some jurists and legal philosophers especially Hart, Dworkin, Lon Fuller, Patrick Devlin and Joel Feinberg on these important questions, the great importance of this piece can be considered following two dimensions theoretical and practical. In the theoretical realm, this work will be very useful for legal scholars, philosophers as well as for the man in the street. It is hoped to provide veritable theoretical distinctions in the various terms related to law and rights. It will specifically provide readers with proper guides to the

various distinctions that puzzle the clapam omnibus about the talk about law and morals and proper legal limitations to individual liberty. On the practical realm, it will be very relevant to all especially to the lay man to whom we hope this will serve as a handbook for daily consultation on the issues that concern law and morals and the limitations of liberty.

The major themes of this work are arranged in five chapters. The first chapter is the introductory chapter that highlights the basic concepts needed for proper understanding of the moral and legal arguments in relation to liberty. The second chapter is a review of the major authors on law and morality. In a very specially way, the legal philosophers and jurists who devoted much time elucidating the concept law as well as their relation with morals are duly highlighted. While admitting their contributions, their flaws are also identified. Among such philosophers and jurists mentioned here include, Austin, Kelsen, Dworkin, Holmes and Raz.

Chapter three is a journey into the life and times, works as well as views of Hart. Among his numerous views, this chapter concerned itself with his teaching on the concept law as well as its relation to morality. Effort is made in this chapter to consider alongside Hart's views, his flaws. Some of these flaws are considered as reasons for his failure to give due regard to moralistic consideration in the legal limitation of liberty.

In order to put in proper perspective the whole issue of law and morality, chapter four is considered a special chapter intended to keep the reader abreast with the fundamental issues involved in consideration of legal limitation of either morality or whatever can properly be considered for such limitation. In every democratic society, laws are put in place as limits to individuals and groups for peaceful organisation

of the society. Such peaceful organisation ensures that no person harms the other, harms himself, harms society or offends the other. These are variously referred to as harm principle, legal paternalism, legal moralism and offence principle. The central argument of Hart, in the relationship between law and morals centres on a critique of legal moralism. This chapter will therefore show that Hart probably because of his undue liberal bent was mistaken in giving consideration to legal paternalism and repudiating legal moralism. In this chapter therefore, some important issues will be highlighted where Hart's position will be useful in solving the problems of the society.

In the final and evaluative chapter, an attempt is made to examine in some details the application of Hart's position about the enforcement of morality. The aim of this is to evaluate his position in relation to our contemporary society. In this direction therefore, some issues in the particular countries such as America, Nigeria and England will be considered. These instances are used to show Hart's failure in taking seriously the relationship between law and morality and therefore the need for legal enforcement of some particular moral injunctions.

John Ezenwankwor CMF
June2013

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1

BASIC TERMS

❖ RIGHTS ❖

The law exists because of the need to protect some rights either of the individual or of the community. It loses its meaning therefore when there is no right to be protected and in such situations it becomes arbitrary. The rights to be protected are called claims or liberties. The exact meaning of the concept rights has been a basic problem dividing many legal philosophers. Some for example, Rex Martin hold that rights are accredited ways of acting while others regard rights as a claim on other persons[1] or as individual liberties. Others yet regard rights as entitlements, justified claims, titles or claims to an interest that is enforceable by law, normative relations between members of a community, valid claims etc.

Among the many authors on rights, Feinberg presented a very fascinating elucidation of the concept rights as valid claims. As a starting point into the elucidation of this concept, he imagined a conceptual world *Nowheresville*[2] where no known rights existed. In spite of all the good things in this world, he

[1] R. Martin, A System of Rights, (London: Clarendon Press, 1997) p. 29

[2] Nowheresville is an imaginary world used by Feinberg for a better description of a world without rights. It is a world in general where people lived in peace with one another and where many virtues flourished.
To make the virtues have the Kantian supreme worth, Feinberg introduced duty into this world. He further added in succession the notion of personal desert and what he called the supreme monopoly of rights into it. In reference to the former, students and servants receive what they deserve from teachers and masters and remain grateful. They will never complain even when the expected deserts fail. In the later, a kind of right is provided to help create ownership of goods and services but only to the sovereign (as in Hobbes Leviathan). This situation failed to satisfy Feinberg and he therefore saw this world as very deficient one.
(J. Feinberg, "The Nature and Value of Rights" Philosophy of Law ED. J. Feinberg and J. Coleman, (California: Wadsworth/Thomson Learning, 2004), p. 312

identified one thing lacking which he called the activity of claiming and distinguished between three types: making a claim (performative), claiming that (propositional) and having a claim (possessive). He emphasised the performative sense of making a claim because of his major objective which is to indicate that human dignity depends on the capacity to make claims against others when unjustly treated. Because those in Nowheresville lacked any concept of making a claim, they consequently lacked the ability to stand up and demand what is their due. The introduction of the activity of making claims will help the citizens in this world to "stand up like men, and look others in the eye and feel in some fundamental way the equal of anyone."[3] The ability for this kind of claim is what makes dignity realizable in contrast to the situation in the imaginary world.

It is not every claim that amounts to having a right. Only valid claims or justified claims that amount to .a right in Feinberg's analysis of rights. In the concluding paragraph of his work, The nature and *Value of Rights*, he writes:

> To have a right is to have a claim against someone whose recognition as valid is called for by some governing rules or moral principles. To have a claim, in turn is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to

[3]J. Feinberg, The Nature and Value of Rights" Philosophy of Law ED. J. Feinberg and J. Coleman, (California: Wadsworth/Thomson Learning, 2004), p. 312

> the notion of personal dignity, and distinguishes this otherwise morally flawed world from the even worse world of Nowheresville.[4]

Among many other issues in his explanation above, the first on which others depend is very important to the general theme of this book which bothers on law and morality. To have a right is to have a claim against someone whose recognition as valid is called for by some governing rules... The claims we make to something do not by themselves justify placing a duty on another person. They require some justifying principles to demand the performance of a duty from others. In Feinberg's terms, only the claims validated by these principles can be properly regarded as rights. Following this model, every claim is initially considered potentially valid but is fully validated when it has been assessed by relevant rules which could be moral or legal. In this sense, moral claim rights are valid when justified by moral principles addressed to public opinion or an enlightened conscience moral law, while legal claim rights are valid when justified by the governing legal system positive law. These relevant rules are the basis for moral and legal duties.

❖ LIBERTY ❖

Liberty is a concept widely and constantly used everywhere but often without much thought on what it truly means or whether it truly represents situations when we usually refer to them. We often say for example that 'I am at liberty to..., This often means that I am free or I have the right to take a particular course of action. This is the primary or the starting point for considerations of liberty. In this primary sense, it is

[4] J. Feinberg, Ibid.

defined as the freedom or right to live and act as one chooses without governmental or other people's intervention. In the language of rights or legal language however, liberty is usually discussed as a right that is meaningful only in relation to the other members of the society. It is not given in isolation but within a community. In this sense, it is seen as the inalienable right of one, or his entitlement to do whatever that does not harm another.[5] Liberty has therefore a very strong footing in the liberal harm principle enunciated by John Stuart Mill where one is taken to be free as long as he does not do anything that 'harms others.' It expresses the valuable thing about us as human beings. Charles Fried refers to such value expressed in liberty as a natural law idea or a "...moral imperative based on what is fundamental about human nature.[6]

As a universal concept, liberty is often interchanged with freedom. It is seen as a state of freedom as contrasted to political subjugation or individual slavery, manipulation and imprisonment. The individual who is at liberty does whatever he wishes that concern him without interference. In agreement with individual non-interference, Harold J. Laski defines liberty as "...the eager maintenance of that atmosphere in which men have the opportunity to be their best selves."[7] Joel Feinberg in an effort to explain the concept, made an interesting representation of the relationship between liberty and freedom thus: "...a liberty equals a freedom, though we do not speak of having a freedom, and at liberty to, equals free to, though we do not speak of at freedom

[5]M.L. Morgah, Classics of Moral and Political Theory,(Massachusetts: Hackett Publishing Company, 2005), p. 1105.
[6]C. Fried, "The Nature and Importance of Liberty" Harvard Journal of Law and Public Policy, 29.1 (2005), p. 3.
[7]H.J. Laski, A Grammar of Politics (London: George Allen and Unwin., 1967), p. 142.

to."[8] Liberty is the freedom or right to act without being constrained by necessity or force. In the sense in which we will be considering the concept here as a legal term, liberty is simply an absence of legal coercion. When citizens for example are prevented from doing a particular thing B under pain of punishment, it means that the citizens are not at liberty to do B. Liberty begins where coercive laws stop.[9] This work will therefore trace the moral contours where the citizens have a right to be at liberty or be free from legal coercion.

❖ LAW ❖

Law just like 'time' is one of the most used concepts in our everyday discussion and it is as well considered a simple concept with clear and concise meaning. In almost every instance of the use of the word, we can easily consider it as having been properly used and understandable too. We get into difficulty however, when we try to give it a concise definition. Just as St Augustine stated that we know perfectly what time is until we try to define it, we can as well say that we understand the meaning of the concept 'law' until we try to define it. Many philosophers and jurists have at various times tried to give concise definitions to this concept, some with a view to giving a general definition that would encompass all uses of the concept. Some on the other hand have tried to give law territorially concise definitions.

In a very broad sense, law is considered as the general conscience of the community on issues which cannot be left to individual choice. It systematizes conscience with

[8] J. Fein berg, The Moral Limits of the Criminal Law: Harm to Self (New York: Oxford University Press, 1986), p.63.
[9] J. Feinberg, The Moral Limits of the Criminal Law: Harm To Others, (New York: Oxford University Press, 1984), p. 7.

necessary sanctions for non-conformity. It is further defined generally as a rule or measure of acts whereby man is induced to act or restrained from acting. From its Latin derivative ligare meaning to bind, law is defined as a rule or measure of acts whereby man is bound to act or be restrained from acting. The notion 'law' is associated with a diversity of subject matters and its meaning undergoes a process of change as the discussions move from one context to another. The most striking difference in the meaning of law separates the way in which natural scientists use the term from the way in which those engaged in arts, morals and politics use it. In each of these, law implies an intrinsic principle of acts. It is conceived as a rule or acts which must be obeyed. In each law, there is always place for an alternative: obedience and disobedience even though the obligation that law creates is that of obedience. The laws of nature which is primarily the concern of the scientists "...do not have this significance and so they are inviolable. The laws of gravitation or Newton's three laws of motion for instance cannot be disobeyed."[10]

Law as we understand it in the 20th and 21st century can to a large extent be said to begin with the speech of Oliver Wendell Holmes at the dedication of the new hall of Boston University in January 8, 1887. On that day, he sought to debunk the jurisprudence of the past with a proposal of a new course for the modern jurists and legal philosophers. We may quickly dismiss his consideration or definition of law but we may not be able to avoid his themes which border on the objectivity of law and its relationship with morality which has since dominated legal philosophy. While introducing his audience to the business of law he began with an explanation of the legal profession itself and from there defines the concept law.

[10]J. Ezenwankwor, "A critical Analysis of Natural Law: Thomas Aquinas Perspective," (Unpublished Philosophical Project, Claretian Institute of Philosophy Nekede), 1994, p. 4.

According to him, one studying law is not studying a mystery, but "a well-known profession." He further states that:

> People are willing to pay lawyers to advise and represent them because "in societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgements and decrees." Now, this is a fearsome power. So people "will want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared." The object of the study of law, therefore, "is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."[11]

This definition leaves us with a lot of problems. It fails to provide grounds for such predictions. Law is neither magic nor fortune telling but a kind of general rules guiding behaviour and therefore it cannot be defined in terms of prediction. The definition further gives the courts unlimited powers, such that whatever they decide is law. Following the inadequacy of such definition, more and more legal philosophers got interested in the proper definition of the concept.

Probably a good starting point into the full consideration of the concept law, is the work of J. Austin, The Province of

[11]R.P. George, "What is Law: A Century of Arguments," First Things: *A Monthly Journal of Religion and Public Life*, (2001), p. 18.

Jurisprudence Determined. John Austin defined laws as commands or species of commands. He began his consideration of laws by first distinguishing between laws properly considered and laws improperly considered. The laws properly considered are commands and laws improperly considered are not commands but figurative laws. Accordingly, he distinguishes between divine laws, positive laws, positive morality and figurative laws. While divine and positive laws are considered as laws properly considered, positive morality and figurative laws are not.

❖ POSITIVE LAW ❖

John Austin defines laws properly so called or positive law as "...a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[12] This definition may be satisfying to a lay man, it certainly does not fully certify the philosopher or the jurist who would need to properly analyse further the conceptual definition with empirical facts. Consider the example given by Hart where a given man orders his victim to hand over his purse with a threat to shoot him in an instance of refusal. The essence of law following Austin's definition will be considered in terms of the feeling of compulsion towards compliance. This is no doubt fully present in the gunman case. The question remains whether we shall consider that as law considering the illegitimacy of such orders.

Considering the enormous variations in the definition of the concept law, Hart feels that the way to get to the proper meaning of the concept law will be to defer giving any concise definition to it. He rather prefers the procedure where

[12]J. Austin, The Province of Jurisprudence Determined, (New York: Prometheus Books, 2000), p. 10.

we first of all inquire into what creates confusion among those who have laboured to define law in history. He indicates issues that together request constantly for a definition of law. The issues which feature in law include always the fact that by law, some aspects of human conduct are made in some sense obligatory and that law consists of rules. The first sense in which conduct is rendered obligatory and therefore not optional is according to him, "...when one man is forced to do what another tells him, not because he is physically compelled in the sense that his body is pushed or pushed about, but because the other threatens him with unpleasant consequences if he refuses."[13] Much of English jurisprudence which originated from John Austin hinged on this way of understanding law as orders backed by threats.

There is no doubt that most laws have this feature. To define law however as mere orders backed by threats would be too simplistic and grossly reductionistic following Austin's analysis of the concept. This is because it ignores, according to Hart, the aspects of law referred to as legal obligation where there are no threats to punishment. For example, in reference to legal obligation one often takes upon oneself the obligation of performing a particular duty. In the following chapters we shall further consider the arguments in favour of both positions.

The other sense in which the question what is law prompts itself according to Hart is in relation to our first and general definition of law as 'a rule'. In whichever way one tries to define the concept, the concept 'rule' is considered as a sine qua non. It is either considered as containing rules or

[13] H.L.A Hart, The Concept of Law, (New York: Oxford University Press, 1997), p.6.

considered as consisting of rules. Apart from the constant feature of the concept in law, it equally features in many other subjects. We can for example refer to rules of etiquette and language, rules of games, rules of farming etc. Within the law, some rules are made by legislation while others originate through societal opinion. The rules of the first type are considered to be in most cases mandatory rules while the later are often not mandatory but relate to habit. We have an instance of non-mandatory rules when we say for example that a child will ordinarily cry when beaten by a snake. In the third chapter of this work where we will be reflecting on the concept of law in its relation to morality, we will proceed further with the debates on what constitutes law. It suffices here to conclude by saying that in general, laws are rules of a type that impose duties and obligations.

❖ NATURAL LAW ❖

We often hear such statements as 'it is not just right', 'it is not natural', 'it is perverse', and 'it is inhuman'. These are often judgemental statements. When such statements are made, they mean that a particular action is objectively considered wrong or that it is not in the nature of the object to attune itself to a particular thing or do a particular thing and therefore should be discouraged. For example, when homosexual acts are judged to be non-natural, it means that they are wrong and should therefore be forbidden. The will, reason and conscience are for instance considered natural in human beings. The things that are considered natural constitute the nature of human beings and without them or any of them human beings will cease to be human beings.[14]

[14] C.D.D. Hodge, Systematic Theology, (London: Thomas Nelson and Sons, 1871), p. 264.

When therefore one does any of the things considered non-natural, one is considered to becontravening what is termed the natural law; that is acting against one's nature. The judgemental statements we make about actions in relation to nature are however often considered nonsensical except in reference to some objectively ascertainable measure of right and wrong, good and bad. Such judgemental statements find their backing on the unspoken assumption of the laws of nature that "...there is indeed a corpus of moral truths that, if we apply our reasoning minds, we can all discover."[15] It claims that what naturally is, ought to be and that "universal and nonconventional dictates of right and wrong exist within nature."[16] It relates to a set of principles "…assumed to be the permanent characteristics of human nature that can serve as a standard for evaluating conduct and civil laws."[17] It is set as an ideal to which humanity must aspire in contrast to positive law that relate to laws enacted by civil society.

In general academic discussions about politics, ethics and law, the concept natural law is pervasive. In spite of the level of concern, for natural law in these fields, there remains a problem that hinders its careful and positive consideration in the modern society namely the bias about its ambiguity as to whether its foundations are purely religious without scientific validation.[18] Even though it is not within the scope of present discussion to defend natural law, we note in passing that we

[15]R. Wacks, Philosophy of Law: A Very Short Introduction, (Oxford: Oxford University Press, 2006), P. 1.
[16] M.R. Gerson, "Natural Law and Modern Economic Theory", Journal of Markets & Morality, Vol. 8, Issue 2, Action Institute, 2005, pp. 387
[17]J.E. Lynch, "Natural Law" Microsoft Encarta 2009 DVD, (Redmond WA: Microsoft Corporation, 2008).
[18]M.R. Gerson, "Natural Law and Modern Economic Theory", Journal of Markets & Morality, Vol. 8, Issue 2, Action Institute, 2005, pp. 387

cannot successfully treat the problems of the contemporary society without proper consideration of the natural law provisions. Its provisions are used by both scholars and non-scholars of all times in very wide contexts and discussions.

The strong foundations for the idea of natural law are credited to the philosophers, Aristotle and Aquinas. This idea which is traditionally seen as an unwritten law is based on the belief that there exists a moral order requiring the attention of everyone who intends to attune himself to his necessary end. Three things are fundamental in the general understanding of natural law: there is a nature common to all humans that which marks him out from brutes; that distinguishing mark is rationality through this he is able to recognise the general ends of human nature; by using thought, he is able to relate his moral choices to such ends. The natural lawyers are therefore in agreement that before we come to revealed religion the bible, tradition, wise men of the community or to any other source of moral refinement, we already possess the capacity of thinking ethically and learning, the general requirements of good conduct.[19]

The ancient Greek philosophers were the first to make an elaborate discussion on the idea of natural law doctrine. As early as the 6th century B.C., Heraclitus already believed in a universal reason that unifies all things and "...commands them to move and change in accordance with thought and rational principles. These rational principles constitute the essence of law the universal law immanent in all things. All people share this universal law..."[20] The implication of this

[19]R.M. Hutchins, Natural Law and Modern Society, (New York: Meridian Publishing company, 1966), pp. 18-20.
[20]S.E. Stumpf, Socrates to Sartre and Beyond, A History of Philosophy, Seventh Edition ed. James Fieser, (New York: McGraw Hi)), 2003), p.16.

therefore is that all we do as rational beings must be geared towards the thoughts of God who is the reason behind all our actions. In the same way, Aristotle giving a special place to natural law distinguishes between two kinds of political justice: justice by nature and justice according to convention. He disagrees with the sophists that because all just things are subject to change, there is only conventional justice. He rather insists though without giving a single example of what is just by nature that there are a number of things that are just by nature. He only gives clues on the things that can be considered just by nature. He holds that by nature for example, "...the right hand is stronger, and yet it is possible for any man to become ambidextrous."[21] Among the list to be included into the content of natural justice is the attainment of a 'state of goodness' eudemonia. The stoics especially the philosopher Chrysippus, believe that the world is carefully arranged by an active principle that they referred variously as God, mind or fate and every conceivable thing is considered part of nature. They identified nature with reason and contended that human beings will live "'naturally' if they lived according to their reason that is willingly submitting to nature."[22]

Drawing on Stoic philosophy, Cicero identified three main components of natural law thus:

> True law is reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions. And it does not lay its

[21] C. Lord, Aristotle History of Political Philosophy, Third Edition, Ed. L. Straus and J. Cropsey, (Chicago: University of Chicago Press, 1987), p. 128.
[22] F.O.C. Njoku, Studies in Jurisprudence, A Fundamental Approach to the Philosophy of Law, (Owerri: Claretian Institute of Philosophy, 2001), p. 17-18.

> commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.... (God) is the author of this law, its promulgator, and its enforcing judge.[23]

This however does not mean that Cicero totally accepts the arguments in favour of natural law but he believes that it is very useful for proper societal organisation and it is usually addressed to the honourable men of the society. This explains why he implored the members of his own school, the academic sceptics not to examine his argument for proposing natural law doctrine to the Roman Republic too closely. This is because according to him, if "...they should attack what we think we have constructed so beautifully, it would play too great havoc with it."[24] His fear for imploring the academic sceptics is especially in reference to the Divine backing and anthropocentric teleology of the natural law which he himself earlier rejected. He implores the honourable men to accept such backing for the natural law for it is 'desirable and praiseworthy' even though it is not thoroughly investigated. The implication of the natural law having its origin in God and having a universal application is that it is taken to be a higher law than other laws. It further implies that natural law must be considered as a basic criteria for every just enactment.[25] On this basis, classical natural law doctrine was used as a justification for revolutions.

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[23] A.P. D'Entreves, Natural Law: An Introduction to Legal Philosophy, (London: Hutchinson University Library, 1951), pp. 20-21.

[24] J.E. Holton, Marcus Tullius Cicero History of Political Philosophy, Third Edition, Ed. L. Straus and J. Cropsey, (Chicago: University of Chicago Press; 1987), p. 171.

[25] K.H. Peschke, Christian Ethics, Moral Theology in the Light of Vatican II, Vol. II: Special Moral Theology (Bangalore: Theological Publications in India, 1992), p. 574.

For example during the 6th century BC, the Greeks having recourse to natural law had Hipparchus and Hippias assassinated and exiled for tyrannical rule.

The medieval period saw the emergence of great pillars of natural law doctrine: St Augustine and St Thomas Aquinas. Augustine taught that human laws should approximate natural principles. This implies that human laws that lack the principles of natural law should be considered as unjust laws. St Thomas Aquinas in agreement with Augustine holds that "human law is law only by virtue of its accordance with right reason, and by this means it is clear that it flows from Eternal law. In so far as it deviates from right reason it is called an unjust law; and in such a case, it is no law at all but rather an assertion of violence."[26] He enumerates four kinds of law: eternal law, natural law, human law and the divine law. The whole community of the universe is governed by the Divine reason. This conception of Divine reason in things is what Aquinas calls Eternal law. Man is a rational creature that is subject to the Divine reason. The natural law is then considered as "...a rule of reason, promulgated by God in man's nature, whereby man can discern how he should act."[27]

In more recent times, Aquinas disciples, Jacques Maritain and John Finnis, were forceful in defence of natural law. According to Maritain, there is a universal and unwritten law which all people can know and should respect. For him this law "...does and ought to serve as a standard for human

[26]T. AquinasSummaTheologiae The Teaching of Modern Christianity on Law, Politics and Human Nature Vol. 2 Ed. i. Witte mr. & F.S. Alexander, (New York: Columbia University Press, 2006), p. 30.
[27].E. Rice, 50 Questions on The Natural Law, What it is and Why We Need It, (San Francisco: Ignatius Press, 1999), p. 51.
[28]J. Maritain, Natural Law, Reflections on Theory and Practice, (Indiana: St Augustine's Press, 2001), p. 7

behaviour. This is the natural law."[28] Following Aquinas he asserts that law "is an ordinance of reason for the common good made by one who has care for the community and that is promulgated." [29]John Finnis brought an enhancement in the doctrine of natural law by his innovative addition of the practical reason. By this, he was able to clear the obfuscation of nature by David Hume into the doctrine of natural law. Defending the Aristotelian Thomistic doctrines, he holds that what has been presented by Aristotle and Aquinas are essentially what conforms to reason and not necessarily nature. In this way, he further clarified the Aristotelian and Thomistic doctrine of natural law.

MORAL LAW

Moral law is a direct consequence or offshoot of the eternal and natural laws. If natural law is considered as a rule of reason, promulgated by God in man's nature, whereby man can discern how he should act, he is therefore under obligation to strive after it. While striving after this, there is an order to be followed, that order is the moral order. Some people who define natural law as what is, define moral law as 'what ought to be'. Moral law is however more than 'what ought to be', it is both 'what ought to be' and 'what is'. Moral laws describe 'what ought to be' and 'what is'.[30] This means that whether enacted as legal laws or not, the objective moral order exists. It precludes the argument of some liberals that moral law or moral rights are not laws or rights except when they are properly enacted by the legislature as legal laws.

[29] J Maritain, p. 8.
[30] M. Tse-Tung, Mao's Road to Power: Revolutionary Writings 1912- 1949, Ed. M.E. Sharpe, (New York: Armonk, 1992), p. 184.
[31] K.H. Peschke, Christian Ethics Vol. 1, General Moral Theology in the Light of Vatican II, (Bangalore: Theological Publications in India, 1993), p. 109.

The moral order is brought to the attention of all rational creatures through the moral law. In its general and universal meaning moral law "...is a directive ordering man's activity towards the ultimate end."[31] The ultimate end of man in God is judged to be good and so every genuine moral law must, following its origin, be good and holy. This means in the words of Karl H. Peschke that:

> (It must) contribute to the realization of the final goal of human history and of creation, and that it prevents men from obstructing the attainment of this end. Although at first sight it might seem an exaggeration that every moral directive must be a guideline towards the ultimate end, one must keep in mind that even "the most ordinary everyday activities" are expected to contribute to the "realization of history of the divine plan" (GS 34). Therefore the moral directives must be formulated in such a way that these ordinary activities also can really fulfil the task of contributing to the realization of the final goal.[32]

This means that the moral norms unlike the positive norms only get their binding force according as they are related to the final end of man. Whatever norm in the moral order that does not lead to the final end of man loses its force of command on the will. It is to be taken as an evil norm and consequently unlawful.

[32] K.H. Peschke, Christian Ethics, p. 109.

❖ MORALITY ❖

It is common among philosophers to approach the meaning of morality from a consideration of moral judgements. We will also follow the same direction here borrowing from Fred Feldman who suggests that "...perhaps we can shed some light on the meaning of the noun "morality" by considering the adjective "moral." Proceeding in this way will enable us to deal with a less abstract concept, and we may thereby be more successful. So instead of asking "what is morality?" let us pick one of the most interesting of these uses of the adjective "moral" and ask instead, "what is a moral judgement?"[33] Moral judgements are evaluations as to whether a particular action, inaction, intention, motive, character trait or a person is good or bad measured against some standard. In this evaluative process, human actions are measured according to certain set standards and judged as right or wrong. "When we make a moral judgement we are saying that, so far as we can see at the moment, the supreme standard indicates that such and such a line of action is the one which ought to be taken."[34]

Some human acts are generally considered as right and therefore to be done and others as wrong and to be avoided. The ability to make this kind of judgement called moral judgement is considered an inherent capacity in every human. Underlying judgemental statements are principles that direct us to encouragement or discouragement of particular actions. In every situation, there is usually a distinction between what is good and bad, right and wrong with regard to the conscious human acts. An important question however is whether we are sure of the certainty of such judgements of particular

[33]F. Feldman, Introductory Ethics, (Englewood Cliffs, New Jersey: Prentice-Hall, 1978), p. 2.
[34]W.D. Lamont, The Principles of Moral Judgement, (Oxford: CIarendon Press, 1946), p. 4.

actions as good or bad. Why judge some particular conducts right and others wrong in the first place? These and similar questions form the basic content of morality.

Morality requires just and fair treatment to others and therefore can with a threat of punishment compel people to do or abstain from certain actions. It is essentially concerned with conduct. This is affirmed by Eli F. Ritter while making a distinction between religion and morality. According to him, "...morality is a matter of conduct. The law (morality) does not interfere with matters of belief, but does undertake to control matters of conduct."[35]

The concept: morality is derived from the Latin 'mores' which is a general concept for important ideas and acts of people in the society. It represents the required behaviour which finds expression in the morals and sometimes in the laws of a society. In line with this, morality can be defined as the standards of conduct generally accepted within a society as right or proper. The distinctions made by Lon L. Fuller between the morality of aspiration and morality of duty are particularly interesting in the proper understanding of morality. The morality of aspiration very much exemplified in the Greek philosophy "...is the morality of the good life, of excellence, of the fullest realization of human powers."[36] There might be some overtones of duty in the morality of aspiration but they are not essentially duty in terms of obligation but more in terms of personal failure to achieve a certain goal. The morality of duty on the other hand "...lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark."[37] In each

[35]E.F. Ritter, Moral Law and Civil Law, Parts of the Same Thing, (Westerville OH: American Issue Publishing Company, 1910), P. 49.
[36] Fuller, The Morality of Law, (London: Yale University Press, 1969), p. 5.
[37](Ibid., pp. 5-6.)

case, there are standards to be met. While the standard required in the morality of duty is followed by judgements that go in form of accusation for failing in duty, morality of aspiration are not accusations but rather that of pity and disdain for failing to reach a goal or for taking an infamous course of action. In each case, morality implies adherence to certain standards of behaviour or conduct.

A number of people tend to think of morality as law; morality has a lot to do with law, it is very much related to law but is not the law and in fact there is more to morality than law. It is viewed from various perspectives especially by theologians. Variously morality is viewed by some theologians to be in the model of love and discipleship, legal model, inner conviction model, liberation model and relational or personal growth model.[38] Those who view morality in terms of discipleship feel that we need to turn to the scripture in all our actions and particularly consider the command of Christ to love one another. The inspiration for all moral behaviour therefore should focus on the kind of love that makes us consider the welfare of others in all our undertakings. For those who view morality as inner conviction, every form of community based morality should be jettisoned for personal choice. In this case, personal responsibility for what is morally right takes precedence over what is communally imposed. In this kind of morality, we are judged not on conformity to traditions but on personal integrity and authenticity.

Following the nature of human beings in their societal or communal organisations knitted together by some guiding rules, the legal model of morality which is of much concern here is viewed as the most popular understanding of morality. The early experience of morality show that rules commonly

[38] Fagan, Does Morality Change, (Blackrock, Co Dublin: The Columba Press, 2003), p.45.

accepted in the community are enacted to ensure peace among members who would hitherto follow different selfish directions. These rules were made for the common good and therefore ". . .individuals felt obliged to obey them, either out of personal conviction or because they feared punishment."[39] With this form of legal system which was common in most societies, many people thought of morality primarily as law and therefore think of morality in legal terms. God for example is considered as a supreme law giver who punishes offenders. In the same way, people feelthat contraventions of natural laws are subject to various forms of punishments according to natural laws.

[39]Ibid., p. 46.

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LAW/MORALITY DEBATE

❖ INTRODUCTION ❖

The idea that proper human organisation is based wholly or partly on the notion of certain basic laws has been familiar in philosophical and political thinking. From Aristotelian natural laws through the eternal, divine, moral and positive laws that form the central debates of the medieval, modern, contemporary and postmodern times, humanity has remained in agreement that some laws are necessary for proper societal organisation but remain in disagreement on the nature and relationship of these laws to morality. Some even deny the existence at all of some of these laws. For example, some notable philosophers like Bentham and some later positivists deny existence of natural laws or natural rights as well as moral laws. The denial notwithstanding, their existence has never been totally defeated but tends to be renewed in the face of so many unjust situations. In the event of injustice which is characterized by the denial of moral or natural law, one of Cromwell's soldiers expresses his disgust at the denial of natural rights and laws in relation to slaves thus: "Really sir, I think the poorest he in England hath a life to live as the greatest he."[40] It does not matter therefore whether the statutes indicate only the protection of the slave owners against the slaves, the natural laws or moral laws when properly enacted should give both the slave owner and slave the same protection because they live the same human life. In the following pages, we will highlight some prominent philosophers and jurists who in their different times concerned themselves with the concept and critique of H.L.A Hart's views on law and its relationship with morality. Among

[40]A M. Macdonald, "Natural Rights" Theories of Rights, ed. J. Waldron, (Oxford: Oxford University Press, 1984), p. 21.

such philosophers and jurists are Lon Fuller, Ronald Dworkin, Joseph Raz, John Finnis, Philip Ostien, Gerald Dworkin and Basil Mitchell.

❖ LON FULLER ❖

The legal philosopher Lon Fuller, a colleague of H.L.A. Hart at the Harvard University, is essentially a natural law theorist. He flourished at a time when legal positivism was at its climax and yet emerged as a champion of natural law theory drawing applause from many of his contemporaries He contends that the purpose of law is to subject human conduct to the governance of rules His book, *The Morality of Law,* is partly a response to Hart's view on law and its relation with morality It is as well his most famous work in defence of the intimate connection between law and morality at-a time when legal positivism dominated jurisprudence In the morality of law, he challenged Hart's positivist view of the relationship between law and morality and posited that every law must have an inner-morality giving it credence. He defined law as an "enterprise of subjecting human conduct ton then governance: of rules"[41] and emphasised that law must meet certain formal requirements, demands or desiderata[42] of which without them, they will be less recognised as systems of law. This implies that in contradistinction to Hart's

[41] L L.Fuirer, The Morality of Law (London Yale University Press, 1964), p. 106.

[42] Fuller indicated eight ways in which law can fail to be a good law even if enacted by legislators. They include: (1) the lack of rules of law, which leads to ad-hoc and inconsistent adjudication.
(2) Failures to publicise or make known the rules of law.
(3) Unclear or obscure legislation that is impossible to understand.
(4) Retroactive legislation. (5) Contradictions in law. (6) Demands that are beyond the power of the subjects and the ruled.
(7) Unstable legislation (an instance is daily revision of laws).
(8) Divergence between adjudication/administration and Legislation.

positivist bent, he believes that law has an "...internal morality that goes beyond the social rules by which valid laws are made."[43] For him, law has a fundamental connection with morality. He explained this relationship by first distinguishing between the morality of aspiration and the morality of duty. The morality of aspiration in his terms refers to the morality of the good life or aspiration towards excellence. It "...directs our minds to the perfection of that which we ought to fix our minds on to attain our goal in its fullest excellence."[44] It does not mandate us to do or forbear but brings to our consciousness conceptions of the good life and what befits a human being when he is at his best. It carries sometimes some duty undertones but is not essentially duty in terms of obligation but a kind of an inner feeling of failure in achieving a specific personal goal. There is no condemnation for actions that bother on morality of aspiration but there might be disdain for shortcomings and praise for attainments.

The morality of duty refers to the basic rules without which we cannot have an organised society. If we try to judge conduct in reference to the morality of duty, "...we apply to it definite formidable rules: we speak in imperative or quasi- imperative forms ('thou shall not', or its modern equivalents), and though deviation from the rules attracts accusations and censure, conformity with them is not usually a matter for praise:"[45] The morality of duty is what can be called a minimum morality for the sustenance or survival of a society In this kind of morality, members are duty bound under pain of punishment or visitation of evil in the event of failing to perform the duty It"

[43]"Jurisprudence" in http://en.wikipedia.org/wiki/Jurisprudence, March 1st 2011.
[44]F.C.C. Njoku, Studies in Jurisprudence, A Fundamental Approach to the Philosophy of Law, (Owerri: CIaretian Institute of Philosophy, 2001), p.75.
[45]H.LA. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford Clarendon Press 1983) pp 344 345

urges that people pay attention to the rules that is doing something or refraining from doing something

While we may consider the morality of duty in the same level with established legal rules which must conform to the eight principles,[47] "Fuller contends that the inner morality of law is chiefly the morality of aspiration rather than that of duty. The eight demands or desiderata which Fuller mentioned as inner morality are equated with the morality of aspiration and they are necessary for good laws. He considers law as a purposive enterprise which requires effective means of achieving its purpose. This channel or means is satisfied according to Fuller by the inner morality of law. Whatever is used to achieve the purpose of law must in some level conform to the nature of the laws itself otherwise it will contradict its purpose and law cannot be indifferent to the right ways it attains excellence. The relationship of the inner morality and laws is lucidly explained by Njoku thus:

> The inner morality of law sets the parameter for assessing law. And it is precisely that law is a purposive activity that the inner morality stands to it as a standard of excellence... The inner morality of law requires moral commitment on the part of the content of law itself and those who apply it.[48]

[46]F.O.CNjoku p75

[47]In *The Morality of Law* puller presents eight routes of failure for any legal system. These include: (1)the lack of rules of law, which results in ad hoc and inconsistent adjudication (2) Failure to publicise or make known the rules of law. 3) Obscure legislation. (4) Contradiction the law.(5) Impossible demands from those who are the subjects óflàW (6Retràactivelegisltion. (7) Unstable law requiring constant revisions. (8) Divergence between adjudication and legislation. Each of these routes of failure has its corresponding Principle. For the avoidance of such deficiencies which should be respected in legislation Without such principles in any system of governance, fuller contends that it will not be a legal one These Principles are what he refers as the internal morality of law.

[48]F.O.C. Njoku, p. 80.

On the closeness between law morality especially in consideration of law as purposeful enterprise, Fuller though in agreement with Hart's power conferring and duty imposing rules, accused Hart of making this power exclusive to the legislators. Hart's view in Fuller's understanding meant that their enactments cannot be revoked even when they fail to meet the demand of an ideal law. Fuller insists that legislators must conform to the expectations of the citizens and must not violate the standards of legal system. Legislations therefore cannot be said to be independent of the standards of morality. Every legislation or law must, following this view, have a moral commitment.

RONALD DWORKIN

Professor Ronald Dworkin (born December 11, 1931), an ardent critic of Hart's theory of law and a pupil of Lon Fuller is an American philosopher and scholar of constitutional law. A survey of legal studies points at Professor Dworkin as the second most cited American legal scholar of the twentieth century after H.L.A Hart. His theory of law unlike Hart's theory is not dependent on positivist rules but focused on the ability or integrity of the judges to '..interpret the law in terms of consistent and communal moral principles, especially justice and fairness."[49]

Dworkin was the most ardent critique of legal positivism and rejects the theory that there can be a general theory of the existence and content of law A theory of law is for him in contradistinction to Hart and Austin's rule theory, one that concerns itself with how cases ought to be decided. This should begin with an abstract ideal regulating the conditions under which governments can coercively limit their subjects

[49] "Ronald Dworkin" in http//en.wikpedia.org/wik/Ronald_Dworkin, March 2nd 2001

and not with an account of political organization. Dworkin, in his work: Taking Rights Seriously was very critical of a theory of law which has for long been taken to be the liberal theory of law. This theory which Dworkin called 'the ruling theory' has two parts. The first part of the theory is about them meaning of law while the second is about what the law ought to be. The former which was much of Hart's interest is a "theory about the necessary conditions for the truth of a proposition of law. This is what is termed legal positivism which stipulates that "the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions and nothing else.[50] They deny the existence of rights independent and prior to legal legislation and deny that individual or groups can have rights in adjudication except the ones provided explicitly in the community rule of law. The positivists view is to a great extent built on Bentham's denial of the existence of natural rights. They encounter with much hostility and suspicion any form of abstract theory of societal order other than factual situations of political organisation. As a result therefore, they do not accept the natural law theorists' or moralists claim of the relationship between law and morality.

Dworkin challenges and criticizes this theory as an inadequate conceptual theory of law which should therefore be abandoned He argues that it is wrong to suppose as we find in legal positivism that" in every legal system there will be some commonly recognized fundamental test for determining which standards counts as law and which do not."[51] He therefore posits that no such test can be found in

[50]R. Dworkin, Taking Rights Seriously, (Cambridge, Masschusetts: Harvard University Press, 1978), p. Vii
[51]Ibid p 46

complicated legal systems such as Britain, United States nor can we find in them clear and ultimate distinctions between legal and moral standards as posited by the positivists Such commonly recognized tests can only be found according to him in simple legal rules such as the ones that appear in statutes In adjudication however, lawyers are not only interested i such statutory norms but also on other standards which Dworkin called 'legal principles'[52] such as the principle that 'no man may profit from his own wrong as exemplified in Riggs v. Palmer[53] case of1889. What Dworkin thinks that is implicated in this judgement is adequately indicated by Njoku thus:

> Law is not neutral to moral and institutional standards. In one way or another, if one accepts that law consists of other standards in addition to rules, one cannot maintain a distinction between what law is and what morally ought to be law. The non-rule standards judges employ in deciding what the law is in hard cases include principles, which principle are embedded in the community's morality, and in doing this, he is deciding what the law is.[54]

[52] When Dworkin speaks of legal principles he is not limited to set standards found in statutory norms but to other standards such as moral standards that is to be observed They are standards desirable not because they secure economic political or social situation deemed desirable but because they are requirements of justice or fairness or some other dimension of morality (R. Dworkin, Taking Seriously, p. 24

[53] In this case, the court had to decide whether an heir named in the will of his grandfather could inherit under that will after having himself murdered his grandfather in order to inherit the will. In the letters of the law, there was no reason to deny the heir his inheritance. The court however had recourse to other standards which they termed fundamental maxims of the common law which further stipulate that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniqui€y, or to acquire property by his own crime.
Based on this extra moral standard, the courts denied the heir his inheritance (R. Dworkin, p. 23).

[54] F.O.C. Njoku, p. 100.

This means that the meaning of law is not limited to what we find in statute books but includes as well what we do not have in those handbooks which are found nowhere else but in the generally accepted community moral standards.

❖ JOSEPH RAZ ❖

Professor Joseph Raz (born 1939 in Palestine), a pupil of H.L.A. Hart is one of the most prominent advocates of legal positivism as well as one of the most influential contemporary writers in the philosophy of law. While his general views embody a theory of law, he did not concern himself with definitions of law but provides a broad view of the characterizations of the meaning of law. Rather than begin with the definition of the concept - law, Raz argues against the positions of Hart and Austin that the elucidation of law which is entirely a creation of the western world of sovereign states need not inevitably result in a rigidly parochial concept of law He notes that the concept law, has been changing making it less and less parochial. According to him, ".,.while our concept of law is a stable part of a common and shared understanding, it is a philosophical creation designed to aid understanding of particular social phenomena by mediating between words or phrases and aspects of the world. As a philosophical creation which is more than a reflection of linguistic usage, that creation is influenced by new experience."[55] The concept of law does not in his view compete with shifting interests but responds to them. For example the talk about law should concern itself with every type of authority that enacts law in every society and not just with the select sovereign as found for example in the western society.

In his book, The Authority of Law: Essays on Law and Morality, Raz identifies the perennial and inexhaustible problem over the nature of positivist analysis of law as coming from the elusive meaning of 'positivism' in legal philosophy. For him, this problem or controversy can be overtaken if we approach legal positivism through the particular theses or groups of theses around which it revolves. He identified three of such areas namely:

1. the identification of law
2. the moral value of law
3. the meaning of the key terms

These three areas are identified simply as social thesis, the moral and the semantic thesis respectively. The social thesis holds that what is law and what is not law is a matter of social fact. This means that the varieties of social theses with the support of positivists are considered as refinements and elaborations of the crude formulation of the social thesis. It claims that the existence of and content of the law is a matter of social fact which can be established without resort to moral argument."[56] On the other hand, the moral value of the law thesis holds that "the moral value of law (both of a particular law and of a whole legal system or the moral merit it has) is a contingent matter dependent on the-content of the law and the circumstances of the society to which it applies."[57] The semantic thesis about the nature of law is an attempt to define the concept law. This kind of effort was boosted by the "...anti-essentialist spirit of much of modern analytical philosophy, and in particular by its tendency in its early years to regard all philosophical questions as linguistic

[55]M Giudice, "Joseph Raz's legal Philosophy" in http://iyr-enc.info/index, Php?title=Joseph Raz's legal Philosophy 26th February 2011, 5pm

[56]J. Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics, (Oxford: Clarendon Press, 1995), p. 234.

[57]J. Raz, The Authority of Law: Essays on Law and Morality, (Oxford: Oxford University Press, 1979>, p. 37

questions."[58] In general positivism, the semantic thesis states that terms like 'rights' and 'duties' are not the same, they have different meanings in reference to moral and legal contexts. It is formulated as follows:

> (1)'moral rights' and 'moral duties' are meaningless or self-contradictory expressions, or (2) 'rights' and 'duties' have an evaluative and a non-evaluative meaning and they are used in moral contexts in their evaluative meaning whereas in legal contexts they are used in their non-evaluative meaning, or (3) the meaning of 'legal rights and duties' is not a function of the meaning of its component terms as well as a whole variety of related semantic theses.[59]

Raz merely mentioned the semantic thesis just to dismiss it, accusing the philosophers of the linguistic turn of taking the work of lexicographers. Among the three theses, he identifies the social thesis as the more fundamental and responsible for the name 'positivism'. The law is therefore considered in Raz terms like in John Austin and Hart as made by the activities of human beings. It should therefore be separated from morality which represents the ideal or what should be but should represent the positivists' enactments following social situations. He therefore emphasises that while law may derive authority from a moral claim, legal theorists must not suppose that legal claims are morally legitimate just on the basis of its claim to have emanated from morality. His sources or social thesis is basically an insistence that the existence of particular laws and legal systems is everywhere and always a matter of

[59] J. Raz, The Authority of Law, p.38.

social practices. They may, but do not necessarily need to satisfy moral principles or values.

The semantic and moral theses of the problems of the meaning of law are thought to be the necessitation of the social thesis. The relationship is outlined in clear terms by Raz thus:

> Since by the social thesis what is law is a matter of social fact, and the identification of law involves no moral argument, it follows that conformity to moral values or ideals is in no way a condition for anything being a law or legally binding. Hence, the law's conformity to moral values and ideals is not necessary. It is contingent on the particular circumstances of its creation or application. Therefore, as the moral thesis has it, the moral merit of the law depends on contingent factors. There can be no argument that of necessity the law has moral merit. From this and from the fact that terms like 'rights' and 'duties' are used to describe the law--any law regardless of its moral merit--the semantic thesis seems to follow. If such terms are used to claim the existence of legal rights and duties which may and sometimes do contradict moral rights and duties, these terms cannot be used in the same meaning in both contexts.[60]

Joseph Raz argues for the separation of law and morals in opposition to some natural law proponents but does not hold that the law has no relation to morality. He rather proposes the view associated with some natural law theorists in his version

[60] Loc. Cit.

of positivism. He defends the idea that one acquires a legal duty not simply by any other reason but because the law requires its performance. For him, there is a necessary connection between law and morality only in those situations where such morality is endorsed and practiced by the population.

❖ PHILIP OSTIEN ❖

A recent critique of Hart, Philip Ostien sought to resurrect Austin's command theory taken by many to have been crushed by Hart in his work, Logical Form of Orders Backed by Threats: the Command Theory of Positive Law Defended, published by the University of Jos. In Hart's Concept of Law, as we shall see in detail, in the proceeding chapter, he claims that most modern state laws cannot be plausibly analysed as commands in Austin's terms. For him the title or power conferring rules are different essentially from commands or orders backed by threats. An instance of such power conferring rules are powers to make wills and laws that give officials like judges the power to try cases. They are not to be considered as commands. Such power conferring rules are therefore essentially different sorts of things from duty imposing rules and orders backed by threats. In disagreement, Ostien holds that Hart is essentially wrong and adduces that "all positive laws can very plausibly be analysed as orders backed by threats issued by a sovereign in apolitically independent society."[61] He feels that Hart essentially failed to understand the logical form of Austinian orders backed by threats and that power conferring rules are actually assimilated in the Austinian orders backed by threats. While Hart takes Austinian orders backed by threats as commands

[61]P. Ostien, "The Logical Form of Orders Backed by Threats: The Command Theory of Positive Law Defended," University of Jos Law Journal, 6 (1998), P. 69.

that leave us with no choice, Ostien thinks that every Austinian command leaves us with responsible choice. Even when we are confronted with the gunman situation, we still have choice either to forebear or to respond to his wishes quite aware of the various consequences. Ostien's analysis and review of Austin as we shall see in the next chapter softens the hardness of Austinian commands as analysed by Hart. It is simply seen as an advice and therefore need not be issued in the imperative mood. It simply advices us on how to act when we have certain desires, backed up by adequate reason "relating to the desires and intentions of the orderer. The air of the imperative form of the order is just an illusion, invented to help you forget that you have a choice to make, and perhaps useful also in communicating to you the firmness of the orderer's resolve or the intensity of his desires."[62]

❖ JOHN FINNIS ❖

John Finnis, an Australian scholar is among the most prominent living legal philosophers. In his book, Natural Law and Natural Rights published in 1980, he challenged the Anglo-positivist approach of John Austin and H.L.A. Hart to legal philosophy with his review of the natural law theory. Having a background that is specifically Catholic and greatly influenced by it, he offers a compelling alternative to purely deontological theories of law and morality. His central consideration of law and morals are imbedded in his teaching on natural law and moral theory. Finnis treated natural law as a type of moral theory and not as a type of legal theory even though he concedes that they have implications for legal theory. A moral theory of natural law emphasizes the ability of every human being to understand basic moral obligations.

[62]Ibid., p.76.

This implies that the morality based on the natural law is such that will be discoverable by every human person irrespective of race, colour or culture. Such morality must apply to all persons as well. Natural law theory is essentially an aid for all people to know what they ought to do and what they ought not.

John Finnis observes that for proper understanding of moral and legal reasoning and their interrelationships, we cannot avoid having recourse to reason.[63] Reason gives ground for intelligent actions motivated by the basic human goods.[64] Statements about the basic human goods relate to human nature but does not relate to the pre-existing theoretical conception of human nature but to the practical understanding of the human goods as reasons for choice and action. Such practical understanding (practical reasonableness) about human nature is what Finnis calls a theory of natural law.

In response to the positivist conception of separation of law and morals, Finnis theory of natural law, accepts the thesis of the separation of positive law from morality. In defence of the classical doctrine of natural law and legal moralism, he holds that it does not mean that "…there is a simple and universal all-or-nothing moral criterion for the validity of every law in every legal system; transcendentally super added to whatever may be each system's explicit internal criteria of validity of

[63] J. Finnis, "Natural law and Legal Reasoning" Natural Law Theory: Contemporary Essays, Ed. R.R George, (Oxford: Clarendon Press, 1994), P. 134.

[64] John Finnis basic human goods refer to the very minimal requirements of human existence and flourishing. They are usually available to man through natural intelligence and they are the foremost of the goods to be pursued by him. Seven of such human goods are outlined by Finnis which include: life, knowledge, play, aesthetic experience, sociability, practical reasonableness and religion(J. Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980), p.85.

law."[65] Therefore while Aquinas takes an unjust law to be non-legal but corruption of law, Finnis teaches that Aquinas position is not strictly a teaching about the validity of law in the technical sense. Validity in this sense refers to adherence to some procedures. This however does not mean that in some cases, we do not have legislation which is properly and procedurally enacted which lack the demands of justice or fail moral tests. The lacks in such enactments do not in Finnis terms render them unlawful or non-legal as such. The legal duties they impose and the legal rights they grant remain valid irrespective of their moral defectiveness. They can merely be regarded as defective, substandard or corrupt laws but they remain valid laws.

❖ LORD DEVLIN. ❖

While many are interested but do not bother much about the concept critique of Hart's view on law under the general assumption that his concept clarifications are monumental and therefore require no further work, many more are interested and as well subscribe to his views about law and morals. Some others are as well critical of his thought on law and morals. Such jurists and philosophers particularly concerned themselves with the debate between Lord Devlin and Professor Hart about the enforcement of morality that issued from the Wolfenden report on sexual morality[66] in relation to the legitimate role of the use of the criminal sanctions to punish immoral conduct. The report as noted by Devlin principally stated that:

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[65]N. McCormick, "Natural Law and the Separation of Law and Morals" Natural Law Theory: Contemporary Essays, Ed. R.P. George, (Oxford: Clarendon Press, 1994), p. 109.

[66] The Wolfenden report refers to the decision in 1959 of the Committed set up to examine sexual morality in England. The report recommended the removal of criminal sanctions from consenting adults engaging in homosexual practice in private on the reason that the control of conduct merely because it was immoral was not the law's business.

> Adultery, fornication and prostitution are not... criminal offences: homosexuality between males is a criminal offence, but between females it is not. Incest was not an offence until it was declared so by statute only fifty years ago. Does the legislature select these offences haphazardly or are there some principles, which can be used to determine what part of the oral law should be embodied in the criminal?[67]

The central question of this debate as Hart framed it is formulated thus: "...ought morality as such be a crime?[68] Lord Devlin attacked the report for removing criminal sanction from consenting adults in homosexual practice, arguing that a society's shared morality is necessary for its existence as a recognised government and the justification for its enforcement by law was simply to preserve the essentials of societal existence.[69] Professor Hart on the other hand insisted that whether or not a society is justified in defending itself must depend on what sort of society it is and what the steps to be taken are. Contemporary liberal theorists such as Feinberg and Ronald Dworkin agree with Hart that the state has no business punishing conducts simply because they are immoral. There are others critical of Hart's position too. Among them are Basil Mitchell and Gerald Dworkin.

❖ BASIL MITCHEL ❖

Basil Mitchell principally noted as a mediator between Hart and Devlin feels that Hart took stand with the Wolfenden

[67] P. Devlin, The Enforcement of Morals,(London: Oxford University Press,1965), p. 1.
[68] G. Dworkin, 'DevIin was Right: Law and the Enforcement of Morality" William and Mary Law Review, 40.3 (1999), 927
[69] P. Devlin, The Enforcement of Morals,(London: Oxford University Press, 1965), 17.

report probably not with much thought but by the avowed liberal position based on Mill's work: On Liberty.[70] He notes that Hart however amended his position by giving consideration to paternalism but did not give a clear indication whether there should be a distinction between a man's physical good and hismoral good. It is not clear for example if he merely wanted to limit paternalism to the prevention of physical harm or whether he wishes to extend paternalism to include protection from moral harm Mitchell holds that the law's concern with corruption is a clear case of its concern withmorality but this however does not mean that morality will be enforced all the time by the law.

Against Hart's position, Mitchell holds that the function of the law is not only to protect individuals from harm but also to protect the rationally essential institutions of the society. For example, to protect the essential institutions necessary for societal existence will imply the preservation of some institutions whose precise form is variable from society to society. Such institutions like marriage are determined by the ideals of that particular society such as religious ideals. He therefore advocates with proper distinction that "...the values, with which the law must concern itself, although not 'universal' in the sense just mentioned, should nevertheless be rational."[71] The particular distinction 'rational' specially indicate that the values behind the law must be de facto positive morality and that the law should not punish morality

[70]The libertarian position which most people including Hart believe in has its origin in the Mill's work: On Liberty. Mill specifically stated that "the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant Cf J S Mill On Liberty (NewYork John B Alden 1882) p 21

[71]B. Mitchell, Law, Morality and Religion in a Secular Society, (London: Oxford University Press, 1970), p. 121..

on the sole reason that it is immoral but it cannot be in all respects neutral to morality. Against Hart's adoption of paternalism in law, he insists that the law cannot be committed to paternalism and at the same time reject what tends to corrupt the ethics of the society. Mitchell is in agreement with Hart following the liberal principle that the protection of individual from harm is the only reason for the law to intervene in individual liberty. Mitchell however notes over and against Hart's position that "...the protection of individuals from harm is not a purpose, which can be realized independently of the protection of the institutions under which they live."[72] This does not mean that whatever is proposed by the various institutions will be taken blindly. Such morality emanating from institutions or elsewhere which the law should protect should be beyond criterion and debate and should be open to informed discussion. Mitchell therefore in conclusion holds that the protection of institutions and legitimate concern for the ethics of the society may sometimes justify the enforcement of morality.

❖ GERALD DWORKIN ❖

Gerald Dworkin sided with Hart against Devlin on most issues that concern specific laws in the belief that the conduct in question should not be criminalized. However in holding that ". . .there is no principled line following the contours of the distinction between immoral and harmful conducts such that only grounds referring to the later may be invoked to justify criminalization"[73] parted ways with Hart. For him:

[72] B. Mitchell, p. 69.
[73] G. Dworkin, p. 927.

> (The) law is an institution whose central rationales include making it less likely that acts that ought not to be done are not done and serving as a vehicle for condemning those who do what ought not to be done. The existence of principled reasons for ruling out (in advance) the criminal process as a means of discouragement therefore seems quite implausible.[74]

While not agreeing with Hart for a general principled restriction he nevertheless admits that principled reasons exist in excluding certain subclass of immoral actions from the criminal law. For example in free speech, some subclasses of actions are considered immoral such as holocaust denial, racial insults etc. Such acts are often given immunity from criminal prosecution even though they pass the initial threshold as legitimate objects of state interference. Dworkin believes that there are reasons for maintaining a sphere of autonomy for individuals engaged in such actions and he calls such reasons policy decisions rather than principled restrictions. For him, such acts should not be used as principled restrictions for legal moralism for such acts are "...not merely immoral but also harmful, so that it constitutes an exception to the harm principle as well. If the existence of such a protected class counts as proof that the state ought not interfere with immoral acts, it also shows that the state ought not interfere with harmful acts."[75]

We have merely highlighted Hart's position in these preceding pages in order to properly situate other jurists and

[74]Loc. Cit
[75]Loc. Cit.

philosophers who interested themselves with Hart's views on the enforcement of morals. We have tried to review the views of notable philosophers and legal theorists who have variously concerned themselves with Hart's views on law. What we have tried to do in these few lines of the second chapter is essentially to point out those of them who either agreed with, jettisoned or remodelled Hart's understanding of law and its relation to morality. In the proceeding chapter, we will consider in greater detail Hart's elucidation of the concept of law as well as its relation to morality.

The views expressed as belonging to these scholars have to some reasonable extent been able to clarify as well as refute some contentions of Hart in his views about law and morality. They are generally scattered thoughts of eminent men in the field of legal philosophy which we have taken as forming the starting point for the discussions central to the next chapter. They are indicators as well to thegeneral contention of this work that Hart's views about law and morality though germane and epoch-making is not incontrovertible. The distinguished philosophers and jurists have indicated some of the flaws in Hart's views; these indications though very enlightening and explosive are not exhaustive. I will argue in the proceeding chapters that both Hart and some of his critics were guilty of similar pitfalls. In the main, Hart continuously argued from the standpoint of a liberal while some of his critics argued from the conservative position. They were to some extent embroiled in the liberal/conservative cave and were blind or claimed be blind to the happenings outside the cave. In both Hart and his critics, we find inconsistencies in relation to the different considerations of law and morality as it affects individuals and society, sometimes the considerations move from absolute individual right against

state imposition of law and sometimes communal feelings are considered higher in the scales of law and morality.

I will argue in the following chapters that true law must have a link with morality and that the society following Devlin's thesis will actually disintegrate without the state apparatus (the law) in protecting the moral values in the society. I will further argue for the preservation of the societal will embodied in its morality as a necessity for the survival of the individuals in the society as well as the society itself. To proceed, we will first consider in its detail, the views of Hart in the next chapter. This will afford us a better opportunity to evaluate his views about law and morality in a democratic state.

3

LAW AND MORALITY IN HART

❖ LIFE AND TIME OF ❖ HERBERT LIONEL ADOLPHUS HART

Herbert Hart was born to a Jewish tailor of German and Polish descent in 1907. He was educated at the Bradford Grammar School and New College Oxford where he graduated with a first class honours in classical Greats. For eight years (1932-40), he practiced as a barrister at the chancery bar. Being unfit for war during the Second World War he worked with the M15 military intelligence. It was during this time that his interest returned to philosophy and at the end of the war, he was appointed a tutor at the New College, Oxford.

Following his brilliant chancery background, he was persuaded in 1952 by J. Austin to vie for candidacy for the Oxford chair of Jurisprudence at the resignation of Professor Arthur Good hart. He worn this post and held it till 1969 when he relinquished it to his student and a later, ardent critic of his legal philosophy, Ronald Dworkin. It was during this period too that he delivered the undergraduate lectures that eventually turned into the Concept of Law, first published in 1961 and later edited with postscript in 1994. On resigning from the jurisprudential chair, he devoted time to the study of Bentham whom he regarded along with Kelsen to be the most important legal philosophers of the modern times.

During his retirement days, he concerned himself with the criticisms of Dworkin to his works. He did not eventually give a reply to Dworkin before he died in 1992.

The major published works of Hart include The following:

- ❖ Definition and Theory in Jurisprudence (1953)

- Causation in the Law (with Tony Honoré) (1959)
- The Concept of Law (1961)
- Law, Liberty and Morality (1963)
- The Morality of the Criminal Law (1964)
- Punishment and Responsibility (1968)
- Essays on Bentham: Studies in Jurisprudence and Political Theory (1982)
- Essays in Jurisprudence and Philosophy (1983)

❖ THE CONCEPT OF LAW ❖

H.L.A. Hart in the first chapter of his book, The Concept of Law, considered the question of legal theory namely: what is law? A number of past theorists have given answers to this question from the highly illuminating to less illuminating answers and from the unsatisfactory to the bizarre answers that it is ". . .the prophecies of what the courts will do."[76] Hart's approach is very remarkable for his indirect consideration of the question before him. He rather achieved something far more subtle. Even though the question is not very much answered it is not avoided either, it is rather transformed. His argument for following this part is "…that when one question is asked, we are actually seeking the solution to an entirely different question, and it is because we have been asking (or trying to answer) the wrong question that the answers given have been so unsatisfactory."[77] For him, in every discussion of law any averagely educated person should be able to identify the following:

[76]O.W. Holmes, "The Path of the Law," The Essential Holmes. Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, mr., Ed. R.A. Posner, (Chicago: University of Chicago Press, 1992), p. 163.
[77]B. Bix, Jurisprudence: Theory and Context, (Boulder, Colorado: Westview Press, 1996), p. 11.

A. Rules forbidding or enjoining certain types of behaviour under penalty
B. Rules requiring people to compensate those they injure in certain ways.
C. Rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations.
D. Courts to determine what the rules are and when they are broken and to fix punishment and compensation.
E. Legislature to make rules and abolish old and obsolete ones.[78]

In spite of this common knowledge of the basic features of every law, the question, what is law, has persisted and people have continued to give contrasting and sometimes contradicting answers to this question. Hart gives two reasons for the difficulty in coming to a consensus on the meaning of law. In the first place, he finds some of these central features of law lacking in international law. States under international law cannot be brought to the international courts without their consent, there are no centrally organized and effective systems of sanctions nor are there any central legislatures in international law. Because of such deviations, their classification becomes difficult and questionable. In the second place, in such complex terms like law, we are usually forced to recognize clear standard cases for which the word is put to use. Hart notes that "sometimes the deviation from the standard case is not a mere matter of degree but arises when the standard case is in fact a complex normality concomitant but distinct elements some one or more of which may be lacking in the cases open to challenge. Is a flying boat a 'vessel'? Is it still 'chess' if the game is played without a queen?"[79]

[78] H.L.A. Hart, The Concept of Law, (Oxford: Oxford University Press, 1991), p. 3.
[79] Ibid., p. 4.

Considering the perplexing nature of the question 'what is law' and the paradoxical nature of the answers, Hart feels that the best way to approach law is to defer giving any answer to any of such questions. We rather approach its proper understanding by trying to understand its puzzling features that have concerned professionals who have variously engaged in its study. From the ancient times, people have variously speculated on the meaning of law and these speculations concern aspects of law which seem to come to us very naturally. These aspects are often confusing even to the learned and therefore this generates the need for better clarity. It is considered that this clarity will provide a better definition of law. Three of such features are outlined by Hart. In the first place, the existence of law "... means that certain kinds of human conduct are no longer optional, but in some sense obligatory."[80] Even though this characteristic appears simple as Hart holds, it is also perplexing for, in certain situations; various forms of non-optional-obligatory forms of conduct can be distinguished. We distinguish a non-optional conduct in situations where for example one is forced to do the wish of the other. He does this not because he wants to but because the other threatens him with unpleasant consequences. A typical example of the 'gun man' is given by Hart of a conduct undertaken because of fear of unpleasant consequence in the event of refusal thus:

> The gunman orders his victim to hand over his purse and threatens to shoot if he refuses. If the victim complies, we refer to the way in which he was forced to do so by saying that he was obliged to do so. To some it has seemed clear that in this situation where one person gives

[80]Ibid., p. 6.

> another an order backed by threats, and, in this sense of 'oblige' obliges him to comply, we have the essence of law or at least 'the key to the science of jurisprudence'. This is the starting point of Austin's analysis by which so much English jurisprudence has been influenced.[81]

In penal codes, statutes that declare some conduct offensive with specifications of appropriate punishment represents the gunman. The difference however is that in the case of the penal code, the orders are addressed to the general public that habitually obeys such laws. Even though this redaction of law to this simple phenomenon might appear attractive, it leaves us in quandary over the distinction between law and orders backed by threats.

A second feature arises in situations where the conduct is not considered optional but obligatory. This refers to moral rules that oblige people to certain actions as well as withdraw certain areas of conduct from their free option. In both moral and legal orders, we are in a quandary over their precise relationship and therefore we are tempted "...to see in the obviously close connection an identity. Not only do law and morals share a vocabulary so that there are both moral and legal obligations, duties and rights; but all municipal legal systems reproduce the substance of certain fundamental moral requirements."[82] Following the close link between such orders backed by sanctions and moral rules obliging to conduct, Hart postulates that "law is best understood as a 'branch' of morality or justice and its congruence with the

[81] Ibid., pp. 6-7.
[82] 1b1d., p. 7.

principles of morality or justice rather than its incorporation of orders and threats is of its 'essence'."[83]

The third issue which has perennially prompted the question 'what is law' is the connection of law with rules. Those who understand law in terms of orders backed by threats and those who consider law in terms of morality and justice are united in speaking of law as consisting largely of rules. The two groups are in agreement that the law consists of rules they however differ in trying to define the term rule in the proper understanding of law. There is the problem of understanding what it means to say that a rule exists. Hart agrees that laws in standard cases imply rules enacted by the legislators and generally accepted and enforced by the courts. However, in consideration of laws lacking in some of the features in standard cases, Hart would prefer that instead of fruitless attempts at the definition of law, a clearer understanding of the features of law should be sought. This according to him will provide the kind of clarity that will make the question, what is law more illuminating.

❖ LEGAL RULES ❖

Besides rules identifiable in legal and moral codes, there are further rules for practically every aspect of human or animal, living. Some rules are mandatory requiring conformity to some specific mode of conduct such as abstaining from violence and paying tax. There are other rules that only prescribe the procedures, formalities and conditions for the making of marriages, wills or contracts and they indicate what people should do to give effect to the wishes they have.[84] The first important account of rules for consideration as part

[83] Ibid., p.7-8.
[84] Ibid., p. 9.

of the proper elucidation of the concept law refers to the idea that when one says that a rule exists, he means that a group or most people behave 'as a rule' in special situations in a specified way. To say therefore in England that one must stand when 'God save the Queen' is played means that people generally stand during such times.[85] Hart considers this account very deficient in accounting for the meaning of law. For him, mere convergence of behaviour does not really mean that in actual sense that a law requires it. The fact for example that people wash their mouths early in the morning or wash their hands before eating does not mean that there is a law requiring it. Beyond mere convergence of behaviour, there are situations when the existence of a rule in a social setting requires proper adherence. Such situations are when such words as 'must, should and ought' are used.[86] In general, the impulse to group behaviour and predictable reaction to deviation accompanying the rules with the 'ought', 'must' and 'should' prefix drive us to behaviour in accordance with the rule and act against those who do not.

ORDERS/COMMANDS

Professor H.L.A. Hart started his development of the concept of law by a reference to John Austin's view that law should be understood in terms of commands.[87] He criticizes Austin's commands as referring only to orders backed by threats which he considers deficient as a definition of the concept law. In such commands, words such as obedience and obey are considered to be corresponding responses. He notes that Austin ignored other forms of command in which we naturally speak of commands. According to him, the word command "carries with it a very strong implication that there

[85]Loc. Cit.
[86]Loc. C.
[87]J Austin, The Province of Jurisprudence Determined, (New York: Prometheus Books, 2000), p. 1.

is a relatively stable hierarchical organization of men, such as an army or a body of disciples in which the commander occupies a position of preeminence."[88] His main submission here is that all commands do not have latent threat of harm accompanying their disobedience. He sees commands as essentially the exercise of authority over others and not power to inflict harm. Ignoring for a while his consideration of Austin's command thesis as misleading, Hart considers commands as the closest term for the understanding of law. He however fears that the element of authority involved in law has remained a problem in the proper understanding of law and therefore like Austin, decided to ignore this element saying that its use will be unprofitable.[89]

❖ LAW AS COERCIVE ORDERS ❖

In referring to coercive orders as law, such particular orders given by officials say, the police come to mind. Their mode of function is quite different from what can be considered as law which is usually general in nature. Such standard general forms of criminal statute indicates in the first place "…a general type of conduct and applies to a general class of persons who are expected to see that it applies to them and to comply with it."[90] The orders given by officials are secondary and only give further directions in the event of disobedience of the general orders. Such face-to-face orders rather than considered as laws are forms of communication whereby the one's attention is drawn to a law. Making laws for people is different from this type of communicative order.

[88]H.L.A. Hart, p.20.
[89]Loc. Cit.
[90]Ibid., p. 21.

In using the 'orders backed by threats' as a model for law, Hart therefore contends that we must clearly take note of the great difference between ordering people to do something and making a law. The general intent of a law eventually involves such orders but laws must be seen as complete without such directions. This is clearly stated in his major work, The *Concept of Law* thus:

> It may indeed by desirable that laws should as soon may be after they are made, be brought to attention of those whom they apply. The legislator's purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules concerning promulgation, that this shall be done. But laws may be complete as laws before this is done, and even if it is not done at all. In the absence of special rules to the contrary, laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby.[91]

To further make the concept of orders backed by threats useful to the idea of law, he adduces that we must suppose the existence of a general belief that disobedience to a general order is likely to be accompanied by the execution of threats "not only on the first promulgation of the order but continuously until the order is withdrawn or cancelled."[92] The concept of a general order backed by threats of one generally

[91]Ibid., p. 22.
[92]Ibid., p. 23.

obeyed transcends the 'gunman' situation.[93] Such general orders are closer to the legislative penal statute of the modern times than any other variety of law. He therefore submits that the legal system of the modern times has supremacy within its territory as well as a kind of independence of other systems lacking in the simple model of orders backed by threats. An essential aspect of these two notions peculiar to the modern legal system is that found in the most modern countries. For example, the French and English laws regulate the conduct of people within their territories. Inside these territories, there exists as well a body of persons who also give general orders backed by threats who also receive habitual obedience. However, the orders given by these bodies such as the LCC (The London Chamber of Commerce) or ministers are not considered as laws properly considered. They give delegated legislation and they are contrasted to the Queen in Parliament considered to be supreme and her statutes are considered law properly construed. While such bodies as the LCC or ministers giving orders backed by threats with delegated powers are dependent, the Queen in Parliament is independent. Following this, in every legal system, there must be some persons or body of persons that issue general orders backed by threats. These threats must be generally believed to be implementable in events of disobedience. In addition the one issuing such implementable threats must be internally supreme and externally independent. Likening such supreme and independent persons to Austin's sovereign, Hart defines the law of any country as "...the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign."[94] He however

[93]The gunman situation refers to Harts analogy of the Austinian orders backed bythreats. He begins by making us assume that a robber armed with a gun approaches a bank clerk ordering him to hand him overthe Money with a threat to blow off his head in the event of disobedience.

[94]H.L.A. Hart, p. 25.

considered this definition deficient following his further consideration of the different varieties of law.

❖ VARIETIES OF LAW ❖

Having improved his Austinian starting point by properly harmonizing commands backed by threats with the elements of generality and sovereignty, Hart still points at other elements that make his starting point definition deficient. The deficiency of such a definition is first of all made manifest according to him in the varieties of the different kinds of law which we find in modern times. Here lies Hart's major criticism of Austin, He observes that power or title conferring rules cannot be analysed as commands or as orders backed by threats. For example, laws conferring powers on persons to make wills and laws that give officials such as judges to try cases are not commands. Secondly, not all are enacted as we find in the general model but there are laws that emanate from customs in most legal systems. The main contention of Hart therefore is that "...power conferring rules appear to be logically very different sorts of things from duty-imposing rules, and certainly very different from genuine orders backed by threats"[95] If we assume this to be correct, it means that the Austinian command theory has failed in accommodating an important class of the legal phenomenon namely power conferring laws and will therefore be considered inadequate as Hart holds.

Though some scholars acknowledge along with many of Hart's disciples, his great work in trying to demolish the stronghold of Austin, they still contend that Hart failed to

[95]R Ostien, "The Logical Form of Orders Backed By Threats: The Command Theory of Positive Law Defended," University of Jos Law Journal, 6 (1983), P. 73.

understand clearly how power-conferring rules of law can very plausibly be analysed as 'orders backed by threats'. Among such scholars is Philip Ostien. He assimilates the 'orders backed by threats' into power conferring rules thereby showing that Austin was right while Hart was wrong.

Philip Ostien would want us to consider the situation of the gunman on a visit to the bank again. While Hart thinks that the logical form of his order implies "...do this whether you like it or not" Ostien feels that there are more to such orders than Hart has been able to comprehend. For example, it is clear and no one is in doubt of the gunman's order but what is not clear is who he really is, is he really a gunman or one with a toy gun? Does he really mean to shoot the gun if the bank teller refuses his order? What will the bank teller be able to make from his order, will he understand it the way Hart has analysed it. He will probably need some time to make a proper decision on what to do. Will he now hand over the money because of his threat? Is he really intending to kill? We note that there is already some complication in the mind of the bank teller. Ignoring the much complication of the situation, Ostien tries to represent what the gunman communicates to the bank teller. "If you want to go on living a healthy life, you would be wise to hand over the money and not try to do anything funny."[96] Hart's analysis of this situation seems to imply that the gunman is in his heated irrationality and is ready to shoot the bank teller in the event that he refuses to hand over the money. There are other options to this which Hart unfortunately failed to represent. He presented the bank teller as entirely having no other choice but to do the bidding of the

[95]R Ostien, "The Logical Form of Orders Backed By Threats: The Command Theory of Positive Law Defended," University of Jos Law Journal, 6 (1983), P. 73.
[96]Ibid., p. 74.

gunman. Ostien lays bare the complexities of the situation of the bank teller taken so simple by Hart thus:

> But I, in my hyper-rationality, know perfectly well that the gunman can't mean that. I certainly don't have to hand over the money if I don't want to. I might want instead to trip the alarm and duck, or pull out my own gun and have it out. If I decide on one of these alternative courses of action, I will attempt it. I have a choice to make, out of a larger or smaller range of possible actions that I can think of at the moment. The gunman has merely brought some new facts to my attention facts which give me much reason to simply hand over the money. Now I will have to make up my mind what to do and (try to) do it.

The analysis of Ostien is certainly very interesting philosophically; it brings in free choice in the midst of orders backed by threats and correlatively the responsibility which we must take for whatever action we choose. We cannot be forced to do what we do not want to do but one can be persuaded to take a particular course of action with adequate reason. It is then left for him to accept the reason for his action or to reject it facing the consequences. I might decide to ignore the threat of the gunman and pull my own trigger, risk whatever may come or might decide to try something else depending on whatever clever choice that comes to me at the moment of decision. The analysis of Ostien mellows down the velocity of commands in the way Hart analysed it to something milder, It is particularly taken as an advice. In this way;

> An order needn't be issued in the imperative mood at all. It is just advice onhow to act if you have certain desires, backed up by a reason or a certain specific sort, relating to the desires and intentions of the orderer. The air of the imperative form of the order is just an illusion, invented to help you forget that you have a choice to make, and perhaps useful also in communicating to you the firmness of the orderer's resolve, or the intensity of his desires.[97]

While we note on the one hand following Ostien's observation, that there are other interpretations to the action of the gunman, which leaves the bank teller with some kind of freedom to make choice contrary to Hart's analysis, there is a further problem in interpreting the action of the gunman. He may not really mean what he says or what he wants the bank teller to believe! He may only be bluffing and the bank teller needs to consider too the likelihood that he may not mean it. Or unknown to the gunman, the bank teller is wearing bullet proof or some kind of protective device whether orthodox or unorthodox which he is sure that will make any threat with a gun at him meaningless. These hypothetical situations are only but indications that Austin's orders backed by threats may not after all be non-optional in the way Hart has analysed it.

❖ THE CONTENT OF LAWS ❖

In furtherance of Hart's attack on Austin's theory he x-rayed the content of laws in order to determine those aspects of law that do not particularly feature in orders backed by threats.

[97]Ibid., p.76.

Following the simple consideration of orders backed by threats as Hart has done, the Austinian theory will be very vulnerable to attack because some classes of law such as laws that define social functions are not orders as such. Giving example with legal rules, Hart observes that:

> Legal rules defining the ways in which valid contracts or wills of marriage are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead they provide individuals with faculties for realizing their wishes by conferring legal powers upon them to create by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.[98]

This feature of law which confers on people the power to mould their legal relations with others such as in the case of wills, marriages, contracts etc. are entirely lacking in the simple identification of law as orders backed by threats. This shows further that the distinctive features of any legal system lie not in the general understanding of orders backed by threats or rules habitually obeyed but in the specific provision it makes. Such provisions in the case of laws conferring powers make possible the existence of some familiar concepts in social life such as marriage and laws that impose jurisdictions. In the same way that criminal laws of the mandatory type provide for crimes that identify murders and thefts, the criminal law of the kind providing faculty or powers provide for laws that make possible buying, selling, gifts, wills, marriages etc.

[98]H.L.A. Hart, p. 27-28.

There is further a certain relation between the rules of the power conferring sort and the rules of orders backed by threats which Hart carefully distinguished. Whereas the rules of the orders backed by threats are directly related with duties, rules of the sort that confer powers are indirectly related with duties; they confer powers to make rules of the orders backed by threats. This is exemplified in the legislative powers. Following this analogy of the laws imposing duties and the laws conferring powers, Hart declares that "it might therefore be said that at the cost of some inaccuracy, that whereas rules like those of the criminal law impose duties, powers conferring rules are recipes for creating duties."[99]

In this simple analogous consideration of the two sorts of rule, it might not be wrong to insist that the simple definition of laws as orders backed by threats are still useful in every consideration of law. Hart's argument here is not particularly convincing especially when we consider the premise of the argument that duty conferring laws are designed to force people to behave in a certain way. His premise is misleading because following our consideration of Ostien's position above, duty conferring rules cannot compel one to do what he in fact does not want to do. They can give people proper reasons to make a particular choice but cannot force them to the choice. If the first premise is then correct, we can then say that there isn't much difference between duty conferring laws and power conferring laws. If the duty conferring rules is considered following the analysis above to be a form of advice, then power conferring rules because they are forms of advice too with no threats are only varieties of the same genus. They are simply two types of rules of law. Additionally, his view that power conferring rules are mere

[99]Ibid., p. 33.

recipes for creating duties is also misleading. Power conferring rules actually should be considered as having dual purpose: first they impose duties. Hart's consideration of such rules is only but the secondary function. The legislator or the judge for example that has been conferred the power to make laws or the power of adjudication has by that fact the duty to make laws and adjudicate between parties. The mandate to do this is a duty which is similar to the duty of the criminal law. The only difference however is that it may not be grave as the duties of the criminal law but it has consequences too. Such consequences are often not in the best interest of those who have been conferred with the powers should they decide not to use such powers to the maximum. Power conferring rules unlike Hart's position, are not mere recipes for creating duties but mandatory rules that require conformity with necessary sanctions.

❖ NULLITY AS SANCTION ❖

While we may consider much of Austin's starting point which Hart criticised as useful in every discussion of law, we note that Hart more than any other legal scholar made further exposition for a distinct understanding of law. This is shown in his distinction between nullity and sanction. The nullity concept is very useful in rules conferring powers and it ensures that all the essential qualities necessary for the exercise of any power is existent before conferment. In the absence of any of such qualities, it is considered null. On this count therefore, Hart gives consideration to some people's argument that nullity "is like the punishment attached to the criminal law, a threatened evil or sanction exacted by law for breach of the rules; though it is conceded that in certain cases this sanction may only amount to a slight inconvenience."[100] Hart however considers such extension of the idea of sanction to include nullity as confusing in an attempt to properly understand the meaning of law. This is because 'nullity' in many cases may not be 'evils' as to be equated with sanctions. He gives example with a judge who may be indifferent to the validity of his orders. Such judge for example will not recognize here any threatened evil or sanction. Hart feels that the analogy between nullity and sanction is very trivial and therefore in

[100]Loc. Cit.

defence of proper distinction between nullity cases and criminal laws backed by threats he asserts:

> In the case of a rule of a criminal law, we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it. But how could we consider in this light such desirable social activities as men making each other promises which do not satisfy legal requirements as to form?[101]

Some jurists rightly in spite of the general view that Hart has been able to effectively demolish the command theory insist that laws are essentially orders backed by threats. Some others, rather than considering law with a dual function as prohibitive rules and punitive sanctions, see law essentially as sanctions. They deny such rules that confer powers the status of law and consider them as mere fragments of law. Kelsen for example considered law not as rules but as norms that stipulate sanctions.[102]

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[101]Ibid., p. 34.

[102]H. Kelsen, General Theory of Law and State, (New Jersey: Transaction Publications, 2006), p.61.

❖ SOVEREIGNTY AND SUBJECT ❖

An important feature which Hart generally took for granted in his preceding discussions of coercive orders is the question of the sovereign characterized "...affirmatively and negatively by reference to the habit of obedience: a person or body of persons whose orders the great majority of the society obey and who does not habitually obey any other person or persons."[103] This doctrine posits that there is a habit of obedience on the part of those to whom the law giver applies. Hart considers such a habit insufficiently accounting for the salient features of most legal systems. Using the example of the hypothetical sovereign as, Rex I and II,[104] he explains that the idea of habitual obedience is not plausible. The citizens may have habitually obeyed Rex I but this does not hold for Rex II whose order they must also obey. If we then use the idea of habitual obedience to a sovereign in explaining the meaning of law, we are bound to fail for it will lead to a

[103]H.L.A. Hart, p.50.

[104]Hart used the hypothetical situation of a society governed by a sovereign or monarch (Rex) who reigns for a very longtime. His control of his people is by means of orders backed by threats in which case they mostly do what they would ordinarily not have done. In such situations, therefore we cannot safely consider their obedience as habitual. They simply are afraid of risking the onerous punishment of Rex. The habit of obedience is but a personal relationship between Rex and each individual subject. What this means is that such obedience can be withdrawn once Rex (Rex I) dies. If another Rex (Rex II) emerges, whether he is the son to Rex I or not, may not receive such obedience immediately from the subjects until such a time they consider his power formidable and strong enough to punish them in the event of disobedience. (Hart, The Concept of Law), Pp.52-54.

succession lacuna. The idea of habitual obedience in explaining law fails in two ways according to Hart:

> First, mere habits of obedience to others given by one legislator cannot confer on the new legislator any right to succeed the old and give orders in his place. Secondly, habitual obedience to the old lawgiver cannot by itself render probable, or found any presumption that the new legislator's orders will be obeyed. If there is to be this right and this presumption at the moment of succession, there must, during the reign of earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habit of obedience. There must have been the acceptance of the rule under which the new legislator is entitled to succeed[105]

In order to provide for the loophole created by the term 'habit' in habitual obedience, Hart provides a substitute. For him, the idea of obedience to rules better explains what the law means than habitual obedience. When a group of people or a society is

[105]H.L.A. Hart, pp. 54,55.

considered to have a habit of doing a particular thing, it means that their behaviour does not require criticism or punishment in the event of any deviation. This is because such general convergence does imply the existence of a rule requiring such convergent behaviour. Such deviations are only punished when there is a rule requiring it and therefore its deviation will be considered lapses or faults open to criticism and punishment.

Social rules are further considered distinct from habits in their possession of an internal aspect that is never found in habit. There is generally no known general behaviour that is taught or for which people strive to maintain in habit. Social rules however requires for its existence the criterion whereby some people are at least expected to look upon the behaviour in question as a general standard to be followed by the group as a whole. "A social rule has an internal aspect in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record."[106] The internal aspect of a rule can best be exemplified in the game of Chess where certain moves are considered right or wrong for the protection of the Queen. To express criticism for wrongful or rightful movement of the Queen, Hart avers that such normative statements as "I (you)

[106] H.L.A. Hart, p. 56.

ought not to have moved the Queen like that', I (you) must do that', 'that is right', 'that is wrong'.[107] Criticisms of this nature in a game of Chess are necessary requirements for social rules. People feel bound to act or to conform to certain set of reflectively critical patterns of behaviour considered as standards which should reflect itself in criticism and demands for conformity. Such criticisms are not considered the preserve of others but also involve self-criticism that such demands are justified. The process of self/others criticism and some level of awareness or feeling that such demands- are justified find their expression in the normative terms such as 'ought', 'must', 'should', 'right' and 'wrong'.[108] Such terms specifically distinguish social rules from group habits. Hart acknowledges that such standardized norms are also found in social rules though in a less direct fashion. This rule simply will imply that the specifications of Rex are to be obeyed. Following the discrepancies in obedience in the two imaginary worlds of Rex I and Rex II, Hart tries to show that the continuity of legislative authority as we find in most legal systems depend on a kind of social practice which equally amount to the acceptance of a rule and this is differentiated from the simple facts of mere habitual obedience.

[107]H.L.A. Han. p. 57.
[108]Loc. Cit.

❖ LAW AND MORALS ❖

Probably, more than *The concept of law* itself, Hart is widely known for his discussions and views about the relationship between law and morality. As a starting point he acknowledges that there are various ways that law is intimately connected with morals but quickly asserts that this truth if not well considered may illicitly be taken as a warrant for different kinds of positions. Included among such positions which some critics of Hart take is that every "... system must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it."[109] Hart while not denying the existence of or some level of conformity with morality insists that this cannot be taken to be a necessary requirement for a law. He in fact holds that in every modern state we find in their law numerous influences of either morality or moral ideals which find their way into the societal law through either legislation or judicial process."[110] Beyond various ways in which morality or moral ideals are incorporated in some societies, Hart points further that there are uncountable ways in which law mirrors morality and demands of justice which have been very insufficiently studied. He notes that in some

[109]Ibid p. 185.
[110]Ibid., p. 204.

instances, statutes are merely legal shells which in essence are demands of moral principles. For example the laws of contracts are often conceptions of morality and fairness. Positivists cannot successfully deny such backing in law. Hart therefore avers that if the necessaryconnection between law and morality as proposed by the proponents is limited to such relations as above, then its existence is to be conceded.

The belief by the proponents of a necessary connection between law and morality that 'where the meaning of law is in doubt, morality has a clear answer to offer' is considered as a misguided and irrational belief by Hart. He however failed to provide an alternative but only left such situations to judicial virtues.[111] Hart ditched himself into a conceptual circularity argument, while remaining focused on his desired liberal position or positivist position about the relation between morality and law, he failed to recognise or purposely failed to give moral principles in 'judicial virtues' due recognition as moral principles. Instead, he inadvertently placed his consideration of law as it concerns morality to

[111]Ibid., p. 205.

Holmes"prophesy of what the courts will do"[112] which he himself already rejected. For example, in attempt to substitute moral principles for judicial virtues in doubtful laws he asserts:

> …judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity 'legislative'. These virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a reasoned basis for decision.[113]

Hart's position that the principles above which many consider as a necessary connection of law and morals has through the history been honoured in breach rather than in observance is strange. These

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[212] Wendell Holmes considers the study of law as a kind of effort towards a prediction of what the courts will say. According to him, people study law because they "want to know what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." (O.W. Holmes "The Path of Law" in The Essential Holmes. Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr. Ed. R.A Posner, (Chicago: Unity Press, 1992), p. 160).

[113] H.L.A. Hart, pp. 204-205.

principles have through the centuries remained the background reasoning of most legal statutes except probably in authoritarian and autocratic regimes. Hart's observation may properly hold in democratic societies where a particular moral principle is ignored such as the denial of voting rights to Women in America before 1890 or the sharia law in Nigeria that allows for polygamous marriages. Further, it is not exactly the case as Hart indicates for example that those who have insisted on the appropriation of such values or principles from Austin are merely critics who have found that judicial law-making has often been blind to social values. Indeed many have, purely irrespective of statutes of their day, had reason to reference the social values or the principles of justice. It is only in some instances of authoritarian, autocratic and despotic regimes that reputable men come in frontal criticism of non-recognition of the principles of morality.

❖ MORALITY AND MORAL CLAIMS ❖

In a further clarification of the closeness of law and morality following Hart's view, it is important to note here the kind of morality which is central to the discussions of law and morals and which forms the basis for our contention in relation to law and morality. In the preceding chapters, we defined morality as the standards of conduct generally

accepted within a society as right or proper. These standards are set for better life and organisation in a society from some principles taken as moral values. In general, it is recognised by both Hart and his critics that moral principles give rise to moral claims or moral rights. It is on this basis that we can define a moral right or moral law as a claim made valid by moral principles. The various claims we make can only be considered morally when they are in consonance with the moral principles. The primary understanding of moral principles originating rights or being backbones for laws however does not properly define these moral principles and therefore gives us the liberty to consider all kinds of things as morality. These leave us in limbo on how to properly place the debate between law and morals when some people mention such moralities as cultural morality, tribal morality; social morality, religious morality etc.

❖ THE LEGAL ENFORCEMENT OF ❖ MORALITY

In the book, Law, Liberty and Morality, a compendium of three lectures given at Stanford University in 1962, Hart made his contribution to the ongoing discussion in England of the proper scope of the criminal law. This was stimulated by the publication in 1959 of the report of the committee on

the Homosexual Offences and Prostitution (Wolfenden Report). This report recommended the removal of criminal sanctions from consenting adults engaging in homosexual practice in private on the reasoning that the control of conduct merely for its immorality was not the law's business. This view was attacked by Lord Devlin in his Maccabean lecture to the British academy in 1959 on the enforcement of morals. He argued that a society's shared morality was as necessary to its existence as a recognized government and the justification for its enforcement by law was simply to preserve the essentials of societal existence. Hart challenged Devlin on his reliance on certain provisions of English law as evidence that the law does not attempt to enforce positive morality as such. Devlin's argument for moral enforcement following the non-consideration of victim's consent in cases of murder is repudiated by Hart as a mere piece of legal paternalism.[114] Hart's sympathy here for paternalistic laws is a dividing line between his liberal views and that of John Stuart Mill whom he criticized for his absolute rejection of paternalism. Hart's admission of paternalism as a proper function of the criminal law is considered inconsistent by Devlin. This is

[114] Legal paternalism is the consideration in law that people can be protected from themselves. This view is totally unacceptable by most liberals but Hart considers it a legitimate liberty limiting principle. This principle is defined by Feinberg thus: it is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself."(J. Feinberg, Moral Limits of the Criminal Law Vol. 2 Offence to Others. NewYork: Oxford University Press, 1985, p.

because his consideration cannot be considered consistent if it stops short with what he terms physical paternalism or the control of a person's physical welfare. Once paternalism is admitted according to Devlin, it must be extended to paternalism in matters of morals which is the control of a person's moral welfare to protect him from moral harm.

In the discussions between law and morals, many questions spring up and Hart distinguished four of such questions as follows:

1. Has the historical development of law been influenced by morals?
2. Must reference to morality enter into an adequate definition of law or legal system?
3. Is law open to moral criticism?
4. Is the fact that certain conduct is by common standard immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality to as such be a crime?[115]

The last question here is the subject of Hart's three Maccabean lectures. To this question, J.S. Mill had already given an emphatic no and Hart quoted his essay On Liberty thus: “The only purpose for which

[115]H.L.A. Hart, Law, Liberty, And Morality, (California: Stanford University Press, 1963), pp. 1-

power can rightly, be exercised over any member 'of a civilized community against his will is to prevent harm to others.[116] Mill however ruled that such consideration should be given to human beings in the maturity of their faculties.

Some critics hold that it is merely dogmatic on the part of Mill to limit legal coercion to the class of actions which harm others for there are good reasons also compelling conformity to social morality and for punishing deviations from it even when they do not harm others. Hart considering this dispute in relation to sexual morality notes first of all that he intends not to defend all that Mill said and therefore holds that there are many grounds justifying the legal coercion of the individual other than the prevention of harm to others. He however stands with Mill on the narrower issue relevant to the enforcement of morality.

❖ CONSPIRACY TO CORRUPT PUBLIC MORALS ❖

Hart indicates that in the last few years before 1963, judges in England both in their capacity as judges and their extra-juridical statements have expressed the view that the enforcement of morality is a proper part of the law's business. He particularly cited Lord

[116] Ibid., p. 4.

Devlin who referred to it analogously as suppression of treason. A case of importance here in relation to the decisions of judges is the debate in the House of Lords (1962) in the case of *Shaw V. Director of Public Prosecutions* where the court found Shaw guilty of conspiracy to corrupt public morals. Shaw had composed and procured the publication of a magazine (The LadiesDirectory). In the magazine, the names and addresses of prostitutes as well as their photographs were clearly indicated so that customers will easily see and access the 'services' they provide. The house judges with the exception of Lord Reid found Shaw specifically guilty of:

1. Publishing an obscene article
2. Living on the earnings of prostitutes through their adverts
3. Conspiring to corrupt public morals by means of the *Ladies Directory*.

The judges confirmed the conspiracy to corrupt public morals as offence still known to English law and insisted that it is salutary for they upheld the view that the courts should function as the *custos morum* of the society. What this means is that even in the case where a particular law is non-existent as in the case of Shaw, the courts can still as

guardian, do what will help the societal good. This decision was roundly criticised by Hart as unacceptable. For him, the judges sacrificed other values for the establishment or reestablishment of the courts as *custos morum*. They sacrificed "...the principle of legality which requires criminal offences to be as precisely as defined as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not."[117]

The year, 1954 witnessed the, inauguration of a committee known as Wolfenden Committee in England which was given the mandate to consider the state of law and morality. In 1957 they came up with the recommendations on the issue of sexual morality as follows:

1. The report stated that "homosexuality is a sexual propensity for persons of one's own sex. Homosexuality is a state of

[117] Ibid., p. 12.

condition, and as such does not, and cannot, come within the purview of the criminal law."[118] They therefore recommended that homosexual practices between consenting adults in private should no longer be a crime.

2. As to prostitution, they recommended that though it should not be made illegal, legislation should be passed to drive it off the streets to avoid offence to ordinary citizens.[119]

Legislation was eventually introduced by the government on the later but not on the former. Hart did not concern himself much with the legislation but with the principles that supported the Wolfenden report. Its legal recommendation about homosexuality for example is based on the principle stated in the section 61 of this document(Wolfenden) which Hart quotes approvingly as follows: "...there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[120] Developments like this were not

[118]D. Meghee, Homosexuality, Law and Resistance, (London: Routledge, 2001), P. 2.
[119]H.L.A. Hart, p. 13.
[120]Ibid., p. 14-15.

restricted to England but have its counterparts in America. Hart also cites in approval the American Law Institute's Penal Code that "...all consensual relations between adults in private should be excluded from the scope of the criminal law."[121] They are not considered as harms to the secular societal interests. Such legislations both in England and America are echoes of the continued existence and sustenance of Mill's principle in the criticism of law irrespective of theoretical differences in the different views. The Wolfenden report as well as the American Law Institute's Penal Code is a reflection of an ascent into an unbridled liberalism which Hart and most liberals found as fertile ground for their teachings. While we may approvingly consider the documents' insistence on the legal protection of intimate relations between adults, we note with dismay the unwarranted acceptance of every individual appetite and passion at the expense of the common weal. In the proceeding chapters, we will concern ourselves further with such denial of necessities at the core of the natural law by Hart. At present, we consider some masters of the common law who gave outright criticism to the Wolfenden report on whom Hart concerned himself namely, James Fitzjames Stephen and Lord Devlin.

[121]R. Clark Sterne, The Dark Mirror: The Sense of Injustice in Modern European and American Literature, (New York: Fordham University Press, 1994), p. 258.

❖ POSITIVE AND CRITICAL MORALITY❖

Lord Devlin holds that it is permissible for any society to take the steps needed to preserve its own existence as an organized society and thinks that immorality even private sexual immorality may like treason, be something which jeopardizes the societal existence. Hart arguing for many who disagree with him holds on the other hand that whether or not a society is justified in defending itself must depend on what sort of society it is and what the steps to be taken are. If the society is a tortuous society for example, it is arguable that Devlin's disintegration thesis will be morally better. For Hart, Devlin's principle was not part of English popular morality but he put it forward as a principle to be used in the evaluation of social institutions generally.

To make his positions clearer, Hart tries to inquire on what it is that is prima facie objectionable in the legal enforcement of morality. He avers that legal enforcement of morality has two different but related aspects as follows: In the first place, the actual punishment of the offender deprives him of his liberty and inflicts pains on him. The deprivation of liberty and inflicting of pain are considered wrong without special justification according to Hart. The second refers to those who may never offend the law but are coerced into obedience by the consideration

that they will be punished under the law in case of disobedience. According to him:

> The unimpeded exercise by individuals of free choice may be held a value in itself with which it is prima facie wrong to interfere; or it may be thought valuable because it enables individuals to experiment even with living and to discover things valuable both to themselves and to others. But interference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special form of suffering often very acute on those whose desires are frustrated by the fear of punishment. This is of particular importance in the case of laws enforcing a sexual morality. They may create misery of quite special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from those involved in the abstention from "ordinary" crime.[122]

[122]H.L.A. Hart, p. 21-22.

The third involves the problem of distinction between positive and critical morality. Positive morality is the "...morality actually accepted and shared by a given social group" while critical morality refers to "the general moral principles used in the criticism of actual social institutions including positive morality."[123] Hart therefore further wants a clear demarcation between the kind of morality to be considered in law and the ones to be left as mere conventions.

❖ PATERNALISM AND THE ❖ ENFORCEMENT OF MORALITY

Hart began his treatment of paternalism in relation to enforcement of morals with Lord Devlin's observation that subject to certain exceptions like rape, the criminal law has never admitted the victim's consent as a defence. Lord Devlin insists that this rule of the criminal law is among the rules that many will not like to be expunged from the law even though they would want to object to legal punishment to offences that harm no one. He therefore considers this kind of attribute tantamount to playing double standards. He posits then that there are certain standards of behaviour or moral principles which society requires to be observed.

[123]TRS Allan, Law, Liberty and Justice: The Legal Foundations of British Constitutionalism, (Oxford: Oxford University Press, 1994), p. 103

Among them are the sanctity of the human life and the physical integrity of the person. Therefore he claims that the function of the criminal law is to enforce a moral principle and nothing else.

In answer to Devlin's position, Hart posits that .the rules excluding the victim's consent as a defence to charges of murder or assault may perfectly well be explained as a piece of paternalism, designed to protect individuals against themselves."[124] Here Hart differs with Mill who would certainly protest against any paternalistic consideration. He admits of paternalistic laws in the English law (civil and criminal as we for example find in the supply of drugs to adults, except under medical prescription). He also admits that there is less sympathy to Mill's liberal position which call such paternalistic laws inversion of liberty because of the general decline in the belief that individuals know their own interests best. He tries here to distinguish between the legal moralism and paternalism and says that criminal law should take care of some instances of paternalism and not legal moralism.

[124] H.LA. Hart, p. 31.

❖ THE MORAL GRADATION OF ❖ PUNISHMENT

Feeling satisfied with his response to Devlin, he turns to James Fitzjames Stephen position that the criminal law not only should be but actually is a persecution of the grosser forms of vice and not merely an instrument for the prevention of harm. In consideration of how an offender is to be punished, Stephen insists that the degree of moral wickedness involved in the crime should be considered. For example, he writes in relation to how a judge should make a decision when two criminals stand before him thus:

> A judge has before him two criminals, one of whom appears from the circumstances of the case to be ignorant and depraved, and to have given way to a very strong temptation under the influence of the other, who is a man of rank and education, and who committed the offence of which both are convicted under comparatively slight temptation. I will venture to say that if he made any difference between them, at all every judge on the English bench would give

> the first man a lighter sentence than the second.[125]

James feels that if reasonable importance is placed in the gradation of moral offences in giving punishment, and if the object of the criminal law is to promote virtue and prevent vice, it follows that it ought to put restraint upon vice generally on the ground that vice is a bad thing. Hart exclaims that this argument is generated by Stephen's failure to see the difference between the questions- 'what sorts of conducts may be justifiably punished' and 'how severely should we punish different offences?[126] Hart is not here disputing the fact that some moral wrongs are grave but agrees with Roscoe Pound who believes that no legal machinery will be able to do everything which we might like to achieve through social control.[127] Some moral wrongs may be grave in this consideration but they are considered intangible for legal enforcement. In this

[125]J.F. Stephen, Liberty, Equality, Fraternity, (Indianapolis: Liberty Fund, 1993), pp. 149-150.

[126]In 1940, J. Michael and H. Wechsler in Criminal law and its administration, suggests a threefold problem involved in determining the kinds of behaviour to be made criminal. (a) What sorts conduct is it desirable and possible to deter. (b) What kinds of conduct indicate a likelihood of future dangerous and socially undesirable behaviour? (c) Will the attempts in preventing particular conducts "do less good, as measured by the success of such efforts than harm as measured by their other harmful results (P.W. Tappan, Crime, Justice and Correction, New York: McGraw-Hill, (1960), p. 250).

[127]R. Pound, An Introduction to the Philosophy of Law, (New Haven CT: Yale University Press, 1982), p.46.

consideration too, some moral wrongs to individuals are considered too expensive for prosecution.

A further problem Hart had to contend with is the crime of bigamy[128] not mentioned either by Devlin or Stephen but cited by Dean Rostow as an example of legal enforcement of morality in defence of Devlin. The issue of bigamy is one that has already been adjudicated by the United States Supreme Court and as Rostow points out, it "…has upheld such laws, (against polygamy) in the teeth of the Constitutional provision that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[129] While Hart does not contest the insertion of such law into the books, he insists that such laws can be defended on other grounds as indicated by fellow liberals rather than the enforcement of morality. For example, it can be defended that such laws aremade to protect public records from confusion, to protect religious feelings from offence by a public act desecrating it and to avoid public affront and provocation to the first spouse. These, when allowed, will be harmful to

[128] Bigamy is the act of being simultaneously married to more than one spouse. This is considered a crime under traditional common law in the United states. In Stanley v. Nebraska for example, the Supreme court of Nebraska, convicted the defendant (Stanley) for a second marriage even when there is some knowledge that the first marriage is invalid (cf. J.L. Diamond, "The Myth of Morality and Fault in Criminal Law Doctrine" American Criminal Law Review, 34 (1996), pp.111-131.

[129] Mitchell, Law, Morality and Religion in a Secular Society, (London: Oxford University Press, 1962), p. 26.

individuals and therefore can be conveniently covered by the harm and offence principles. According to Hart, the bigamist in consideration of religious sensibilities is punished for nuisance and not for immorality. He writes

> (The Law) is concerned with the offensiveness to others of his public conduct, which, in most countries, it leaves altogether unpunished. In this case, as in the case of ordinary crimes which cause physical harm, the protection of those likely to be affected is certainly an intelligible aim for the law to pursue, and it certainly could not be said of this case that "the function of the criminal law is to enforce a moral principle and nothing else.[130]

The comparison of nuisance and immorality here is intriguing and is only but a reflection of some deft motive by Hart to undermine the seriousness of some moral offences. Nuisance simply defined as "...harmless annoyance, unpleasantness, and inconvenience"[131] certainly is less serious than some moral wrongs. The evil of bigamy is serious not for

[130]H.L.A. Hart, p. 41.
[131]J. Feinberg, The Moral Limits of the Criminal Law: Offence to Others (New York: Oxford University Press, 1985), p.50

being a nuisance but by the fact that it morally wrongs the first partner and demeans the societal value where it is abhorred. The protection of society from harm and the protection of individuals from harm cannot easily be differentiated from each other as Hart thinks because in trying to do this, we are often presented with false alternatives. In the case of Stanley v. Nebraska for example, it is clear that Stanley was convicted for contravening community moral standards on the institution of marriage and family life. The integrity of the family life in Nebraska requires "an unflinching enforcement of the criminal laws against bigamy. The immorality is not in choosing to do wrong but in transgressing, even innocently, a fundamental social boundary that lies at the core of social order."[132]

❖ SUMMARY ❖

Hart's works: *The Concept of law and Law, Liberty and Morality* remain till date, the most extensive in the analysis of law and its relation with coercion and morality. The Concept of Law admits that most laws have necessarily the Austinian aspect of orders backed by threats but deny that it is part of its

[132]J.L. Diamond, "The Myth of Morality and Fault in Criminal Law Doctrine," American Criminal Law Review, Volume 34, Issue 1, (1996), pp.111-131.

essence. Hart sees the close link between orders backed by sanctions and moral rules obliging to conduct as implying that law while not under morality should be considered as a branch of morality. In whichever way one tries to understand law, either as orders backed by threats or as morality or justice, Hart holds that they all prefigure law as essentially rules.

In developing the concept of law, he attacked the Austinian command theory. He sees this as referring to the orders backed by threats which he considers deficient as a concept of law. He feels that laws must be seen to be complete without orders backed by threats even though its general intent implies orders. His major criticism of Austin is that power or title conferring rules cannot be analysed as commands or as orders backed by threats. The instance of laws conferring powers on persons to make wills and laws that give officials such as judges the power to try cases show that not all laws are commands according to him. He contends that power conferring rules are logically different from duty imposing rules and different too from genuine orders backed by threats.

H.L.A. Hart may have succeeded in awakening the minds of many in what he perceived to be the flaws in Austinian command theory but he certainly did not

succeed in making all believe that this theory is faulty. Among those who considered Hart's view deficient is Philip Ostien. In an excellent article:
“The Logical Form of Orders Backed By Threats: The Command Theory of Positive Law Defended”, he defends Austin's theory against Hart's views. He assimilates the orders backed by threats into power conferring rules of law. In repudiating the command theory, Hart represents the 'gun man' in his heated irrationality and the 'bank teller' as having no choice but the wishes of the 'gun man'. His understanding of the 'gun man' presents the bank teller as one obfuscated and therefore unable to make choice in his present circumstance. This understanding does not very well represent the human nature characterized by rationality and complex abilities. Certainly, the argument of Philip Ostien is more illuminating and shows better understanding of Austin's command theory. The 'bank teller' is not irrational, if he obeys the 'gun man', it is not because he has no choice but because he has weighed other options and considered obedience a momentous option.

Hart's analysis put Austinian command theory in optimum velocity by his reference to the 'gun man' and the 'bank teller'. The Austinian command theory is rather a complex theory that uses all manner of

methods in commanding obedience including advice. It is understood from its optimum command form by Hart but better analysed in its milder form by Philip Ostien. Comprehending command theory of Austin as complex in its command of obedience makes it still relevant today against Hart's position.

4

MORAL ENFORCEMENT DEBATES

❖ INTRODUCTION ❖

The debates over the legal enforcement of morals are centred on the obfuscations that shroud the principles for legal limitation of liberty in democratic societies. Laws limit human autonomy by restricting freedom. They are put in place in every democratic society as liberty limits to individuals and groups for peaceful organisation of the society. Such peaceful organisation ensures that no person harms the other, harms himself, harms society or offends the other. These are respectively referred to as harm principle, legal paternalism, legal moralism and offence principle. Bentham in his classification of all laws excluded legal moralism and offence principle and recognised only the laws designed to protect people from harm caused by others; laws protecting people from harms they caused themselves and Good Samaritan laws (laws requiring assistance to others). Bentham along with most liberals taught that only the first class of laws namely harm to others can be considered legitimate in limiting freedom of members of the society.

Hart is in agreement with Bentham that only harm to others has moral propriety but recognised some aspects of paternalistic laws as legitimate in limiting liberty as well. His arguments in the relationship between law and morals centre on a critique of legal

moralism. Our position is to indicate here that Hart was mistaken in his disregard for legal moralism while at the same time giving consideration to liberty limiting principles especially the legal paternalism. In order to effectively do this, we will begin by highlighting the liberty limiting principles as a guide towards the identification of the moral contours of the zone for a legitimate claim by citizens to be morally at liberty.

❖ LIBERTY LIMITING ❖ PRINCIPLES

A liberty limiting principle "…states that a given type of consideration is always relevant reason in support of a penal legislation even if other reasons may in the circumstances outweigh it.[133] Each of the liberty principles deserves consideration in every discussion of liberty within the society. None is however considered as a necessary and sufficient condition for justified state coercion. This is because "in a given case its purportedly relevant reason might not weigh heavily enough on the scales to outbalance the standing presumption in favour of liberty."[134] The commonly noted coercion or liberty limiting principles which are very relevant in our

[133] J.Feinberg, The Moral Limits of the Criminal Law: Harm To Others, (New York: Oxford University Press, 1984), pp. 9,10.
[134] Ibid., p. 10.

consideration of Hart's position on law and morality include the harm principle, offence principle, legal paternalism and legal moralism.

❖ THE HARM PRINCIPLE ❖

The harm principle, the foremost of the liberal principles was first proposed by J.S. Mill as the only reason for which power can be excercised against any member of a civilized society against his will. He argued that this principle is the only principle for legitimate inversions of liberty. At the onset of his work on liberty, he declared his main object in the following words:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a

> civilized community, agains this will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant.[135]

Mill's principle on closer consideration is after all not a 'very simple' one. It is far more complicated than his presentation of it. Patrick Riordan for example highlights some complications in Mill's harm principle as a reason for limitation of liberty. According to him, the major grounds for this limitation as indicated by Mill are found "...in the two key sentences by the words 'sole end' and 'only purpose' but the end and purpose are not the same: the sole end of self protection differs from the only purpose of protection of others."[136] Mill neither specified the exact persons nor groups denoted as 'others' that need protection or those who will have the power to limit individual action. B. Harcourt further highlights the complexity of this principle as presented by Mill by his indication that the essay took on different nuancens ". . . from a simple They include, "the assertion that harm to others is a relevant ground for restricting individual or collective freedom and that harm to self does not constitute sufficient reason for the restriction of

[135] J.S Mill, On Liberty, (New York: B. Alden, 1885), p. 20-1.
[136] P Riordan, A Politics of the Common Good, (Dublin: Institute of Public Administration, 1996), p. 86.

freedom."[139] These two principles generate further set of principles that can be divided into self-regarding (harms inflicted on oneself) and other-regarding (harms inflicted on others).[140] For Dworkin, only self protection is the sole end and only purpose for which liberty of one person may be legitimately curtailed by others and therefore based on this, self-regarding harm cannot be considered as justifying constraint No one can be compelled to do or forbear based on the reason that others have considered that doing so would make him happier or that it would be wiser. The only good justification for limiting liberty for Dworkin is in relation to the other-regarding aspect of his harm principle. This aspect is further split into different categories according to the unpleasantness to others, whether the unpleasantness is inflicted actively or passively or whether the unpleasantness is faced by an individual or by a group. It is on this aspect that Joel Feinberg built his own harm principle. He further tried with the use of mediating maxims to solve the traditional objections to Mill's position on liberty (which is specifically concerned with the other-regarding aspect of the harm principle) that the principle of liberty which he defends is indeterminate both in its application and meaning. Mill's principle specified harms to others as reason

[139]G. Dworkin, "Paternalism"The Monist Vol. 56 (1972), p. 64.
[140]H. Harry, Limits to Medical Paternalism, (New York: Routledge, 1991), p.20.

for restriction of liberty rights but fails to specify what counted as harm to others. For example, it left unanswered such questions as how we can establish the nature and severity of harms and whether offence to the feelings of others can be counted as harms.

Moving a step further from Mill's presentation of the 'other regarding harms', Feinberg spells out other states of affairs that could be used as reasons for limiting the prima facie (presumptive) right to liberty. They include the prevention of harm, enquiry into harm to a more complex analysis of interests (self regarding and other regarding interests) and eventually to a quasi-legaldetermination of rights."[137] Mill's final restatement of the harm principle defined the concept of harm in terms of recognized or legal rights.[138] Based on some of these complications which are beyond the scope of this work, Mill's harm principle generated much dispute on whether it is truly one principle as he stated. In his essay: Paternalism, G. Dworkin tried to give an answer to this by saying that there are at least two

[137]B.E. Harcourt, "the Collapse of the Harm Principle"Journalof Criminal Low and Criminology, 90(1999), p. 111.

[138]John Stuart Mill finally restated his harm principle thus: "though society is not founded on a contract... the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of another, or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights; and secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incured for defending the society or its members from injury and molestation."(John Gray & G.W. Smith, J.S. Mill, On Liberty in Focus, (London: Routledge, 1991), p.90).

principles involved in Mill's harm principle. offence, hurt and other kinds of unpleasantness to others. While Mill presented the harm principle as limit on the ends for which mankind, and not governments, might limit individual freedom, Feinberg presented his as a moral limit to an individual freedom to be observed by an ideal legislature. While Mill limited the reason for individual coercion to harm to others principle, Feinberg further added the offence principle as a good reason for limiting the *prima facie* right to liberty. While not limiting ourselves to harm and offence principles as possible reasons for limitation of freedom, we will consider further principles that require the attention of the legal machinery in limiting individual liberty namely legal paternalism and legal moralism.

❖ HARMS AND WRONGS ❖

Most liberals are in agreement that the object of the criminal law is the act of harming. An act of harm is one which causes harm to people. Not all harms are considered important in the legal limitation of the actions of others. Harms that constitute the concern of law are harms that thwart or invade the interests of others. Such harms also must be considered as wrongs to others. Feinberg for example argues that a setback to what is admittedly someone's "...interest does not count as harm unless it is wrongfully

inflicted which is to say that it is inflicted in violation of a right."[141] In this view, I do not wrong you for example when I engage you in a fair contest or when you consent to my action that harms you *(volenti maxim).* In the same way, harms which result from sources which no one can be held culpable "such as natural disasters or animals"[142] are not wrongful harms and therefore they do not violate rights. Wrongful actions here are synonymous with right violation; only in special cases can we find wrongful actions without the victim being harmed such as in harmless trespass on another's land. Even though that does not constitute any harm to the owner in the sense of damage to property, such wrong is considered as harm to the liberty of the property owner to decide what happens with his property. Wrongs in this sense are the basis for our claim rights. They are the negative sides of our human experience from which we project rights as their counterparts. In line with this, Michael J. Kerlin stated that "…without the wrongs, we would never perceive, much less demand, the right to this or that condition, to this or that treatment."[143] The link between harms, wrongs and rights play a very

[141]S.S Douglas, "The Hollowness of the Harm Principle" University of San Diego Legal Research Studies Research Paper, 5-07 (2004), p.40.
[142]J.Hampton "Defining Wrong and Defining Rape" K. Burgess-Jackson, A Most Detestable Crime: New Philosophical Essays in Rape, (Oxford University Press, 1999), p. 121.
[143]M.J. Kerlin, "Rights from Wrongs: A Secular Theory of the Origin of Rights" Theological Studies, Vol. 67, (2006), p.67.

important role in the harm principle especially as espoused by Feinberg. In the same way, wrongs and rights are useful in considering offences and evils of a kind considered in legal moralism. The liberty limiting principles have their focus on those types of actions and omissions that violate rights by setting back the victim's interests wrongly or by doing some wrong to the victim. The harms that set back interests without at the same time being wrongs are not considered as right violation. For example if I engage you in a bet of ten thousand naira and win, I thereby harm and set back your interest. I have not however wronged you and therefore the harm principle will not be applied in such a situation. Only set back to interests that are wrongs and wrongs that set back interests shall be considered in our harm and offence principles as well as evils of the kind considered in legal moralism.

The harm principle is very important in every political and liberal theory of the criminal law It is therefore considered by some liberals who follow Mill's principles as the only warrant for the coercion of individual liberty. Indeed as Feinberg asserts, "...few would deny that it is always a morally relevant reason in support of a criminal prohibition that its enactment would prevent harm to parties other than the persons whose conduct is to be

[144]J. Feinberg, p.187.

constrained." The basic function of the harm principle in Mill and its development inFeinberg is to limit the prima facie right to liberty when it causes harm to another prima facie right in others. Put differently, harm principle limits the presumptive case in favour of the interest in liberty when it causes harm to other people's interests considered also as having some presumptive case for a right.

Before considering other principles favoured by different people to have moral propriety in limiting people's liberty, it will be important to note here that the harm principle which is the basis of Hart's position in law and morality is heavily biased in favour of the individual at the expense of the society as a group. A very important argument used by Mill in defence of his harm principle which is taken over by Feinberg revolves around the protection of the rights of the individual against the collective group. Mill makes two things clear in his harm principle: "First, individuality is valuable both to the individual and to the society, and liberty of action is necessary to promote individuality. Second, collective decisions about private behaviour are more likely wrong than right."[145] He argues that "...freedom of action is a precondition for the development of individuality. Without liberty of

[145]D.A. Dripps, "The Liberal Critique of the Harm Principle" Criminal Justice Ethics, 17(1998), p. 3.

action we are not able to choose between different paths of action, nor can we experiment with different plans of life."[146] Individuality, no doubt is a good but it is not the only good. The assertion that 'collective decisions about private behaviour are more likely wrongs' is a highly questionable presumption which gives a very biased assessment of collective decisi6ns. Wrong decisions are not limited to either the individual or the collective. It can be an attribute of both and in fact it is often predominant in individuals. Two heads (good heads) are usually better than one is a common colloquial usage implying that the judgement of two is better than one. Individual decisions are frequently self-focused and limited by relatively narrow experience, On the other hand,collective decisions are often the products of the reasoning of many people or several individuals with a focus on the good of collectives as well as of individuals. The rights of the individual to liberty of action are very valuable and therefore should be well protected. At the same time, we cannot say that because we value individual rights to liberty of action, whatever action the individual takes is likely to be superior to the rights of groups and their collective decisions.

[146]R. Cohen-Almagor, The Boundaries of Liberty and Tolerance; The Struggle against Kahanism in Israel, (Florida: Oxford University Press, 1994), p. 42.

❖ THE OFFENCE PRINCIPLE ❖

Earlier, we pointed out that the first reason considered by many liberals including Hart to have a moral propriety in limiting individual liberty is the harm principle. While many of the liberals take the harm principle as the sole reason for using the state machinery to limit liberty, few others still like Feinberg consider a further limiting principle namely offence as an appropriate justification for the state's intervention in individual liberty. While explaining the meaning of liberalism in Harm to Self considering self a moderate liberal, Feinberg explains:

> "Liberalism" in respect to the subject matter of this book as the view that the harm and offence principles, duly clarified and qualified, between them exhaust the class of morally relevant reasons for criminal prohibitions. ("Extreme liberalism" rejects the offence principle too, holding that only the harm principle states an acceptable reason.) I then candidly expressed my own liberal predictions.[147]

[147] J. Feinberg, Moral Limits of the Criminal law: Harm to Self, (New York: Oxford University Press, 1986), pp. IX,X.

Feinberg therefore taught that if the law is justified in using its coercive methods in protecting people from mere offence, it must be by virtue of a separate limiting principle which he branded offence principle. He would want the state to coercively prevent offence to others in addition to preventing harm to others. Within the ambience of Feinberg,s general meaning of offence are all unwanted states that include disgust, shame, hurt, anxiety and other similar unwanted states. These are to be the concern of the law only when they are wrongfully inflicted on others or when they are considered as right violating conducts. The central points of the consideration of offences in Feinberg's view are wrongs and right violation. Whatever is to be considered a disliked state of mind to warrant consideration under this principle must be a wrongful action or right violating action of others. Wrongful offences -are divided into two: wrongful offences strictly speaking which is accompanied with a sense of resentment and wrongful offence where the victims do not generally care about the wrongs done to them. The law should concern itself only with the offences considered to have been caused by the conduct that really is wrongful and in violation of the offended party's rights.[148] Feinberg's interest in including the offence principle a warrant for limiting people's liberty as

[148]J. Feinberg, The Moral Limits of the Criminal Law: Offence to Others, (New York: Oxford University Press, 1985), p.2.

well as harm principle is to prevent people therefore from wrongfully offending and harming other people.

The offence principle as proposed by Feinberg pinpoints the fact that offensive behaviours constitute an important moral evil which the legislator cannot easily ignore in his legislative action. He was able to lay down this truth in spite of his strict liberal position. However, in order to prevent a situation where rights to liberty will be unduly limited by those instances of offensive behaviour that warrant legislator's attention, he suggested the use of mediating maxims or a form of balancing. His mediating maxims as good as they are, failed because of its undue advantage to the strict liberal consideration on individual autonomy.

❖ LEGAL PATERNALISM ❖

Legal paternalism has through the years acquired some notoriety and controversy partly because of its name. The word paternalism coming from the Latin word Pater with its English rendering as father is often pejoratively understood to mean the treatment of an adult as if he is a child or acting like a father to someone. It implies acting for the good of another without his consent just as parents do for their children. Its end is benevolence and the means at its

disposal is coercive. One of the strictest definition given to paternalism was supplied by Feinberg in his 1971 *'Legal Paternalism'* within the classical liberal spirit as a principle that "justifies state coercion to protect individuals from self-inflicted harm, or, in its extreme version, to guide them, whether they like it or not, toward their own good."[149] Harm here is understood not as wrongful and unconsented injury as we find in the harm principle but as mere setback to interest. Theimplication is that the volenti maxim which excludes some classes of harm from the legal hammer is inapplicable in the case of legal paternalism. The law intervenes whether the victim consented to the harm or not.

Gerald Dworkin treated paternalism beyond the confines of the state apparatus and holds that it is "...roughly the interference with a person's liberty of action justified by reasons referring to the welfare, good, happiness, needs, interests or values of the person being coerced."[150] These definitions carry along a derogatory notion that the state or other persons stand to its citizens and fellow human beings as parents to children.

The distinctions of Feinberg between presumptively blameable and presumptively non blameable

[149] Hayrv, The Limits OF Medical Paternalism, (New York: Routledge, 1991), p. 51.
[150] Loc

paternalism are very illuminating and useful in keeping at bare the pejorative understanding of legal paternalism. Presumptively blameable paternalism refers to the situation where adults are treated or forced to act in some ways as if they were children. This can be for reasons of benevolence where their good is put into serious consideration in spite of their wishes or sometimes for non- benevolence where the goods of others are considered.

Legal paternalism is among the principles excluded by the liberals as having no moral propriety for any coercive legislation. The debate for its removal from or inclusion into the statutes books started in Anglo-American literature with Mill's On *liberty*. He extolled the harm principle jettisoning every form of paternalistic intervention. In the early 1980s, paternalism was further given extensive treatment in Feinberg, John Kleinig, Gerald Dworkin and Joseph Raz. These discussions however failed in taking into consideration possible principled differences that exist between criminal prohibitions on paternalistic grounds and other state interventions aimed at protecting people from self-damaging conduct such as we find in civil and administrative law. Following the idea of autonomy, the state ordinarily should not use coercive law to prevent individual from injuring himself. When the state does intervene from this

view point, she is considered to have infringed on the on the individual's autonomy rights.

Autonomy literally means having or making of one's own laws. Assertions such as 'I am in charge,"no one will tell me what to do with my time', etc. often come from people who feel that their personal autonomy has been invaded and they do not hide their indignation. Autonomy implies self- rule, self-determination, self-government and independence. When applied to individuals, autonomy refers either to individual's capacity for self-governance ". . .or to the actual condition of self-governance and its associated virtues or to an ideal character derived from that conception or (on the analogy of political state) to the sovereign authority to govern oneself, which is absolute within one's moral boundaries."[151] This will ensure that even when someone engages in self destructive activities, he will be left alone.

Legal paternalism while not denying the right to individual autonomy insists that there are situations when the individual is unable to make proper decisions about his own good. It therefore 'protects him from himself' by asserting his safety as a trump over his liberty. Legal paternalism conflicts with the harm principle over competent self-harm and risk of self-harm, harm to consenting others and harmless

[151] J. Feinberg, Moral Limits of the Criminal Law: Harm to Self p. 28.

acts. While the harm principle demands our toleration of these acts, paternalism would sometimes wish to regulate them. Harm principle only considers paternalism where incompetent persons such as children and the comatose are involved.

Apart from the considerations of the incompetent, the harm principle seem not to have been able to take care of the major problems of the contemporary society following the existence of paternalistic laws in almost every society. Instances of legal paternalistic laws existing in almost every contemporary society include among others, the mandatory helmet laws, anti-drug laws, forced retirement savings, smoking bans, sin taxes, prohibition on the sale of experimental drugs, mandatory cooling-off periods after expensive purchases etc. The protagonists of legal paternalism argue that such measures are justified in order to prevent people from harming themselves especially when they stand to gain nothing by the actions that lead to such harms.

❖ LEGAL MORALISM ❖

In general jurisprudence, legal moralism very much referenced to Devlin's view refers to the theory that laws can be used to prohibit the actions of people on

the reason that the societal collective moral judgement considers such to be immoral. It permits the state to use its coercive laws in the enforcement of societal collective morality. Most defenders and critics of legal moralism including Hart base their arguments on this. The protection of societal morality is merely an argument by Lord Devlin in support of legal moralism. There are other reasons put forward in support ofcriminalizing immoral conducts such as the need to preserve a traditional way of life, the perfection of human character, the enforcement of morality and the prevention of wrongful gain. The position we defend here approves the use of the state legal apparatus in limiting individual liberty on actions that are inherently immoral following critical moral principles. Legal moralism on this consideration is the theory that the state can sometimes rightfully criminalize conducts on the grounds that they are moral wrongs. They do not need to have direct victims in terms of offence or harm but on the reason that they cause evils of other kinds. Legal moralism therefore permits any of the large miscellanies of reasons having no reference to harm or offence to anyone to have relevance in support of a criminal legislation. Some of the reasons are:

1. The preservation of a way of life
2. The enforcement of morality

3. The prevention of wrongful gain
4. The elevation of perfect character

We will be concerned here with the legal enforcement of morality as legal moralism in the strict sense. This version of legal moralism akin to James Fitzjames position seeks criminalization of the class of evils regarded as immoralities with or without specific victims that are done either in public or in private. It seeks legal protection from wicked acts "so outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity."[152] Our concern in the following pages will be to highlight the strength of this version of moralism against Hart's position that they are not to concern the law. Contrary to Hart's view, the state can rightly sometimes with the use of criminal law prohibit actions on grounds of their inherent immorality.

Legal moralism gives the state the legitimacy to prohibit through the means of the criminal law certain types of actions that constitute other kinds of evil apart from the big two harm and offence to other people. The state sometimes interferes in people's liberty to protect the persons concerned, other people

[152]J. Fitzjames Stephen, Liberty, Equality Fraternity, (Indianapolis: Liberty Fund, 1993), p.163.

or the society from various forms of evil often excluded in the liberal's list of harms and offences. In such instances the liberal readily queries the rational for inversion of autonomy on the grounds that one has violated a traditional way of life or that one has merely committed sin which harm no one. In order to properly locate the bounds of the state coercive power over individual autonomy or liberty, we need to know what falls within the boundaries of one's autonomy or liberty.

❖ AUTONOMY AND LEGAL ❖ MORALISM

In the liberal view, as indicated in chapter one, autonomy or 'liberty is the freedom to live and act as one chooses without governmental or other people's intervention.' In its extreme liberal consideration following, Mill's teaching, it refers to the individual freedom to do whatever, but what which most of us will be unhappy to give up. For example, the traditional liberal ideal which extols liberty, equality and fraternity is irreconcilable with the liberal denial of community considerations in the discussions of individual autonomy. The liberal fraternity imply group membership and loyalties, cooperativeness, civic duties and public participation The value of fraternity conflicts with the liberal ideal of autonomy where the individual is considered almost as an

absolute sovereign An individual in this category is considered by communitarians as "an atom or island whose essential character is formed independently of the influences of social groups and who is in principle entirely self-sufficient."[153] Within the liberal camp therefore, there is a tension between liberty and fraternity, autonomy and community, individualism and communitarianism In most cases of such conflict, the liberal considers autonomy as a trump for either community or fraternity In such cases, the liberal view gets into an irreconcilable conflict with common sense about the importance of community.

Every sense of the self has its relation to the community and therefore the varying feelings of self is often in an effort to attune oneself to the varying expectations of the community at various times either in relation to the community standards of behaviour or general expectations. In this sense, an autonomous individual is one who is able to achieve a high standard pursuit of institutional goals while at the same time remaining in full control of his faculties, behaviours and feelings. The liberal autonomy devoid of considerations of moral offences and harms to the community considers self as totally free and impulsive. It therefore finds itself in a mess when it has to further consider the values of

[153] J. Feinberg, Harmless Wrongdoing, (New York: Oxford University Press, 1990), p 82

fraternity. The harm principle itself which is at the centre of liberal thought conflicts with this sense of autonomy because every consideration of the harm done to others is linked to the fact that one is not totally autonomous. This kind of liberal autonomy is harms others. With the liberal modification in Feinberg and Hart, it allows the state the use of its coercive machinery in stopping an individual from offending others and harming self respectively. As a result, the liberals consider legal moralism or the inclusion of laws that protect morality inconsistent with the liberal society They therefore consider statutes that protect morality unwarranted inversions of individual freedom.

Actions that are not harmful or offensive to other people could be harmful or offensive to the community in the sense of Devlin's disintegration thesis or in other ways that offend the communal or fraternal values. Autonomy as defined by liberals giving the state the warrant of intervention only through the harm and offence principle will be inefficient in solving the problems of the political society where liberty and fraternity is considered to coexist. Most conservative writers rightfully maintain that personal autonomy of the type explained above so much treasured by liberals is incompatible with certain community values simply described by some commentators as "...the

intensification of individualism combined with the rise of the 'enterprise culture."[154] It is associated with the selfishness of the modern capitalism which "leaves the modern individual bereft of personal connections, de-politicised, without clear guidance or certainty, and raised the very questions of the possibility of any community at all in today's world.[155] In the proceeding pages, while giving credence to the liberal view that autonomy or individual liberty need to be respected, we maintain that such liberty must constantly be balanced by the other values esteemed by the society. One can still preserve personal autonomy in the way that some liberals require and at the same time acknowledge the central and indispensable importance of community in human lives.

THE HART DEVLIN DEBATE

The central concern of the Hart Devlin debate as indicated in the previous chapter is the legitimate role of the use of criminal sanctions to punish immoral conduct. The basic questions in the relation between morality and the criminal law are framed by Hart thus: Is the fact that certain conduct is by common standards immoral sufficient to justify making that punishable by law? Is it morally

[154]M. Lee, HRD in a Complex World, (New York: Routledge, 2003), p. 106.
[155]Loc. Cit.

permissible to enforce morality as such? Ought morality as such to be a crime?"[156] It is claimed that Mill and Hart as well as other contemporary liberals such as Ronald Dworkin and Thomas Nagel gave a negative answer to these questions. James Fitz James Stephen and Devlin answered in the affirmative. The position of James Fitz James Stephen and Devlin which for many years has been the central issue in the philosophy of law is referred as legal moralism. It indicates that the criminal law could in principle be used to enforce some of theimportant moral convictions of the community even if the targeted conduct such as private sexual behaviour between consenting adults does not violate the rights or harm others. They concede to the fact that there are some aspects of morality that will not be the laws business but refused to grant that legal moralism is in principle wrong.

While not professing to be either a liberal or a conservative, my intention here is to defend the position that legal moralism properly modified contrary to the position of Hart could be consistent with the liberal democratic society. The evils of a kind considered in legal moralism are not always linked to harm or offences to others but belong to the group that are by their nature evil, often regarded as inherent evils. We will briefly highlight here the

[156]HLA Hart, Law, Liberty and Morality, (Californa: Stanford University Press, 1963), p.4.

meaning of inherent evil in order to properly chart our argument for legal moralism independently away from the positions of Devlin and James FitzJames.

❖IN HERENT EVIL❖

The concept of inherent evil has its classical origins in the conservative argument about man as naturally prone to anarchy, evil and mutual destruction.'[157] Among the foremost conservatives, Russel Kirk for example argues that human nature as being is 'irremediably flawed' and Robert Nisbet holds that "...there is in human nature 'an ineradicable tendency toward mischief and even evil.[158] They generally agree that the concept of inherent evil in man is given expression by the concept of original sin. While some of them believed in the Christian concept of the original sin, others regarded it as mere metaphor for the nature of man. From whichever angle one sees inherent evil, either as biblical or metaphorical, most of the conservatives "...find that the concept of the original sin best expresses the inherent evil in man's nature evil that must be accepted as a given and that is not due to any cause than human beings can remove."[159] Other conservatives of less theological bent consider man

[157] R Viereck, Conservatism: From John Adams to Churchill, (New Jersey: Princeton University Press, 1956), p. 14.
[158] Loc. Cit.
[159] J.T. Melvin, American Conservative Thought since World War II: The Core Ideas, (New York: Greenwood Press, 1990), p. 22.

as imperfect by nature but they agree that the concept of original sin is able to bring out in a better form the limits inherent in the human condition. Without a concept like original sin according to the conservatives, individuals and societies will not be able to deal with what Will Herbert calls "…the disruptive consequences of the sinful egocentricity which characterizes man's fallen nature."[160] Because of the conservative belief that flaws exist in human nature, they hold that man is not perfectible. There is, they believe, a definite structure of existence that puts limits to human perfectibility. Pure legal moralists like moral realists require "...that moral right and wrong, good and bad be shown to have an objective character wholly independent of the egoistic motivations of the individual."[161] Pure moralists' right or wrong does not for example depend on utilitarian or egoistic considerations but it is deontological in nature.

Lord Devlin and James Fitz James were impure legal moralists. Their argument for legal moralism is based on an appeal to the harm principle rather than on the inherent moral evil of an action. In Devlin's social disintegration thesis, he appealed to the harm of the social disintegration. He was concerned with

[160] Ibid., p. 22.
[161] G. Graham, Evil and Christian Ethics, (Cambridge: Cambridge University Press, 2000), p. 91.

the drastic change to the community's way of life as a result of the change in its established morality.'[162] He argued that the state's failure to employ the criminal law in suppressing immorality such as homosexuality will ultimately be destructive to that society. Taking the fact that the society has the right to protect itself from dangers, and since they easily disintegrate or weaken where there is no societal morality, criminal prohibition of immoral acts are justified. He insists that morality is the foundation of the society, to replace a building foundation with another cannot be done without bringing the whole structure down:

> In England we believe in the Christian idea of marriage and therefore adopt monogamy as a moral principle. Consequently the Christian institution of marriage has become the basis of family life and so part of the structure of our society. It is there not because it is Christian. It has got there because it is Christian, but it remains there because it is built into the house in which we live and could not be removed without bringing it down. The great majority of those who live in this country accept it

[162] J. Feinberg, Harmless Wrongdoing, p. 134.

> because it is the Christian idea of marriage and for them the only true one. But a non-Christian is bound by it, not because it is part of Christianity but because, rightly or wrongly, it has been adopted by the society in which he lives.[163]

This position suggests that the law may rightly be used in the preservation of the essential institutions of society whether they are good or not. Professor Hart addresses this question by arguing that there are only two senses in which an institution can be considered essential to the society. It is either the institution is considered so because the society will not survive without it or because without it the society will be different. He admits of no institution which can be considered as the essence of any society. For him the society will not disintegrate but can only be different with the demise of the institution. Using monogamy as example, he argued that monogamy is essential for England but it does not mean that the English society will disintegrate if it became polygamous. He therefore considered Devlin position that change of societal morality is destructive of the society as totally absurd. Lord Devlin's position here as attacked by Hart seems to

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[163]B Mitchell, Law, Morality and Religion in a Secular Society, (London: Oxford University Press, 1967), p.29.

imply that that 'essential to society' means essential to its cohesion. This can also be considered as the necessity for its form of life. Devlin's argument fails in its strength if it is considered only within the boundaries he couched it as cohesion and necessity for its form of life. Pointing to the harm principle, Hart insisted that change in moral views do not destroy societies and it is therefore absurd to believe that such changes imply the disintegration. Devlin's position is built on the majoritarian consideration of morality while Hart considers law from the view point of humanitarian and individualistic basis.

Hart's position that the society may not disintegrate in terms of cohesion is tenable considering the fact that moral views could be made private as he insisted while individuals in the society remain members of the society bounded by the harm principle. However, the essence of most institutions in the society lie in their ability to satisfy some important needs in ways considered generally acceptable. Such institutions are very much essential to bringing people together in ways that bring harmony. If it is taken that these institutions really bring the people together harmoniously, it will be absurd to think the way Hart does that the society will not care about the destruction of her valued institutions. If the society has the right to care about its institutions, the only way it can do this is to lay down sanctions for their

negligence. The harmonizing values of such institutions are clearly indicated in the writings of Professor Emmet.

> In a social environment, each individual is set in multiple crisscrossing relationships, so that the results of his actions affect and are affected by those of other people, producing snowballing effects (such as inflationary spirals which no one has intended, though they can be understood and controlled through Keynesian economic techniques). Also the frameworks of actions are established patterns of social relationships and ways of doing things-institutions, in fact-- which produce situations in which some kinds of action can be effective and other kinds discouraged or rendered ineffective. In a chaotic aggregate of individuals few purposes could be effective (the Hobbesian insight). Sociological analysis shows why some kinds of purpose are likely to be pursued effectively under some forms of social relationship and others not'[164]

[164]D.M. Emmet, Rules, Roles and Relation, (London: Macmillan, 1958), p. 125.

Of necessity institutions are required to give people the opportunity to live harmoniously together. The society with the ability to protect its institutions is by far, a better society than the community whose institutions have been destroyed by individualism. Such communities, if not well checked can degenerate into a different form of Hobbesian war of everyone against everyone.

This argument though having much weight failed because of Devlin's inability to distinguish the types of institutions that deserve the type of protection that he requires. In England for example, the institution of monogamy may be considered a valuable one. What can we say about such institutions like slavery that depict some people as free born and others as outcasts or institutions that consider twins as evil those who deserve to be made away with? The values or institutions which Devlin intends to protect with the criminal law could be weighed against Hart's positions if he had been able to distinguish between the kinds of value or institution that need such protection. With proper modification of Devlin's disintegration thesis to incorporate only valuable (based on sound moral principles) institutions, it could trump Hart's position on the scales. Lord Devlin's shortfall in his inability to distinguish the kinds of institutions that need legal protection is however given a boost by his distinction between the

kinds of morality that requires legal protection and the kinds that should be consigned to the private domain.

PUBLIC AND PRIVATE ❖ MORALITY ❖

In order to determine what sorts of immoral activity that should be prohibited by law, Devlin first addressed himself to the problem of ascertaining the moral judgements of the society and the society's propriety in judging morals. In the latter case, he asked three basic questions:

1. Has the society the right to pass judgement on things that bother on morality? Shouldn't there be a public morality or do we have to consign morals to the private sphere?
2. If society has the right to pass judgement has it also the right to use its legal machinery in enforcing it?
3. If the society is allowed to use legal machinery in enforcing morals, ought it to use that machinery in all cases or only in some; and if only in some, what principles should guide its use?

His answer to the first two questions forms the basis for our discussion. He states that "...if the society has a right to make judgement and has it on the basis that a recognised morality is as necessary to society as, say, a recognised government, then society may use the law to preserve morality in the same way as it used it to safeguard anything else that is essential to its existence."[165] Both Hart and Devlin agree that some moral principles are necessary for societal existence but while Hart links them to evils of other kinds like harm and paternalism, Devlin considers them as legal enforcement of morality. He argues that the society has a prima facie right to protect morality and sanction immorality. The society according to Devlin will only be able to consider an action immoral following the conclusion of every right- minded person. The right minded person in his terms is the 'man in the jury box' or the, man in the *clapam omnibus*. It has to be the judgement of the man in his right senses "...for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous."[166]

Devlin's argument that every state has the right to protect its institutions is quite convincing against Hart's position that such society does not change

[165] B. Mitchell, p. 36.
[166] Ibid., p. 37

because of change of morality and therefore the society has no warrant to interfere in morality. According to him:

> (This is) not to be done by counting heads but by using a standard which has been evolved by English law, that of the reasonable or right-minded man 'the man on the clapam omnibus', or the man in the jury box... the moral judgement of a society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. Immorality for the purpose of law is what every right minded person is presumed to consider to be immoral."[167]

Arguing impurely, he holds that any immorality in principle is capable of harming society but not all immorality should concern the law. There has to be a sphere of morality that will concern the public domain and a sphere that will be the individual's business. While standing for liberals he holds that the individual has a lot to determine about his life but insists on striking a balance between individual liberty and acts injurious to the society. The limits of tolerance must be exhausted in every case of legal

[167] Ibid., p.7

enforcement of morality. That a majority dislikes a practice is not nearly enough to seek for legal protection, it further requires that such practice for example be felt with much disgust and contempt. Disgust of the majority is not just enough but we cannot "ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of tolerance are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust; they are the forces behind the law."[168]

Devlin's position here is rightly to state that there can be no principled way of giving blanket denial to immorality as it concerns the law. Just like other principles: harms and paternalism which Hart acknowledged to be within the domain of law, legal moralism is a principle that whether we hate or like, continues to come up at different situations of our lives. Sometimes we consider prohibitions, sometimes we argue for privacy. The only way to avoid undue inversion of privacy is not to deny legal moralism but by adequate balancing as Devlin provided.

[168]Ibid., p. 9.

❖ PROFOUND IMMORALITY ❖

The idea of profound immorality or evil has its origins in the feelings of society about particular actions having a felt character that rankles and disturbs the average person. They are evils of the type that contravenes or goes contrary to the societal well-conceived values. They do not need to be witnessed but the feeling that such actions are going on within the community disturbs the clapam omnibus. Profound immoralities are defined by their intensity and durability to the feelings of the ordinary man in the jury box. They go with the feelings of disgust, shame, disappointment and are affronts to the societal values and institutions. There are so many disgusting things which we see, experience and perceive but not all of them need to be considered for protection by the means of the law. Among the list of disgusting things are some which have passed uncontroversially beyond the lines of tolerance. For example in the cultural practices of most of the world population, few practices rank lower than the human sexual contact with beasts. It is a disgustingly evil and detested not because it harms but because it is inhuman. By its nature, it is considered evil. Mere knowledge of such practices rankles even when unperceived or experienced. Because of the intensity of such disturbance to the community and the ordinary man in the community,

such actions that affront, disturb with greater intensity the communal standards require protection from the law. The community and its members need protection from such actions especially when they are indefensible.

Such evils or immoralities are not specifically marked out by their harm, offence or wrong to others or by their personal nature in terms of the victim but by their depravity as evil of a kind that is considered inhuman, beastly and wicked. Their consideration for legislation is therefore not based on either harm or offence but because they are evil. That we see, notice or be harmed by them is not what counts but the fact that they are going on around us is enough for most people to give them a strong feeling of revulsion and disapproval, feel irritated, agitated and disgusted. Profound immorality though victimless sometimes, impinges on the people's higher standard moral sensibilities. Among the list of profound immoral evils are the actions considered inhuman and unnatural such as the unnatural acts of coitus homosexuality, bestiality, sexual congruence with the dead, professional boxing and a number of evils in the list of Feinberg's profound offences such as mistreatment of corpses, voyeurism and abortion. The evil of profound immorality like the profound offences of Feinberg have a strong felt tone. Their impacts are usually deep, shattering, serious and

profound. Though not harmful directly, they cause indirectly greater harms than the actions that cause immediate and direct harms to those who are rightly obsessed by their experience.[169] Profound immorality is an affront to the standards of propriety and therefore it is considered wrong.

❖ HOMOSEXUALITY ❖

Homosexuality is a sexual relation or attraction between two members of the same gender. The practitioners in this form of sexual orientation among humans are positively referred to as gay in the case of men and as lesbians in the case of women. Apart from the scriptural condemnations of homosexuality as a contravention of the Divine law and natural laws,[170] people have all through the history considered homosexual acts as unnatural. We perceive intuitively for example that the natural sex partner of a human is another human; in the same way, the natural sex partner for a man is a woman and vice versa. The generic argument therefore against homosexuality is that it is unnatural.

[169] J.Feinberg, Offence to Others, p.58.

[170] In Genesis 19, two angels in disguise visited Sodom and were offered hospitality by Lot. Men of Sodom demanded that Lot hand these 'men' over for homosexual intercourse. Lot refused and consequently the 'men' blinded the men of Sodom saving only Lot. The prophet Ezekiel referred to the homosexual sin of Sodom as abomination (Ezek 16:50). The book of Leviticus explicitly states, “Do not lie with a man as one lies with a woman, it is an abomination” (Lev. 8:22). St Paul calls homosexual tendencies dishonourable passions and unnatural relations (Rom. 1:26-32).

In the Wolfenden committee however, the arguments about homosexuality did not focus on the nature of homosexuality but rather they addressed homosexuality considering the meaning of the phrase 'homosexual offences'. The phrase became an enigma that needed resolution for the committee. This enigma was also instrumental to the proliferation of speech about homosexuality in general. The committee discovered that the phrase 'homosexual offences'"...did not refer either to a particular named offence or to a discrete category of criminal offences known to English or Scots law. Nor, at the start of the deliberations, was the task of unravelling the meaning of 'homosexual offences' assisted by the existence of a wider general legal category of 'sexual offences'."[171] The committee saw the phrase as having complex and problematic meanings. They felt that the conjunction of 'homosexual' and 'offence' was problematic and therefore sought to distinguish between the two. "Homosexuality is a sexual propensity for persons of one's own sex. Homosexuality, then is a state or condition, and as such does not, and cannot, come within the purview of the criminal law."[172]

[171] LJ Moran, The Homosexual(ity) of law, (New York: Routledge, 1996), p. 92.
[172] RW Winslow, The Emergence of Deviant Minorities: Social Problems and Social Change (San Ramon, CA.: Consensus Publishers, 1972), p. 143.

The definition adopted by the Wolfenden committee implies an inference that the propensity towards something is a common attribute of every human person and that it exists either from what is felt or what is done by homosexuals. In either case, this position is highly presumptuous. It is not always true that an individual will be aware of the strength of his propensities. Even when an individual commits moral wrongs, he hardly accepts this as deviation but makes effort to rationalize his behaviour. This kind of rationalization and deceptive presentation of individual propensities and motivations is aptly described by Robert W. Winslow.

> "…there is a natural reluctance to acknowledge, even to oneself, a preference which is socially condemned, or to admit to actions that are illegal and liable to a heavy penalty. Rationalization and self- deception can be carried to great lengths, and in certain circumstances lying is also to be expected. Secondly, some of those whose main sexual propensity is for persons of the opposite sex indulge, for a variety of reasons, in homosexual acts. It is known, for example, that some men who are placed in special circumstances that prohibit contact

> with the opposite sex (for instance, in prisoner-of war camps or prisons) indulge in homosexual acts, though they revert to heterosexual behaviour when opportunity affords; and it is clear from our evidence that some men who are not predominantly homosexual lend themselves to homosexual practices for financial or other gain. Conversely many homosexual persons have heterosexual intercourse with or without homosexual fantasies.

The committee insinuations are meant to make homosexuality a kind of natural phenomenon where individuals are bound to follow their motivation and propensities and therefore are not liable to be judged by the law for following their natural inclinations. Even if we admit that there are homosexual propensities, this does not necessarily mean that such individuals must end up in an overtly homosexual act just as heterosexual propensities do not always end up in overtly sexual relation with those who are not their partners. It does not matter the level of attraction an adult feels for an under aged person, any attempt to have a sexual relation to such under aged person is always considered evil and punished as such. Many persons though aware of the presence of particular

sexual propensity abstain even when they are aroused in front of a particular sexual stimulus either because it is not right morally or because it is legally not right. Some others too, aware of such stimuli abstain from indulging in the sexual act because of good family life, well satisfying vocation and balanced social life. We do not indulge ourselves in everything that we feel drawn towards. Counter reasons are usually important. Justifying homosexuality for reasons of propensity is rather a weak argument in support of such an orientation considered evil by ordinary thinking men and available reasonable ancient mores.

❖ PROFESSIONAL BOXING ❖

Due to the level of popularity acquired by professional boxers through the ages, the profound depravity in it is often not well pronounced. Most people who have concerned themselves with the morality of boxing have discussed it on the emotional level. Those trilled by rugged sports in general find no problem morally with professional boxing. We exclude here various forms of amateur boxing. Our main concern is the modern professional fighting that goes with the famous title bouts giving credit only to punching power and catering for the brutishness of the spectators. In this kind of boxing, selfish human

ego and money is placed on the one side against the dignity of the human person on the other.

Most of those who consider the ban of professional boxing do so, on paternalistic grounds. They want the boxers protected from the harm that they constantly expose themselves to. The first paternalistic consideration for professional boxing concerns the risk of brain damage which is considered so severe that the boxers need to be protected from the harm they are likely to suffer. The liberal view defended by Mill gives autonomy to every adult to decide whichever profession he likes but the modifications in Feinberg and even Hart give room for further considerations to the discretionary autonomy of the individual. This position grants the state the power to interfere in individual autonomy when one is not fully knowledgeable of one's choices. In most cases, the boxers are merely given fragmentary knowledge about the effects of boxing by their employers and managers who are simply interested in their daily bread gotten at the detriment of the fighters. Nicholas Dixon noting the level of ignorance among boxers about their profession writes:

> Boxers are unlikely to have subscriptions to the Journal of the American Medical Association, whose detailed accounts of the medical

> dangers of their profession are cited above, while promoters, managers, and trainers have a vested interest in not drawing their potential breadwinners' attention to information that might deter them from entering the ring. At best, the majority of boxers are aware that some fighters have died in the ring, and that some have suffered serious injuries, but they likely share--doubtless due to an understatement of risks on the part of the boxing business as well as their own self-deception--the popular misconception that brain damage is a rare occurrence that happens only to fighters who suffer repeated knockouts.[173]

The crude reality that most boxers come from very poor families show that even when they have some relative knowledge of the likelihood of brain damage or similar catastrophes of the boxing profession, they still sink themselves into it like desperate tornadoes. In their sometimes, extreme poverty, they lack what it takes to make a reasonable choice and so it may not be out of place if the state intervenes to save them from themselves.

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[173]N. Dixon, "Boxing, Paternalism and Legal Moralism" Social Theory and Practice, 27.2 (2001), p.1.

A further ground for the prohibition of professional boxing apart from paternalism is based on legal moralism. On this account, professional boxing is considered morally repugnant. It is considered wrong not because it harms others or the self but it is seen as objectively wrong in itself. In professional boxing, the consent of the participants overrules every consideration of the harm principle and in some cases that of paternalism. Trying to locate the profound immorality in professional boxing therefore, we have to look beyond the consequences of the actions and focus on the inherent attitudes of the actions.

The primary goal of a professional boxer is to incapacitate the opponent with dangerous and deadly blows. Often these blows are centred on the head thereby causing temporary and sometimes permanent damage to the brain. Wining by points in professional boxing "...is best achieved by punching opponents' heads, making knockdowns which judges often consider decisive in awarding a round to a fighter..[174] The objective of such boxers are to kill or injure their opponents and treat them as mere objects to be disposed off in order to be victorious. If we therefore concede to the removal prohibition in terms of the harm principle for the damages done to the other because of the consent, we cannot concede

[174]Loc. Cit.

to law's neglect of the action that treats a human person like mere object. The consent to fight does not in any way diminish "...the inherent wrongness of regarding another person as a subhuman object to be damaged."[175]

❖ BESTIALITY ❖

Bestiality in terms of behaviour refers to the human actions that resemble that of animals. When for example a man runs down the staircase streaming like an enraged bull, he is considered beastly. This type of action though irritating and disgusting may be and in most cases will be morally indifferent. It is distinguished from the bestiality of our concern which should be the concern of the law. We are concerned with the bestiality in terms of sexual orientation. In this sense, bestiality is the sexual relation between an animal (a cow, goat, pig, horse etc.) and a human being. Many people feel a strong sense of revulsion on hearing, witnessing or even being within the neighbourhood of bestial practices. Seeing the images that depict such acts even without witnessing it, we might say, pollutes our consciousness. They are not merely disturbing but disgusting, revolting and nauseating. Even asking my readers to contemplate the sight of a sexual

[175]Loc. Cit.

relation between a pig and a human being would be too much an affront to human decency, too degrading and repulsive.

Like homosexuality, bestiality, if serious action is not taken against it, would soon become the common discussion as an evil that should concern no one following the trend of liberalism that proposes criminalisation on the basis of harm principle alone. Already, in our time, those who practice bestiality or zoophiles hold that bestiality should be part of the next sexual rights movement. Bestial practitioners even equate themselves and their situation to the situation of African Americans before they were granted full rights in the United States. They therefore hope that someday, the world will come to their senses to recognise that bestiality is simply a normal sexual orientation. They preach greater social acceptance on the grounds that their actions are totally normal, non-harmful and should be practiced within the society as a matter of choice. They argue that they should be loved in spite of their orientation.

> "…rather than forcing us into chemical treatment or imprisoning us, or castingus out, perhaps it is time for society to take a closer look at its attitudes towards us. As long as we don't

> harm or hurt any people or our partners, as long as we are still productive, functional members of society, why, then the opprobrium? Why not let us be? Is society harmed by diversity or enriched? Please think about it.[176]

Defenders of bestiality suggest that the talk about relationship with animals is not about sex so much as about love: "...who can love and be loved by whom, how love can and cannot be expressed, how love can be denied by law and violence delivered in support of that denial."[177] It is arguable whether the animals really love human beings as the bestial practitioners hold. The scope of this work limits our discussions about the disposition of animals towards the sexual advances of humans. Our interest here is to note that bestiality is a free floating immorality or evil whose criminalization is not based on the harm or the offence principles.

The arguments variously presented in different cultures and traditions by the zoophiles that they harm no one by their sexual actions have not been successful in removing such laws in the statute books. They remain on the basis of their immorality! Dekkers thinks that those who indulge in such

[176]D. Delaney, Law and Nature, (Cambridge: Cambridge University Press, 2003), p. 236.
[177]Loc. Cit.

profoundly disgusting acts should be considered as prohibiting the sacred and therefore should be decisively dealt with even with something if there is, that is more than the law itself.

> Laws against bestiality are not necessary. Even without a court in the background it is bad enough to be found committing bestiality. This is why it is taboo. A man who is caught with a calf is a dirty old man; a woman with a dog is a slut, a foreigner with a goat a laughing stock. No one who has gained notoriety as a chicken violator will get very far in life.[178]

Laws are made to protect one interest or the other and therefore they prohibit actions that set back such interests. In the case of bestiality, as is indicated by Dekkers position, whether there is an interest to be protected or not, the act of bestiality is objectively wrong in the highest profundity and therefore should be condemned as profoundly immoral.

[178]Ibid., p. 254.

❖ NECROPHILIA ❖

Necrophilia is the sexual congruence with the dead. It is broadly defined as a fantasized or practiced love for dead bodies. Many people will consider this unimaginable but this has been practiced for ages among many cultures. Its history as a bizarre sexual behaviour and a deviant social phenomenon however remains largely unexplored. Following this, most of the materials on necrophilia are "littered with inaccuracies as to the origin and applications of the term."[179] The most acclaimed originator of the term necrophilia is Joseph Guislain, a mid 19th century Belgian alienist in his *Legons Orales sur les phrenopathies,* as found in the transcription of a lecture delivered in1850.

> It is within the category of the destructive madmen (alienesdestructeurs) that one needs to situate certain patients to whom I would like to give the name NECROPHILIACS (NECROPHILES). The alienists have adopted, as a new form, the case of Sergeant Bertrand, the disinterrer of

[179]R Goodwin and D. Cramer, Inappropriate Relationships: The Unconventional, the Disapproved & the Forbidden, (Mahwah, New Jersey: Lawrence Eribaum Associates, 2002), p. 172.

> cadavers on whom all the newspapers have recently reported. However, don't think that we are dealing here with a form of phrenopathy which appears for the first time. The ancients, in speaking about lycanthropy, have cited examples to which one can more or less relate the case which has just attracted the public attention so strongly.[180]

Necrophiliacs desire absolute immobility in their sex partners in order to feel fulfilled in their sexual relationship. The woman or man who is the object of the necrophiliac's fantasy must resemble a dead person, for only thus will he/she be able to achieve orgasm.[181]

Many people arguably will agree that necrophilia is a moral depravity. It is so devious that mere reference to it as inappropriate behaviour by some liberals fails in bringing out its inherent evil. It is a profound evil. Some liberals like Feinberg will like us to consider this kind of inappropriate action as offensive. There is however something that rankles more than mere offence at the thought of or sight of a Necrophiliac. It is first and foremost considered as a moral evil which

[180] Ibid., p. 175.
[181] W. Stekel & L. Brink, Sadism and Masochism: The Psychology of Hatred and Cruelty, (1953), p. 76

no one would be happy to witness or have around him. The evil in necrophilia harms no one in terms of the harm principle but it is detested because it is evil in itself. The dead man or woman is not made better or worse by the act and so there is no harm involved. One can as well argue as Feinberg does that the criminalization of such action could be rationalized under the offence principle but such arguments fail when we consider the fact that most necrophiliacs do not show off their actions in public.

❖ VOYEURISM ❖

This is the practice of spying others for the purpose of obtaining sexual pleasure. The voyeur secretly watches other people's bodies while undressing, naked, while performing sexual acts or while performing other activities of a private nature. It is in other words, the inversion of another's privacy it views the person where he would have a reasonable expectation of privacy. Australia's Crimes Act of 1910 considering voyeurism as a crime defines a voyeur as “a person who, for the purpose of obtaining sexual arousal or sexual gratification, observes a person who is in a private act without the consent of the person being observed to being observed for that purpose, and knowing that the person being observed does not consent to being

observed for that purpose is guilty of an offence." The 2009 Criminal code of Canada defines voyeurism as follows:

> Every one commits an offence who, surreptitiously, observes including by mechanical or electronic means or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity; the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engage in such an activity; or the observation or recording is done for a sexual purpose.[182]

The observation of other people's private affairs could be done in a number of ways by the voyeurs.

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[182]wwwduhaimeorg/LegalDictionary/v/VoyeurismaspxDec 15th 2011, 3pm.

The subject may be observed from a distance through the use of peepholes or through some modern technological equipment such as hidden cameras. Voyeurism is roundly condemned as an evil especially for its inversion of people's privacy. The story from a 'Sixty minutes' show of CBS 1983 represented in Feinberg's Offense to Others describe some women employees of a Kentucky mining firm who found themselves as victims of voyeurs. Even though the women found themselves in a job hitherto reserved for men, they creditably performed their jobs competently. In spite of this, they were never accepted by the men folk. To their horror, they discovered one day that the men had peepholes bored through a wall that separated a supply room that gave them access to the womens bathroom. Through the hole, the peeping Toms watched the women whenever they undressed in their bathroom. To describe the feelings of the women as mere offence would be an understatement. They were profoundly offended by the action of the men. The action itself is profoundly immoral and a display of depravity which the law should not ignore.

Our concern is not that a particular evil such as voyeurism, abortion, bestiality, and homosexuality should be made criminal but the law must concern itself with such evils. The limits of punishment should be left to the legislators and judges but there

must be a concern for immorality in the law. It is better to debate about proper balancing of individual liberty with harms, offences and immorality rather than excluding immorality in its entirety. Such consideration of harms and offences that do not consider immorality is self-defeating. The fundaments or the essential parts of morality are the harm and offence principles but they do not exhaust morality itself.

❖ LEGAL PATERNALISM AND ❖ LEGAL MORALISM

Hart introduces the principle of paternalism in order to defend the denial of a victim's consent in a criminal defence. He holds that legal paternalism is consistent with liberalism and therefore acceptable while legal moralism is not and therefore unacceptable. The purpose of paternalism is to prevent physical or moral harm to individuals. Against Mill's position that the individual's own interest is not a warrant for the law to intervene in his actions, he holds that for various psychological reasons, individuals may not be able to know their own interests. He argues that individual's physical good is a sufficient warrant, if he is likely to neglect his interest. For example, the state may require the use of car seat belts and motorcycle helmets from individuals to protect them from harming

themselves. He sharply distinguished between legal paternalism and legal moralism and holds that the state can only interfere for the interest of the individual and not for reasons of morality. The state intervenes for self-regarding interest and not for morality.

Hart's appreciation of legal paternalism in the Hart Devlin debate inadvertently puts him in a slippery slope in his rejection of legal moralism. It is assumed that legal paternalism without distinction presupposes legal moralism because the idea of protecting one from the harm he caused himself is inextricably connected with the idea of legal enforcement of morality. Feinberg believes that Hart unadvisedly admitted "...that a certain amount of physical paternalism could be tolerated by the twentieth-century liberal."[183] Giving a strong push to Hart's argument towards a slippery slope, Devlin draws the distinction between physical and moral paternalism. Physical paternalism justifies state's intervention on individual autonomy in order to make his life better for a physical or psychological condition. Moral paternalism justifies intervention in order to save a person's moral wellbeing. Devlin sees no consistent way for a physical paternalist to avoid moral paternalism. He argues that if the state is

[183] J. Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, p.16.

interested in physical paternalism, it cannot avoid being interested too in moral paternalism. If society has an interest which permits it to legislate in the one case, why not in the other; if we further find ourselves in moralistic paternalism, we cannot help but slip into legal moralism.

> If it is difficult to draw a line between moral and physical paternalism, it is impossible to draw one of any significance between moral paternalism and the enforcement of moral law. A moral law, that is a public morality, is a necessity for (moralistic) paternalism; otherwise it will be impossible to arrive at a common judgement about what would be for a man's moral good. If then society compels a man to act for his own moral good, society is enforcing the moral law; and it is a distinction without a difference to say that society is acting for a man's own good and not for the enforcement of the (moral) law.[184]

Physical injury defined as a "setback to the welfare interest of normal persons"[185] makes people handicapped in the performance of almost all that is

[184] P Devlin, The Enforcement of Morals, (London: Oxford University Press, 1965), p. 136.
[185] J. Feinberg, Legal Moralism, p.17.

essential to their welfare. The same criteria for judging physical harm to self is used in judging moral harm. One whose character is deranged is protected (moral paternalism) from deranging his character to such an extent that he is no longer able to make appropriate choices. Hart's concession to paternalism weakens his argument against legal moralism because legal paternalism especially in consideration of its moral angle, presupposes legal moralism.

Even if we suppose that Hart meant only the physical harm, he needed to further clarify his position. On the ground of physical harm for example, the society can legislate against suicide which Hart seems to oppose. Blanket prohibition of physical paternalism will support the prohibition of various actions that Hart would not want to consider for prohibition, most of whom are now legal. The various types of professional sports such as boxing and bull fighting carry significant risks of debilitating injuries to the body. It does not seem that Hart would want such professional sports prohibited yet he subscribes to physical paternalism.

❖ SUMMARY ❖

In the foregoing pages of this chapter, we have highlighted some of the central issues that make the idea of legal enforcement of morality a necessary principle in solving the problems of the democratic society in contradistinction to the position of Professor H.L.A. Hart. While accepting the harm principle, the major liberals of distinction in the discussions of autonomy and rights Feinberg and Hart added further principles offence and paternalism rejecting legal moralism. Our essential claim here is that Hart failed in treating the legal principles for the limitation of liberty (harm to others, offence to others, legal paternalism and legal moralism) fairly and therefore gave undue preference to liberty in his views about law and morality. Our contention is that the considerations of liberty and autonomy are to be consigned to the four proposed liberty limiting principles as legitimate reasons without excluding any. The consideration of each with proper balancing, we maintain is consistent with the liberal society. Principally, this work gives attention to legal moralism among the other legal principles for the limitation of liberty on which Hart's arguments about the relationship between law and morals are centred.

We have tried to give detailed highlights of the background for which the debates over the legal limitation of human conducts are based. The background for this debate is the principles that limit liberty in a democratic society. In every democratic society, laws are put in place following Bentham's view as limits to individuals and groups for peaceful organisation of the society. Such peaceful organisation ensures that no person harms the other, harms himself, harms society or offends the other. These are variously referred to as harm principle, legal paternalism, legal moralism and offence principle. The central argument of Hart, in the relationship between law and morals centres on a critique of legal moralism. The indications we have made in relation to various pitfalls of Hart are meant to show that he was mistaken in his repudiation of legal moralism even when he supported the idea of legal paternalism.

The popular interpretation of legal moralism has much reference to Lord Devlin's views in his debate with Professor Hart. This view known as social disintegration thesis holds that the individual liberty can be limited or prohibited on the reason that the societal collective morality has been invaded. Neither standing for or against this position following Hart's attack on it, we merely highlighted some of its merits. Having much relation to the harm

principle rather than moralism, we focused on actions considered as evil without qualification - free floating evils. These evils are considered not in terms of their harms or offences to others but simply because they are evil. Very few liberals will give a thought to the prohibition the prohibition of free floating evils without qualification. In the same way, the class of evils or immoralities we have presented in the preceding pages for legal prohibition belong to a special class which I termed profound immoralities. They refer to the evils that society considers its nature to be highly depraved. They are actions accompanied with a felt character that rankle even the distant observer. Their felt tone is so. intense and durable that the average person views it as an evil that need to be eliminated with every means available. Included in the list of such disgusting and shameful actions are bestiality, sexual congruence with the dead, homosexuality, voyeurism, abortion etc. Our argument for insisting on the usefulness of legal moralism in a liberal society is built therefore on these disgusting evils and unnatural actions. The proper consideration of these evils which I termed profound immoralities obsoletes Hart's position that legal moralism cannot be a legitimate warrant for legal prohibition of individual liberty.

Having indicated Professor Hart's position about legal enforcement of morality and my alternate consideration in the previous chapter and in the present chapter, I will proceed in the next chapter by an evaluation of these positions as they relate to the practical democratic and political society. The legal framework of some societies on the issue of morality will be highlighted. In particular we will consider some evils in the list of our profound immoralities as they are understood within some democratic societies. This will enable us to make proper decision on what principles among the liberty limiting principles to accept and the ones to drop; whether we will approve of Hart's rejection of legal moralism or to accept legal moralism.

5

THE EVALUATION OF HART'S VIEW ON LAW AND MORALS

❖ INTRODUCTION ❖

in the pretending chapters, we treated in detail the principles for the limitation of liberty namely, the harm principle, the offence principle, legal paternalism and legal moralism as they concern H.L.A. Hart's views on law and morals. Specifically, in chapter four, we concerned ourselves with a detailed presentation of legal moralism a principle rejected by Hart as otiose in every legal discussion of autonomy and liberty. Our position has remained that Hart was mistaken in jettisoning legal moralism and, relegating practically every obscene action to the private sphere because of his overbearing liberal position. Particularly, we indicated that there are particular evils that cannot be ignored in the discussions about law's concern with liberty namely the free-floating kinds of evils we termed profound immoralities. In the following pages, we will highlight the language of obscenity as a background for considerations of legal moralism in our current political society. This will afford us the better opportunity to evaluate our position and Hart's own position in their relevance to our current political and democratic societies.

A sampling of the major countries of the world with instances of legal moralism is made here in our evaluation of law's relation to morality in praxis. We

invoke these instances with the understanding that examples of particular experiences and historical events make things clearer and afford us the most convincing kinds of proof in every field of knowledge. It particularly applies to the empirical field of knowledge and makes theoretical knowledge truthful or untruthful. This truth is however not without some problems. Sometimes examples could be misused or misapplied to argue for one's preferred position rightly or wrongly. This is indicated by Hart when he pointed out that some examples in the English and American law were abused by some legal moralists such as James Fitzjames Stephen and Lord Devlin as legal enforcement of morality. On the other hand, it happens sometimes also that theoretical writers like Hart and Mill avoid the necessary experiential examples. We feel therefore that it is important in this chapter to give credence to the correct use of examples.

❖ OBSCENITY ❖

Before examining these cases of legal moralism grounded on profound immoralities, we need to consider here the fundamental concept for most legal considerations of immorality namely obscenity. Obscenity is a moral language that describes actions or statements that strongly offend the prevalent moral standards. It is often defined in terms of the

sexual by most dictionaries but obscenity is not limited to the sexual. The United States Supreme Court in Roth and Albert cases that concern sexual obscenity, together dealt expressly with the meaning of obscenity as a legal term. As a result of this, Justice Brennan speaking for a court divided six to three in Roth and seven to two in Albert's stated the definition as used by the trial judge thus:

> In Roth, the jury was instructed: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." ...the trial judge in the Albert's case had said obscene material is that which has a "substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires." (Emphasis added by Mr. Brennan). Then Mr. Justice Brennan continued: "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interests."[186]

[186]T.J. Murphy, Censorship and Obscenity, (Helicon Press Ltd, 1963), Pp. 24-25.

The phrase, 'appealing to prurient interests' is understood by many commentators to mean the tendency to excite lustful thoughts in people. Theses explanations define obscenity as a moral depravity more or less in terms of the model of sexual offences.

Apart from obscenity in terms of the sexual, there is another standard for identifying obscenity. This second standard emphasises the offensive character of obscenity and recognises in a special way the community input in deciding what is obscene. This new dimension referred by Feinberg as 'patent offensiveness' was added by Mr. Justice Harlan in 1962. It emphasises that for a material to be obscene, it must appeal not only to prurient interests, but must also be patently offensive to the community moral standards or community standards of decency. This definition was considered laudatory for it compared more than mere reference to the sexual.

The enlarged consideration of obscenity incorporates along with the sexual, all profanities and vulgarities. Obscenity is a profanity as well as a taboo. It is considered as an action or speech that is indecent, abhorrent, disgusting and inauspicious. In its predominant usage, "...it expresses a judgement about the capacity, of its object to produce certain

kinds of offended states of mind in observers."[187] To refer to X as obscene means that we are giving X a very low moral grade; this implies our disapproval of it. It further means that we feel offended by it as something in our judgement that needs to be condemned. In every reference one makes to the obscene, one depicts something in terms of disapproval, rejection and condemnation. Obscenity has for convenience been classified into two: profanities and vulgarities. The profane obscenity cover such words considered as vain swearing, blasphemies and vain curses while vulgarities concern the indecencies and scatological words in our language especially the words and actions that relate to sexual immorality. Following the limits of our topic of consideration, we will treat obscenity as it concerns the various vulgarities or scatological indecencies leaving for the moment profanities as they fall outside the scope of profound immoralities of our consideration for legal prohibition.

SEXUAL OBSCENITY

When we refer to anything or action as obscene, we imply that the object or action is vulgar, or blatantly disgusting. The combination of the words sexual and obscene in this understanding may immediately or

[187] J Feinberg, The Moral Limits of the Criminal Law: Offence to Others, (New York: Oxford University Press, 1985), p. 97.

intuitively imply that sex is disgusting or vulgar. Sexuality as a term refers generally to sex, sexual organs, the different sexes or different actions that relate to sex. Much contemporary research narrowly defines sexuality in terms of the sexual behaviour such as "kissing, genital touching, oral, anal, and vaginal intercourse."[188] This kind of definition recognises only a small number of behaviour as sexual. In contrast, a wide range of behaviours can be considered as sexual. For example, the holding of hands, prolonged eye contact, hugging, dancing, massage etc. are considered sexual especially when they are intended to bring some sexual satisfaction.

Sexuality in its expanded meaning recognises every sex related behaviour such as sexual behaviour itself, cognition, thought, identity, emotion, and socio cultural factors.'[189]

The ordinary reference which we make to the sexual organs, the different sexes or the various forms of sexual relation is not considered obscene. What then do we mean when we say that something is sexually obscene? To define obscenity as something or some disgusting act alone will not be of much help in the appreciation of obscenity in terms of the sexual.

[188] J. Delamater & J. Shibley Hyde, "Conceptual and Theoretical Issues in Studying Sexuality in Close Relationships" J.H. Harvey & Co. ED. The Handbook on Sexuality in Close Relationships, (Mahwah, New Jersey: Lawrence Eribaum Associates, 2004), p. 8.
[189] LOC Cit.

Every action, thing or word acquires its judgement as obscene following a blatant violation of some relevant standards. To establish whether anything is obscene therefore requires a set of arguments that are dependent neither on the definitional fiat of obscenity nor on the thing or action in question. We can understand better the concept of the obscene from "…those actions, representations, works, or states which display an exercise of bodily or personal function which in certain circumstances constitutes an abuse of that function, as dictated by standards in which one has invested self-esteem, so that the supposed abuse of function is regarded as a demeaning object of self-contempt and self disgust."[190] To identify a particular thing or action as obscene, it has to be able to do two things: abuse of nature and violation of set standards: abuse of nature in terms of the bodily functions and violation of set standards with reference to our actions and speech.

From this consideration, sexual obscenity means the abuse of sexuality and its functions as well as the violation of the standards for approaching sexuality. We ordinarily feel disgusted and disappointed at the obscene picture of an adult using a naira or a dollar note for a toilet paper. We give such action a disapproval judgement because we consider it an

[190]A.J. Richards, The Moral Criticism of Law (Encino California: Dickenson Publishing, 1977), p. 61.

abuse of a country's currency notes and a violation of the standards for the use of these notes meant for monetary transaction. In the same way, we consider as obscene any sex related behaviour that abuses the natural functions as well as violate the norms or standards considered appropriate in sexual behaviour. That we give a particular action a disapproval judgement as obscene does not mean that we will at the same time consider such action for legal prohibition. Most of obscene actions on the balancing scale weigh lesser than the right to liberty or autonomy. Much as we may be offended or feel disgusted by their occurrence, we are not warranted thereby in seeking to limit the autonomy rights of others in every case of their occurrence.

❖ OBSCENITIES AND AUTONOMY ❖

Unlike the near straight forward legal limitation of liberty in considerations of the harm principle, the other principles (legal paternalism, offence principle and legal moralism) require careful balancing and consideration in order to know strictly speaking the actions that require legal limitation following their rationale. So far, we have reduced moral consideration for legal prohibitions to those immoralities under 'free floating evils which are considered obscene leaving out most immoralities considered as sin or free floating minor evils.

Practically every reference to obscenity in people's action implies a judgement that such actions are immoral or considered evil and to be condemned. However not all these actions are to be considered for legal prohibition under the principle of legal moralism.

In making a proposal for a statute for the legal limitation of individual liberty on the reason of immorality, what kinds of immorality are to be considered?

(1) Every form of immorality? Certainly not, there are a number of immoral offences which should concern only the individual offender. Such classes of immorality regarded as sin in general terms should not concern the law except in the instances where they become harmful to others under the harm principle. Beyond the general classification of immoral actions, obscene actions are considered more intense and therefore require more attention for legal prohibition.
(2) Do we then consider all obscene actions legitimate to limit individual liberty following the principle of legal moralism? Within the domain of obscenity, there are various free floating evils that fall short of any legitimate consideration for legal prohibition. For example,

some sexually scatological, obscenity though immoral may not pass for any legitimate consideration for legal prohibition. Among the list of such scatological evils are the ones in Feinberg's list thus:

> The various vulgar terms for urine, excrement, and the excreting organs, of which "piss,""shit,""scrap,""turd," and "ass" are perhaps the most prominent. These are the "dirty words" in a strict or narrow sense. In a wider sense, now less common as the older attitude towards sex as "dirty" diminishes, "dirty words"also include the vulgar terms for the sex organs and the sexual act. Among the more prominent of these terms in contemporary English are "cock," "prick," "tit,""cunt,""screw," and the word that is generally thought to be the chief obscenity in the language, "fuck." A miscellany of other terms is also recognised to be usable only for impolite purposes- "bastard," and "son of a bitch,"....[191]

[191] J. Feiriberg, p. 191.

These are considered generally by many to be disreputable and obscene but they are obviously not our concern in this work as they do not pass for the kinds of evils we would like to consider under legal moralism. Our concern here is the class of moral obscenities which rankles even the unobserved when they are mentioned. Such obscenities are considered extremely shameful and disgusting in their blatant abuse and violation of functions and moral standards of the society. We termed these forms of obscenities profound immoralities to exclude them from mere immoralities with very little felt tone. In the following pages, we will consider some of the profound immoralities under the banner of obscenity. In highlighting these profound immoralities, some existing statutes in the world will be used as case examples for situations where morality or extreme obscenity could be considered a legal warrant for limiting autonomy.

❖ CASES FOR LEGAL MORALISM ❖

In Law, Liberty and Morality, Hart concedes that the criminal law of both England and America contain rules which can only be explained as attempts to enforce morality especially in the realm of sexual morality. Such laws in England for example include "...laws against various forms of homosexual behaviour between males, sodomy between persons

of different sex even if married, bestiality, incest, living on the earnings of prostitution, keeping a house for prostitution, and also, since the decision in Shaw's case, a conspiracy to corrupt public morals, interpreted to mean, in substance, leading others (in the opinion of a jury) "morally astray."[192] Other examples which Hart considered abuse of examples included the evils like abortion, bigamy, polygamy, suicide and the practice of euthanasia. Also in America, he points out that there are many penal codes which are listed in various states that can only be interpreted as attempts to enforce morality.[193] Hart is silent on those laws which are correctly interpreted as attempts to enforce morality but simply says that such laws (like laws against sexual morality) should be expunged from the law as balderdash. However, about other laws misconstrued as legal enforcement of morality, he says that "we are not forced to choose between jettisoning them or assenting to the principle that the criminal law may be used for that purpose for an alternative account can be given of them. In his frontal attack of Devlin's position, he turns to his treatment of the principle that denies the victim's consent the status of an admissible defence. Granting that this kind of consent should not be admissible in a criminal defence according to Devlin

[192]HLA Hart, Law, Liberty and Morality (Stanford California: Stanford University Press, 1963), p. 25.
[193] Ibid., p. 26.

means that the law is concerned with the enforcement of a moral principle. The moral principle considered here is the protection of the sanctity of human life. Hart objects to this and holds that this is merely a piece of legal paternalism designed to protect individuals against themselves. Hart's introduction of paternalism into Mill's theory enabled him "to drive a wedge deep into Lord Devlin's argument. But he devotes surprisingly little space to defining its terms, so that we are left in some doubt as to what are to count as cases of paternalism and 'the enforcement of morals' respectively.[194]

Our concern here is not principally on the debate between Hart and Devlin about victim's consent in criminal actions but to point out further examples which truly represent enforcement of morals in the English and American law especially as it relates to profound immoralities. Presently, there are practices considered profoundly immoral and therefore made illegal by different countries of Europe, America, Africa and Asia. The most prominent among such profound immoralities are the ones generally considered unnatural such as bestiality, homosexuality and sexual congruence with the dead. Bestiality is currently illegal in Netherlands, Canada, Australia, United Kingdom, Turkey, and

[194]B. Mitchell, Law, Morality and Religion in a Secular Society, (London: Oxford University Press, 1967), p. 13.

New Zealand and in thirty two states of America. The rational for criminalization in these countries vary from harm to the offenders, harm to animal victims to gross immorality in participating in acts considered unnatural.

Prior to December 1971,[195] laws against unnatural acts were generally classified under sodomy offences and it received an extraordinarily wide range of penalties in the United States. For example, there were reported cases of "sentences of more than 20 years for homosexual acts in private among adults, though some States such as New York, no longer allow penalties more than a year for Sodomy offences."[196] However by 1974, when Florida dropped the term 'crime against nature', eighteen states still had it as 'crime against nature' in their statutes in United States.[197] The major reason to drop this term hinged on the confusing grouping of various moral offences ranging from bestiality, homosexuality to even oral sexual relations between

[195] The year 1971 (December) witnessed the abrogation of the 103 year old offence defined as crime against nature as an imprecise phrase in the definitions of the various moral offences related to sexuality. This was done by the Florida Supreme Court that held that persons of common intelligence ought to know what precisely they are prohibited from doing. They found the existing law as unconstitutionally vague and uncertain in its language. They however allowed the law against unnatural and lascivious acts' to stand, reasoning that through its use, the society will be protected from such immoral and reprehensible acts.

[196] G. Geis, Not the Law's Business?: An Examination of Homosexuality, Abortion, Prostitution, Narcotics, and Gambling in the United States, (Rockville, MD: National Institute of Mental Health, 1972), p.34.

[197] J. Murdoch and D. Price, Courting Justice: Gay Men and Lesbians V. The Supreme Court, (New York: Basic Books, 2001), p.175.

different sexes. For convenience, we will concern ourselves with bestiality and homosexuality as they fall under our considerations of profound immoralities.

HOMOSEXUALITY AND BESTIALITY

There are degrees and gradations of sin or immorality; some regarded as mere sinful acts fall below the boundary we would want the law to intervene. Some however go beyond the threshold of mere immoralities such as bestiality and homosexuality. Ranking bestiality among the most disgusting practices, David Delaney writes:

> In the cultural hierarchy of disgusting practices in the modern West, few practices rank lower than human sexual contact with nonhuman animals. As Midas Dekkers puts it, "At all times and in all places bestiality has been punished. People simply do not approve of others having sex with animals. That is what makes them human beings." Or, as a theologian puts it, "The 'yuk' factor is immense and many people feel disturbed by the mere thought of it." But even here, if one deigns to look more

> closely, one might discern finer distinctions. If one can imagine the intelligibility of amonogamous, long-standing (hetero - sexual) relationship between a man and a horse as the Horseman invites us to one might acknowledge a qualitative distinction between that and the exploitative, pornographic, commercial representation of a woman having sex' with an eel or anteater. One might also distinguish these from the fatal sexual mutilation of a chicken in a motel room. One might even be genuinely indignant at the suggesting that there are no significant differences here. Such is the politics of bestiality.[198]

Bestial practices are considered so disgusting that people do not immediately think about whatever harm associated with it. People simply hate it because it is considered an abominable evil and profoundly immoral. Even the mere justification of it in any form profoundly offends people. The rational for its prohibition is on the distinctive character of' the act as disgusting, revolting and profoundly depraved and therefore reprehensible.

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[198]D Delaney, Law and Nature, (Cambridge: Cambridge University Press, 2003), p. 250.

Article 125 of the United States Uniform code until its repeal by the Senate in 2011 for example specifies that any person who indulges in carnal knowledge of any person of the same sex or with animal is guilty of sodomy and therefore subject to court martial. Despite the repeal of sodomy acts in 2011, the Uniform Code still retains article 134 which deal on bestiality. Till date, bestiality remains illegal in the United States military under article 134 of the uniform code. Zack Ford in an effort to explain the continued relevance of bestiality quotes the military's position on the law.

According to Lt. Col. Todd Breasseale, the military defence spokesman, "even if Article 125 is removed, the UCMJ contains provisions under which troops can be punished. Article 134 for example, forbids "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of nature to bring discredit upon the armed forces."[199]

The Congress has been poised to remove from the books any reference to homosexuality and bestiality as contained in the Uniform Code of Military Justice (UCMJ). Thus when article 125 that dealt with both

[199]Zack Ford, "Despite Right Wing Outage, Military Prohibition of Bestiality Remains Unchanged", http://thinkprogreSS.Org/Igbt/2011/12/09/386074/despite-right-wing-outrage-miniary-prohibition-of-bestiality-remains-unchanged/Jan 3, 2012, 5:47pm

evils was obscurely deleted, the conservative groups were outraged over the repeal. The military therefore re-stated that the act of bestiality remains illegal citing article 134. This issue traces back to the judgement of the Supreme Court in 2004 which struck out state anti-sodomy laws. That ruling notwithstanding, anti-sodomy laws remained in the UCMJ till date.

While Europe and America struggle to get rid of moral statutes in their books, most African countries do not even contemplate to remove moralistic legislations as they feel that these mores best keep their society together in the line of Devlin's disintegration thesis. Africa as a continent has through the history been shown to have a total distaste for homosexuality and bestiality. Even though some European commentators consider this hypocritical contending that African culture is merely homophobic about homosexuality,[200] the reality is that most African countries have rightly valued heterosexuality as the natural means of procreation and consider homosexuality unnatural. This is evident in the criminal codes of most African nations. For example, in Nigeria, the Criminal Code and EFCC (Economic and Financial Crimes Commission) consider homosexuality and bestiality

[200]U.N. Azuah, "The Emerging Lesbian Voice in Nigerian Feminist Literature" F. Veit-Wild & D. Naguschewski ed. Body, Sexuality and Gender, (New York: Rodopi, 2005), p. 132.

as unnatural offences against morality and stipulate fourteen years imprisonment for offenders. In chapter 21, No. 213, it legislates that any person who:

1. has carnal knowledge of any person against the order of nature; or
2. has carnal knowledge of any animal; or
3. permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for fourteen years.[201]

The various efforts made by international human rights groups opposed to legislation against homosexuals have not succeeded in changing these laws. The Nigerian countrymen and legislators have rightly insisted that these acts are profoundly immoral and therefore have refused to remove them from the legal books. In an effort to reinforce this law against various groups in opposition to it, the Nigerian legislature (Senate) on the 29th of November, 2011 banned same sex marriage stipulating a 14 years jail term for offenders. They also banned all Gay clubs from operating in the country with a 10 years' imprisonment for defaulters.

[201] Olajide, Criminal Code and EFCC, (Abuja: Lawlords Publications,2004), pp 82-83.

Even when Nigerian legislators were blackmailed to remove such legislation by the international community with a threat to withdraw aids to the country, they remained resolute on allowing the legislation. They insisted that no amount of aid could make them mortgage the morally cherished values, customs and ways of life which make Nigeria a people. At a meeting with a German ambassador to Nigeria, Janetzke Wenzel, the Senate President, David Mark insists that:

> Any aid (foreign aid to Nigeria) tied to endorsement of same sex marriage is not welcome. It is unfair to tie whatever assistance or aid to Nigeria to the laws we make in the overall interest of our citizens. Otherwise we are tempted to believe that such assistance comes with ulterior motives. If assistance is aimed at mortgaging our future, values, custom and ways of life, then they should as well keep their assistance.[202]

Efforts made by some internationally sponsored groups and individuals were rebuffed by the legislators and most prominent Nigerians. For example the vituperations of a Nobel laureate Wole

[202]A. Foasade-Koyi, "Same Sex Marriage ban irrevocable Mark" http://www.sunnewsonline.COm/WebPa8eS/fleW5/natb0V0hh/c,2/national-O2-12-2O11-O1O.html, January 14th 2012, 8pm.

Soyinka against the legislators who banned same sex marriage were scorned by Nigerians. Amidst the general commendation for the legislators for enacting the law against same sex marriage, Soyinka and few other Nigerians in Diaspora condemned it. The Diaspora Nigerians contended that "...the law was an abuse of individuals' fundamental human rights."[203] On his part, Soyinka held that the senators have no business legislating on the matter and therefore asked them to return to the classroom to learn the difference between public and private affairs. According to him:

> The problem with legislators is that they fail to distinguish between personal bills and interventions in private lives. That is the problem. I see no reason why they should intervene in the private lives of adults. What people do in their bedroom is no business of mine. It should not be the business of legislators... the legislators need to go back to school to learn the difference before they waste their time with what people do in their private bedrooms.[204]

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[203]C. Omegoh, "No Soyinka, Senators acted well on same-sex marriage. Clerics, traditionalist berate Nobel laureate for comments on gay practice" http://www.sunnewsonline.com/webpages/features/ citysun/2011/dec/2citysun-28-12-2011-001.html, January 14, 2012, 11am.
[204]Loc. Cit.

The liberal individualistic comments of the eminent scholar drew sharp opposing reactions from most Nigerians who generally feel that matters that affect profound immoralities should not be consigned to the private sphere. Most of the resounding criticisms of his comments came from religious leaders and cultural custodians. For example, Dr. Nwajei Chuks Nwajei, the Agumba (lion of the tribe) of Ogwuashi-Ukwu kingdom in Delta state described same sex marriage as abnormality in extremity. He roared:

> Even animals don't mate with same sex, if this holds true in the animal kingdom, it therefore follows that men should not marry men and vice versa. Same sex marriage is the height of abnormality; it is the height of madness; it is the height of decadence that the world has come to witness. It doesn't happen and can never happen in Ogwuashi-Ukwu Kingdom. Each time I hear about men dying to marry men, I come away with the impression that the world has gone mad... by contemplating same sex marriage, it appears that we have gone to the dogs... To my mind, a 14-year term is too small; all those involved in thepractice ought to be locked out of humanity... None of the religious

> adherents in this country will ever accept this practice because it is animalistic; it is idiotic; it is devilish."[205]

Alhaji Ogunro, the chief Iman of Lagos Quranic Central mosque was not even in better disposition to give same sex marriage a thought. He entirely considers it as a profound or abominable evil unacceptable to Allah. He judged that "…the practice of same sex in Nigeria is capable of attracting the wrath of Allah on all of us." In his own submission, the director of social communications, Catholic Archdiocese of Lagos Monsignor Osu vocally condemned same sex marriage as an aberration that is contrary to the divine will of God. Insisting that it is contrary to nature, African culture and scriptural teaching, he says:

> We are totally against it because it is against biblical teaching and alien to our culture as Africans. It inhibits natural procreation. It is an ill-wind that will blow no one any good and so, we totally condemn it in all its ramifications... America is not Nigeria. We are poles apart. The possibility of ever legalising same-sex marriage in

[205] Loc. Cit.

> Nigeria is not feasible. It is a foreign culture and morally out of place for us as a people. So, there is no meeting point.[206]

Sun News editorial of Wednesday, 7th December 2011, summarizing the drumbeat of Nigerians about the legislation against every form of homosexuality commends the legislators for following the heart of the right thinking Nigerians.

> We commend the forthrightness of the Senate in this matter. Gay marriage, as has been noted by right-thinking Nigerians, is strange to us. It is alien to our culture and violates all the values and mores that we recognise and cherish. We even consider the mere mention of gay marriage as an expensive indulgence. It is the antithesis of things we consider descent and acceptable. It may be that those who have been advocating same sex marriage in Nigeria are persuaded or attracted by the practice in some parts of Europe and America. Unfortunately, they may not have taken into consideration the fact that we are, culturally speaking, poles apart from

[206]Loc. Cit.

> these countries. Besides, the race differences between Africans and Europeans imbue them with different values, attitudes and orientations. Each should therefore cherish what it holds dear. To ape other people's way of life is to have contempt for oneself.[207]

The view of Monsignor Osu that legalizing homosexuality in Nigeria is not feasible is reinforced by the lower house who after eighteen months voted in favour of the decision of upper house to ban all gay marriages and outlaw any group activity supporting gay rights. This bill is expected to receive the assent of the president soon. Under the newly proposed law:

> Nigeria would ban any same-sex marriage from being conducted in either a church or a mosque. Gay or lesbian couples who marry could face up to 14 years each in prison. Witnesses or anyone who helps couples marry could be sentenced to 10 years behind bars. Anyone taking part in a group advocating for gay rights or anyone caught in a 'public show' of affection

[207]Loc. Cit.

> also would face 10 years in prison if convicted by a criminal court.[208]

Apart from Nigeria, homosexuality is made illegal in most other African countries. In Ghana for example, the criminal code last amended in 2003 in its section 104 dealing on sexual offences outlaws as misdemeanours any unnatural carnal knowledge with animals or with persons in an unnatural manner. As we find in Nigeria, the fury against immoral profundity of homosexuality is not less in Ghana; government officials, religious leaders and indeed the average man in the streetabhor both homosexuality and bestiality as profound evils. At various times, Ghanaian officials and prominent citizens in the face of blackmail from international human rights community have maintained that Ghanaian law enacted to protect the cherished moral values overrides international conventions recognising gay rights.[209] The international human rights groups have accused the government of Ghana of advancing cultural relativism argument in their defence of laws against gays for arguing that "Ghanaians are unique people whose culture, morality and heritage totally abhor homosexuality

[208]"Law Makers Pass Anti-Gay Marriage Bill", The Leader, Vol. LIV, No. 21 (Owerri: Assumpta Press, June 2, 2013)

[209]E. Mittelstaedt, "Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations" in Chicago Journal of International Law, 9 (2008), p. 353.

and lesbian practices and indeed any other form of unnatural sexual acts."[210]

❖ NECROPHILLA ❖

Necrophilia or sexual congruence with the dead is considered an extreme obscenity. It affects the moral sensibilities of people as a profoundly disgusting and immoral act. It has a popular image as a highly unusual act, exceedingly bizarre, and thoroughly immoral and perverse sexual act.[211] Most countries of the world make it illegal because of the profundity of its immorality while some other countries like some American states in a bid to avoid being accused of making laws considered moralistic, merely outlaw it on the reason that it lacks the consent of the dead. In the state of Wisconsin for example, it is illegal to have sex with the dead not because the dead could be harmed but because it is argued that such actions are unlawful because it lacks the consent of the dead. The concern for consent in making legal judgements affecting the dead is ridiculous and seems to be a liberal way of obfuscating the fact that sexual actions with the dead bother on offence, and morality and not on harm. A dead person obviously will never be able to give consent. A reasonably informed person will

[210] Loc Cit.

[211] D. Nobus, "Over My Dead Body: On the Histories and cultures of Necrophilia" R. Godwin & D. Cramer Ed. Inappropriate Relationships: The Unconventional, the Disapproved and the Forbidden, (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2002), p. 178.

simply understand the statute to prohibit the indecency of having sex with dead bodies. The consent rationale also failed to consider the situation which prompted the Supreme Court to make it illegal in the first place namely a public outcry on the need to prohibit the immorality of necrophilia.

The crime of necrophilia was resurrected by the Supreme Court after a public outcry in June 2008 when a lower court ruled that there was no law against necrophilia. The judgement of a jury of five against two was given in condemnation of the case of three men who were allegedly seen with a picture of a 20 year old woman accident victim. They were accused of attempting to have sex with her dead body after being caught with shovels, crowbars and a box of condoms in the cemetery in Cassville in Southern Wisconsin where the woman was buried.

Profound immoral practices like necrophilia are considered as 'extreme porn' in England and are treated under Part 5, Section 63 of the criminal Justice and Immigration Act 2008. This section defines pornography as:

> An image of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal which is

> grossly offensive, disgusting or otherwise of an obscene character, and portrays in an explicit and realistic way any of the following: an act which threatens a person's life, an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals, an act which involves or appears to involve sexual interference with a human corpse, a person performing or appearing to perform an act of intercourse or oral sex with an animal (whether dead or alive).[212]

All the four proposed limiting principles harm, offence, legal paternalism and legal moralism play out in. the above prohibitions. They are prohibitions which protect human beings as well as animals from harm and offence as well as from the violation of public decency. In all the instances, the indication of bestiality and necrophilia stand out as prohibitions based on morality. In some instances, the courts get into the confusion of deciding the rational for prohibition. In England where there is a near total disdain for the enforcement of morals, the court decisions in some instances of the above prohibitions imply clear protection of societal

[212]O. Nobus, "Over My Dead Body: On the Histories and Cultures of Necrophilia" R. Godwin & 0. Cramer Ed. Inappropriate Relationships: The Unconventional, the Disapproved and the Forbidden, (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2002), p. 178.

morality. In 2011 for example, the Stafford Crown court sentenced a man for possessing a staged image depicting a knife attack and a woman drowning in a bath. The reason for his sentencing was indicated as the "need to regulate images portraying sexual violence, to safeguard the decency of society and for the protection of women."[213] The rationale for these as noted above bother on the harm principle and enforcement of morals.

In many nations and jurisdictions, because of the difficulty of knowing the existence of necrophiles there are no laws or prohibitions against it. As a result, most of those who are caught having sexual congruence with the dead in any form are punished under related laws. When caught in the act of necrophilia, such nations usually punish offenders on the rationale that such conducts defile a dead body, disturb the peace of the dead or offend the sentiments of the relatives.[214] Giving an independent consideration, the ideal legislature will ordinarily prohibit necrophilia on the rationale that it is immoral. It is not harmful to the dead nor to the living, it might be offensive to relatives but the most obscene part of the act is the profound immorality of the living person's attempt to enjoy sexual relation with a dead person.

[213]http://en.wikipèdia.org/wiki/SectionG3_of_the_CriminaI_Justice_and_Immigration_Act_2008, January 102012, 5pm.
[214]D.L. Peck & N.A. Doich ed. Extraordinary Behaviour: A Case Study Approach to Understanding Social Problems, (Westport, Connecticut: Praeger, 2001), 195.

In concluding this section, we note that irrespective of our level of quest for autonomy or liberty, we cannot ignore the fact that the society needs to protect the values that give it desired decency. Such values abhor obscene acts and images considered offensive and immoral to the community standards of propriety. Obscenity as defined by the law concerns the acts or works that appeal "...to the average person, applying contemporary community standards, (and where) the dominant theme of material taken as a whole appealed to prurient interests."[215] Obscenity relates to acts and depictions, but most reference to obscenity in terms of the law refer to actions that often go with the notion of shame. In the European thought for example, the notion of obscene has historically been linked to the scatological and the sexually lascivious acts. This history makes it clear that the notion of obscene is linked to morality as it considers obscene acts and depictions as morally corrupting. This explains why the Comstock act[216]which forbade the mailing of obscene materials in interstate commerce in the United States, in

[215] R. Tatalovich and B.W. Daynes, Moral Controversies in American Politics: Cases in Social Regulatory Policy, (Armonk, New York: M.E. Sharpe, 1998), p. 222.

[216]The Comstock Act refers to the United States federal law of March 3,
1873 that amended the Post Office Act and made the sending of any obscene, lewd or lascivious materials including contraceptive devices and information through the mail illegal. It also made the distribution of information on abortion for educational purposes illegal. Twenty four states joined in making the same federal restrictions which were collectively referred as the Comstock laws.

speaking of obscenity, included in its prohibitions contraceptives and abortifacients or anything else for any indecent or immoral use.[217]

Most of the profound immoral acts - bestiality, necrophilia, homosexuality find their roots in the sexually obscene acts. They have historically been considered both in Europe and America as reasons for considerations in the limitation of liberty. The argument that such considerations today in principle should be discarded as the opponents of legal moralism like Hart insist is not admissible. What should bother the liberal should not be the legal moralism in principle but to what extent these particular moralistic indications will go in limiting liberty or whether in the scales, any moralistic statute will be able to weigh against liberty.

As we indicated above, only very minute aspects of moral prohibitions will find their way into the legal books. In the list of such moralistic considerations are the ones we termed profound immoralities such as bestiality, necrophilia and homosexuality. They are given consideration for prohibition irrespective of their free floating nature because of their extremely felt character in shocking the average

[217]D.A. Richards, The Moral Criticism of Law, (Encino, California: Dickenson Publishing, 1977), p. 60.

sensibilities and the violation of community standards of propriety.

❖ FINAL COMMENTS ❖

In this work comprising five chapters, we have tried to explore the moral and legal languages that define the limits of individual liberty. We have primarily tried to show what constitutes a law and its relation to morality in the terms of H.L.A. Hart. Our position from the beginning has been that Hart's elucidation of the concept law is laudatory and therefore can be compared as second to none before and after him. This position notwithstanding, there are identifiable flaws in his positions to the concept law and its relation to morality.

The development of Hart's concept of law has its primary origins in the work of John Austin who considered law as essentially commands.[218] He attacked this theory as implying that in every law there is an aspect of threat to the one who is commanded to obey. For him, laws generally have a general intent of orders baked by threats but they must be seen as complete without orders backed by threats. The example of the officials such as judges who are given the powers to try cases is for him an

[218] J. Austin, The Province of Jurisprudence Determined, (London: Prometheus Books, 2000), p.1.

indication that not all laws are commands. His attack and arguments against Austin's command theory was thrilling as well as enlightening but was not convincing enough to consider Austin's command theory as comatose. The fact that there is an element of order backed by threat is evident in every law. Even the power conferring rules are accompanied by element of threat. The judge is not bound by immediate threat of punishment if he fails to use the power conferred on him to try cases but he certainly faces further threats of losing his job or running out of funds in the long run if he keeps refusing to try cases. In defence of Austin's command theory, Philip Ostien repudiates Hart's views. He assimilates 'orders backed by threats' into power conferring rules of law. For Ostien, Hart seems always to represent the 'gun man' always in his heated irrationality and the 'bank teller' as having no choice by the bidden of the 'gun man'. He sees the 'bank teller' finding himself in a situation where he is unable to make choice. This understanding fails to represent accurately the human nature characterized by rationality and complex abilities. Following the complex nature of human beings, Philip Ostien's argument in favour of Austin trumps Hart's argument that laws are not essentially commands. His argument is more illuminating and shows a clearer understanding of Austin's command theory. The bank teller is not irrational, if he obeys the gun man;

it is not because he has no choice but because he has weighed the available options which include giving in to the order, refusing the order, fighting the 'gun man' etc. and chose the option of obedience.

The central problem of this work which formed the focus of chapters four and five relate to a critical consideration of Hart's views on law and morality. Hart's overall treatment of the relationship between law and morals is a reflection of his views about the legal limitation of liberty. As a liberal of distinction, Hart failed in treating the four generally proposed legal principles (harm principle, offense principle, legal paternalism and legal moralism) for the limitation of liberty fairly and therefore gave undue preference to liberty in his views about law and morality. Following John Stuart Mill's teaching, Hart addressed the problem of individual liberty, giving only the harm principle and in few instances legal paternalism a warrant for legal limitation of liberty. He generally ignored both offensive and immoral actions of people as possessing no legitimacy in limiting individual liberty.

Against Hart's position, we recognise the legitimacy of all the four proposed limiting principles. In particular, legal moralism which Hart denounced is taken as a reasonable consideration in favour of prohibitions to limit individual liberty. Shifting

away from the popular understanding of legal moralism (attributed to Lord Devlin's views in his debate with Hart) known as social disintegration thesis, we focused on free floating evils. Evils whose pains are felt not in terms of harms or offenses they cause to others but simply because they are evils without qualification.

Not many liberals would give the smallest attention to the idea of prohibiting free floating evils or any evil whatsoever considered as immoral. In a similar way, our intention in these pages has neither been to present every free floating evil for legal prohibition nor to present every immorality for legal prohibition but to present a class of free floating evils never considered in the age-long debates on law and morality namely profound immoralities. This class of immorality is defined in terms of their felt tone as highly depraved. The mere feeling of such actions taking place in private rankle the man on the street as an evil that need to be eliminated at all costs. Included in the list of profound immoralities are the acts that are considered disgusting, shameful and in some situations considered as a taboo. Among the list included here is homosexuality, bestiality, necrophilia, voyeurism and abortion.

The consideration of these profound immoralities makes legal moralism a necessary principle for

every liberal society that wants to exist without shattering obscenities. Obviously Hart and indeed many other liberals have never given a serious thought to the fact that there are evils that in their shattering and rankling profundity do more harm to people than the mere description of harm as 'set back to interests'[219] as we find in the harm to others principle.

Most of the profound immoralities are covered within the general language of obscenity which the society generally detests. In most instances, a number of obscenities are tolerated following the trump of individual liberty. The society where every obscenity is prohibited is as good as a dead society or an autocratic society. In the same way, the society that gives individuals absolute freedom to obscenities will as well not be better than a dead society. There has to be some level of balancing between the individual liberty to obscenities and the right to protect the moral standards. Most obscenities may pass for free speech and individual autonomy but we considered here only a little class of sexual obscenities which because of their profundity in violation of set standards and debasement of nature need to be considered for prohibition.

[219]J. Gray and G.W. Smith, J.S. Mill: On Liberty in Focus Ed., (New York: Routledge, 1991), p. 8.

If we accept, which I think we should that some obscene immoralities are devastatingly shatteringto our normal senses; then it is inevitable that we need to find means of making sure that we eliminate such obscenities. The kinds of immoralities in this level cannot be compared with the minor free floating evils regarded as sins in general terms. They are rather heinous crimes against nature and common standards of living. If we again agree that the society need to be protected from such profound immoralities or evils, we need to do that with the societal apparatus. That apparatus is the law.

This understanding is not new as evidenced through the ages by the norms of various nations which affirm the deep profundity of such profound immoralities by prohibiting them by the use of the law. The instances of legal prohibition of evils in the level of profound immoralities (bestiality, homosexuality, necrophilia etc.) as indicated above in the laws of various nations are clear indications that Hart's proposal that law should not be used to enforce morality is merely a theoretical proposal that has not worked in praxis. The momenteverything about morality is removed from the laws of the nations of the world, we would become wolves to each other!

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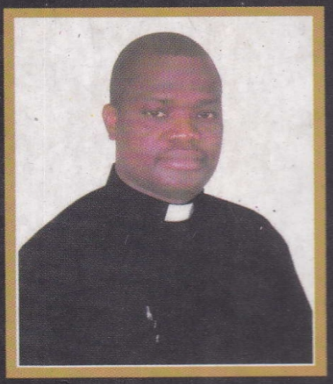

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