

The Problem of Connection between Morality and Law: Devlin-Hart Controversy

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Introduction

The role of morality and law in controlling our social behaviour cannot be denied. The relation between the two concepts, however, often creates problem when we want to understand how far they are closely connected. Legal moralists hold the view that morality and law should be connected while libertarians or legal positivists say that law ought to be separated from morality (Louch, 1963). Whether morality ought to be enforced by the law has been a philosophical debate among legal philosophers. In this paper, we shall examine the relation between morality and law with special reference to the views of legal moralists and libertarians or legal positivists. Here we shall particularly concentrate on the views of Devlin and Hart as the representatives of legal moralists and libertarians or legal positivists respectively which is known as Devlin-Hart controversy. In this connection, we will try to defend some of leading legal moralist Lord Devlin's views in relation to important libertarian H L A Hart's views from our own outlooks. The paper begins by discussion on morality and the law generally, focusing on their relationship. It then takes up Devlin's view about the connection between morality and the law followed by Hart's view about this problem. Finally, the paper concludes by synthesizing the both views. However, the paper mentions Mill's harm principle from his utilitarian point of view as a background of the problem followed by welfenden committee report as an instance of practical problem in relation to morality and law.

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THE CONCEPT OF MORALITY AND LAW

To show the morality's relation to law, we have to explain, what we actually mean by morality in the present context. We are not going to the analysis of the concept of morality from different normative discourses. Rather, we will limit our discussion to the concept of commonsense morality that we actually hold as members of a society. There are many examples which indicate the common moral judgments; we must not tell lies, must not deliberately destroy life and must not involve ourselves in unorthodox sexual practices, must not break our promises, must not laugh at others etc. According to *Encyclopedia of Britannica*, the word "morality" refers to any of the following: 1) the community's relevant factual behaviour patterns (its mores), 2) its socially approved behaviour patterns as sanctified by some widely held rational or religious ideals whether observed in practice or not (social morality); 3) the moral ideals accepted by each individual as binding on himself and on others, whether or not those others agree (individual morality). From this analysis of common morality we come to understand that morality is a norm vis-a-vis with the individual, social and religious factors. This is certain that whatever morality it is is practised or accepted by individual human being, this works according to the feeling and rationality of individuals. Some legal moralists regard morality as a feeling only. Every moral judgment unless it claims a divine source, is simply a feeling that no right minded man could behave in any other way without admitting that he was doing wrong (Devlin, 1971). But morality cannot be a feeling; it has a role of rationality. Hart accepts this when he says that morality is consisted either of divine commands or of rational principles of human conduct discoverable by human reason (Hart, 1971). In case of mental acts of human being at first feeling comes and then rationality. If an individual understands morality by feeling only without the help of rationality

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what legal moralists say, then it can be said that it is a more developed stage of morality.

Law is the authoritative power to control the socially unacceptable behaviour of man. There are also many forms of law. These are political law, natural law, divine or religious laws and so on. But our concern here is political law which is closely related to commonsense morality. Mackenzie says that the laws of a country are made by a people or by its rulers. This kind of law may be changed, may be disobeyed by the citizens of the country and have no application at all to the inhabitants of other countries (Mackenzie, 1929). *Encyclopaedia of Britannica* writes: "The word 'law' refers to the specialized form of social control familiar in modern secular politically organized societies" (1982, p. 715). To distinguish between legal laws and moral laws one point may be mentioned here. Legal laws or laws of nations must be obeyed and there are certain penalties for violation of it. On the contrary, a moral law is a law that states that something ought to be done and there will have no certain penalties for violation of it. We all, either as good citizens or as bad citizens are already under the sovereignty of law. But Devlin sees criminal law from more practical standpoint. "The criminal law", says Lord Devlin, "is not a statement of how people ought to behave, it is a statement of what will happen to them if they do not behave; good citizens are not expected to come within reach of it or to set their rights by it"(Devlin, 1971, p. 46). On the other hand, Hart has seen the concept in a very general form when he says: "Law... to be ascertained by the standards of the reasonable man, and he is not to be confused with the rational man"(Hart, 1971, p. 50). It is recognised that the only force behind the law is physical force. But there is no physical force behind morality. Rather, it has internal force, i.e., reason, conscience, religious feeling, and social culture

etc. The instrument of the criminal law is punishment; those of the moral law are teaching, training and exhortation.

The Relation between Morality and Law

Legal positivists or libertarians and legal moralists express their views about the relation between morality and law. Legal positivists oppose the connection between morality and law. Among them Hart is an important legal positivist. He says: “there is no necessary or conceptual connection between law and morality”(1994, p. 259.). Hart always puts emphasis on law in relation to morality and this is why he further continues: “the contention that there is no necessary connection between law and morals or law as it is and law as it ought to be” (Hart, 1983, p. 57). Finnis says: “human law is artefact and artifice, and not a conclusion from moral conclusions....” (1996, p. 206). On the other hand, Lon Fuller as a legal moralist argues that the connection between law and morality is necessary only at the level of an entire system although some laws might be unjust or immoral –but the system as a whole must satisfy certain moral demands (Fuller, 1964, cited in Murphy and Coleman, 2004, p. 19).

To clarify the relation between law and morality we need to give some particular examples related to law and morality. Acts like murder, rape, theft and robbery are to be both crimes against law and morality. Hence in these cases there is no controversy between legal moralists and libertarians. On the other hand, there are many kinds of behaviour, which most people regard as morally wrong, although these are not offences against the law such as meanness, selfishness, intolerance, indignation, disgust, and cowardice offences. Besides, there are some sorts of sexual behaviour which most people regard as immoral but are not offences against the law. In many western countries particularly in England, the USA, and Canada, adultery is at least not a legal offence. But the

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question may arise when morality and the law conflicts to one another. It may be said that the moral weight that often, or always, lies behind the law may be opposed by competing reasons. These reasons give rise to conflicts between morality and the law. In a narrowest sense, one might say that a genuine conflict between law and morality exists only when, after all claims have been properly weighed, moral reasons require action that is contrary to what the law demands (Greenawalt, 1989). More specially saying, here the relation between morality and the law is going to be discussed under a specific question namely, when is the use of criminal law to impose limits on some immoral acts such as some sexual conduct or misconduct, e.g., homosexuality, gay marriages and other activities such as smoking, artificial genetic engineering, assisted suicide, development of genetically modified food, publishing of objectionable content on the internet, or forming or using cult groups to spread superstitious ideas, or even speculation in the property market.

There is thus a distinction to be drawn between morality and law. Some questions then arise to us, for examples: what is the real function of law? Should laws be designated to mirror moral teachings and to impress the moral views of the majority upon the actions of the members of a society as a whole? Should our laws function entirely outside of moral concern? To answer these, some legal moralists such as Lord Devlin (1971) and Ronald Dworkin (1986) hold that the immoral acts such as unorthodox sexual conduct must be an appropriate object for criminal legislation. On the contrary, some libertarians e.g., Mill (1968) and Hart (1966) deny that unorthodox sexual acts are wrong and conclude that they are not appropriate objects for criminal legislation.

MILL'S HARM PRINCIPLE

Morality and law make an individual disciplined by limiting one's freedom which is detrimental to society. John Stuart Mill's assertion that the only justification for limiting one person's liberty is to prevent harm to another is significant in the discussion which is known as harm principle. In his famous essay, *On Liberty*, Mill points out his simple principle:

That the only purpose for which power can be rightfully exercised over any number of civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right... The only part of conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence, is of right, absolute. Over himself, over his own body and mind the individual is sovereign (Mill, 1968, p. 73).

Mill's harm principle is a particular viewpoint following his general theory of utilitarianism¹. The purpose of Mill's principle is to restrict the interference of society with individual freedom. The society can interfere with one's freedom only when his conduct becomes harmful for others. It is also true that most of us do not want to be harmed. So it seems that Mill is right to say that a person should not be allowed to do a certain thing which will cause harm to others. But the problem is that his principle is not universally accepted within the philosophical community. Harm

¹ The main theme of utilitarianism is 'the greatest happiness for the greatest number' propounded by Bentham and Mill. In other words, according to this theory, human actions and practices should be evaluated in terms of the consequence what will bring happiness or well-being of a majority of person.

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principle cannot be the criterion of applying law in immoral acts as some immoral acts are not harmful to other if these are done privately. To identify the appropriate role of law in moral matters, it is important to distinguish between public and private spheres of morality as the application of law is easier in the former than in the latter.

WOLFENDEN COMMITTEE REPORT

Upon the derivation from public to private spheres of morality particularly, private consensual homosexual behaviour has been a focal point of this debate. Almost fifty years ago, in 1965, the publication of the Wolfenden Report in England touched off public debate about the role of law in these two spheres of morality. Wolfenden Committee Report in the United Kingdom in 1957 examined the problems of governmental interventions in the private lives of citizens and concluded that private behaviour is no business of law.² In the public discussions following the Report's publication, two quite different approaches to law's place in addressing issues of morality emerged and were captured by the well-known Hart-Devlin controversy.

Devlin in his article, "Law, Democracy and Morality" brings an important example of this report comments that the offences like homosexuality and prostitutions are "within a realm of private morality and immorality which is, in brief and crude terms, not the law's business"(Devlin, 1972, p.152). The committee only prohibited street prostitutes; as a result, Street Offences Act 1959 was passed, which made it impossible for prostitutes to continue soliciting in streets. On this point before the House of Lords in 1961 Viscount Simonds presents the statement: "...there remains in

² See Sir John Wolfenden. "Evolution of British Attitudes toward Homosexuality" in (ed.) Peter A French, *Exploring Philosophy*, Schenkman Publishing Company. Inc. Cambridge, Massachusetts. 1972. (PP. 135-141)

the courts of law a residual power to enforce the supreme and fundamental purpose of law, to conserve not only the safety and order but also the moral welfare of the state” (Fanon, 1972, pp.92-93). It means that at least in this particular case the British law upholds the significance of the reflection of moral values to preserve law.

DEVLIN’S VIEW ABOUT CONNECTION BETWEEN MORALITY AND LAW

Lord Devlin rejects many parts of Mill’s principle and Wolfenden recommendations in his famous lecture in 1965 entitled *On the Enforcement of Morals* in which he claims to show that there is no point beyond which the behaviour of persons is none of the law’s business; there is no separate sphere of merely private morality which could be assigned as in principle outside the concern of criminal law (cited in Dworkin, 1966).

Society consists of individuals and individuals’ morality turns into common morality in society. The society has the right to make judgment on morality according to Devlin’s view. His argument is that a society is nothing more than its cohesive moral beliefs. Morality is such an essential part of society that without which society cannot exist. He points out: “Society is not something that is kept together physically; it is held by the invisible bounds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is a part of the bondage. The bondage is part of the price of the society; and mankind, which needs society, must pay its price”. (Devlin, 1971, p. 33).

Society has not only the right to make judgment on morality but it has also the right to use laws to enforce it. Devlin defends the position that morality must be the basis of criminal law. Society may use the law to preserve the common morality which acts as

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the essential part of the existence of society. Society has also different kinds of factors, i.e., positive factors and negative factors, of which positive factors help integrate society and the negative factors help disintegrate society. Society must protect itself by using law. According to him, "The law must protect also the institutions and the community of ideas, political and moral without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies"(Devlin, 1965, p. 22). For this reason he concludes, "The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define sphere of private morality than it is to define one of private subversive activity"(1971). So, there are no theoretical limits to the extent to which the law may go against immorality. As Lord Devlin puts it, if a man chooses to get drunk every night in the privacy of his living room, this is society's business, and not merely his own, for society would not survive for long if large number of people got drunk every night in the privacy of their homes.

To determine public morality and to determine what types of immorality ought to be punished, according to Devlin, the measure of society's morals are the standards of the reasonable man. The man on the street, who may also be characterised as the right-minded man or man in the jury box. About immorality, Devlin says that the action which every right-minded person consider as immoral is immoral.

Whether the weapon of the law should always be used against immorality, Devlin's answer to this kind of question is "no". Society should only use the law in some cases. While Devlin believes that all crimes may be sins, he does not believe that all sins should be made criminal. In deciding how far the law should

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go in enforcing the common morality, lawmakers, according to Devlin, must strike a balance. On the other hand, the state cannot be completely shut out on questions of immorality.

Law can play a vital role to enforce morality in a society but the problem is that how far it can work and what limitations it have. To answer this, Devlin proceeds to lay down some what he calls “elastic” principles for the guidance of the legislature in enforcing morals.

Firstly, “There must be toleration of the maximum individual freedom that is consistent with the integrity of society”(Devlin, 1965, p. 16). The measure of the limit of tolerance, he says, is the ordinary man’s feelings about a given practice. If an ordinary man has a particular form of conduct which comprises a certain intensity of intolerance, indignation and disgust then it is an indication that we have reached the outer bounds of toleration.

Secondly, to implement or to apply law in a society it should not be hurried as Devlin recognises that in case of tolerance and deviation from moral standards there might have been a gap between two generations that follow. He believes that in all such matters, the law should be slow to act, for if it acts too hastily, it may undermine very important principles or institutions.

Thirdly, the concept of privacy should be underlined and must be respected. The enforcement of moral prohibition should respect the right of privacy which implies that the law must act in a moderate way. But this does not justify, however, the exclusion of all so-called “private morality” from the scope of law.

Fourthly, law is concerned with a minimum, not a maximum, standard of behaviour. The law is not designed, and is not capable

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of making people “virtuous” persons. Therefore, some harmful kinds of behaviour, for example, adultery, have been left outside the criminal law especially in western society. But Devlin thinks that adultery should be regarded as human weakness and it is suitable for punishment by imprisonment.

According to Devlin, when the above conditions are met, then the law-makers will consider about the instruments of criminal law (e.g., fines, imprisonment, etc). In other words, the law-makers will determine appropriate ways of decision in each case for dealing with particular deviations from the code of morality.

HART’S VIEW ABOUT NOT CONNECTION BETWEEN MORALITY AND LAW

Lord Devlin’s lecture has been the subject of intense discussion and widespread criticism since its publication. One of the most important critics of Devlin and of others who hold similar views to Devlin is that Hart which is published in a little book entitled *Law, Liberty and Morality*.

In General, Hart disagrees with Devlin and agrees with Mill on the question of legitimacy of making an immoral conduct criminal, even if the conduct is not harmful to others. Hart takes particular argument with Devlin’s basic notion of “Society” and the preservation of society as the rationale for legal intervention. According to Hart, Devlin’s principal thesis that society has the right to enforce morality because immorality may weaken it or lead to its collapse is based on an unsupported assumption. That is, the assumption that “sexual morality-together with morality that forbids acts injurious to others such as killings, stealing and dishonesty - forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole” (Hart, 1966, p. 51).

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About Devlin's assumption that those who deviate from the norms of sexual morality constitute a general threat to society, Hart comments in the following way:

"No reputable historian has maintained this thesis i.e., that derivation from accepted sexual morality, even by adults in private, threatens the existence of society, and there is indeed much evidence against it. As a proposition of fact it is entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes". (Hart, 1966, p. 50).

Apparently it is true that privately done immoral acts i.e., sexual acts cannot directly threaten the existence of society. But if everyone thinks so and acts accordingly then the society will be seriously affected. Hart goes on to say that to the extent that Devlin holds that every society depends on some degree of shared morality, he may be correct, but his move to the proposition that a society is virtually identical with its morality is absurd. It is absurd because such a proposition that would require us to assume that the slightest change in a society's moral or legal code would be tantamount to the disappearance of that society and its replacement by a new one. Whereas, in fact, changes in conventional morality, according to Hart, are not only consistent with the preservation of society but in fact may be indication of its progressive development.

We see, on the other hand, that some libertarian views on morality differ from that of Devlin. To him morality is to rest on a basis of unchangeable facts. Thus consented homosexuality, prostitution and promiscuity escape the category of sin as well as that of crime. Hart admits the charge of gross immorality levelled against the homosexual or the promiscuous, but wants nonetheless to exclude such acts from the reach of law. But our rational will, our conscience always drives ourselves to condemn immoral acts like

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homosexuality or promiscuity and demand that such kind of immoral acts must be under the range of law at least in its weak sense. According to Kelsen's view, Moral judgments have no basis in fact; they simply express the attitude that we have. So it is impossible for law to be a morality. The identification and interpretation of law must be independent of moral conditions (Kelsen, 1961, pp. 5-13 cited in Lyons, 1984, p. 64).

We cannot agree with Kelsen's view absolutely. However, it is true that the law is determined by the thoughts of the lawmaker. But those thoughts do not remain in the individual as windowless. Actually, any society's own values, norms, morality, interaction with other people always center round the law-maker's thoughts that keep a significant role when a law-maker makes law. So it can be said that the law which is independent of moral conditions will lose its social acceptance. Here the concept of society should be imagined as an ideal society what Kant says, "Act so as to will the maxim of your action as a law of nature in a kingdom of Ends".

The legal moralists seem to be on a strong ground in claiming that murder is punishable because killing is wrong, and therefore, threat anything that is wrong is punishable. If it is admitted that the homosexual activities are immoral acts, it is reasonable to suppose that the law could take action against those kinds of activities. But murder, as an offence, can no way be compared to sexual offences like homosexuality in particular. Because murder is a major offence; when it has occurred then the life of a man who has the right to live is removed from the world. On the other hand, immoral acts like homosexuality are not life-threatening as that of murder. This does not mean that homosexuality would be excluded from the reach of law. Rather it should be included under the sphere of law but its objective would be reformative so that a man who is engaged in such kind of immoral act can reform himself.

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Hart and many other libertarians point to obstacles to legislative interference with private consented acts that appear almost difficult. This is the police work which is necessary to produce evidence that sexual vice has occurred. Since, these crimes occur privately and with consent, methods of detection must almost certainly violate a man's privacy by spying or resorting to trickery or fraud e.g., by having an officer pose as a prostitute's client. Hart draws a distinction between public and private conducts and suggests that certain conduct, when done in public, may be prohibited on the ground of causing offence against society. Thus he continues:

Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Conversely, homosexual intercourse between consenting adults is immoral according to conventional morality but not an affront to public decency though it would be both if it took place in public... The recent English law relating to prostitution attends to this difference. It has... not made prostitution a crime, but punishes its public manifestations in order to protect the ordinary citizen, who is unwilling witness of it in the streets, from something offensive (Hart, 1966, p. 45).

At this stage Hart and Devlin appear to be at completely different positions, though they both agree at the definition of immoral acts. Hart says that right to undisturbed performance of private consenting acts is more important than the immorality of the act. Devlin says that when the help of the law is invoked by an injured citizen, privacy must be irrelevant. In this case, Hart's view cannot be accepted. If privacy is given importance then privately wrong doing acts will be considered as right acts indirectly. If everyone is engaged in immoral acts under the excuse of privacy then the

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condition of society will be like that of a Hobbsean³ to a great extent. Another critic of Devlin, Joel Feinberg (1988) admits the view that criminal law may take morality into account, for example by lengthening sentences based on greater blameworthiness, but in opposition to Devlin he maintains that this does not justify morality invading all of the criminal laws.

CONCLUDING COMMENTS

It is clear that the libertarian is denying the law's right to a man who harms another person keeping privacy at his home. But the accent is not only privacy, but on consent only, and on the absence of obvious marks of injury. In fact, the acts on consent seem immoral should not be escaped from law. Suicide and particularly the death of all members of 'Heaven's gate Cult' (a religious Organization of USA, the members of which died simultaneously in 1997)⁴ are explicit instances of contentious acts but immoral and therefore punishable by law. As man has no power to give birth to himself, so he has no right to kill himself voluntarily. Just after born man has an obligatory duty to try to live throughout his life what is given by God. This is also the innate and natural essence of human being. In this constant attempt to live he as a member of the society participates in the so-called life struggle. In this life-struggle men fulfil their various kinds of demands from the society

³ Thomas Hobbes in his *Leviathan*, imagines about a state of nature where each person is free to decide for him/herself what he/she needs. In this situation, there is no common authority to resolve many disputes. As a result, the human life is as per Hobbes words, "solitary, nasty, brutish and short, a war of every man against every man".

⁴ On April 1, the 37 members of the cult commit suicide simultaneously to get together with the comet Hale-Bopp as they thought that the earth would be spaded over while the comet would come nearer to the earth. They also thought that by their death they will go to the heaven. See in details: *Newsweek*, 1997, Vol. CXXIX, No. 15, pp. 26-33. or The weekly *Robbar* (Bangla magazine), April, 27, 1997, pp. 35-37.

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according to their capabilities. If anyone wants to withdraw oneself forever from this life-struggle that means selects the path of suicide then it is treated as an offence. If this is not considered as an offence then it is supposed to be legally acceptable. And if it is legally acceptable universally (as per the principle of universalizability) then the human existence will be threatened. The reason is that the principle of universalizability demands that any moral principle will be applicable in universal way⁵. As a result, immoral act like suicide is taken under the sphere of law.

There are laws regarding the illegal manufacture and sale of food and drugs to various sources of impurity that these impurities cause demonstrable harm to consumers. These laws applied on the assumption that men are vulnerable and ignorant about the real constituents of things except some specialists, so these impurities cause demonstrable harm to men or constitute demonstrable deceit. The legal moralist must show that both these criteria are met in the sexual cases and these kinds of sexual practices day by day ruin them. The law must protect the vulnerable against such kind of immoral persons.

Moreover, in 1986, the American Supreme Court faced the same question of whether private consensual homosexual sodomy could be properly prohibited by law what the Wolfenden Report (in the UK) had dealt with wherein the majority of the court held that it could be prohibited while four justices dissented (Sylla, 1998). The majority of the Court's reliance on history and common conceptions of morality illustrates its allegiance to Devlin's way of thinking that the state has a right to regulate private activity to preserve private morality (Sylla, 1998).

⁵ All moral judgments are universalizable. See for details, R. M. Hare, 1963, *Freedom and Reason*.

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Devlin's position that morality should be the basis of state law can be supported from different standpoints. Each individual member of society is bound to live under the shadow of law otherwise the state authority will fail to keep order in society. To show respect to the state law is also a one kind of morality. Socrates thought this many years ago when he had refused to escape his execution telling Crito that his birth, bringing up, education everything had happened in the state and therefore he had agreed to be governed by the law and to suffer his punishment under that law despite the fact he felt that he had been unjustly treated. All are not like Socrates who thought that to obey law (either moral or immoral) is to obey morality. The citizens of Nazi Germany have obeyed the laws of their state even though they have known that the laws concerning genocide were morally wrong. In Bangladesh, the controversial Indemnity Ordinance, 1975⁶ was definitely inconsistent with the common morality. The Special Power Act, 1974⁷ in Bangladesh is inconsistent not only with the moral values but also inconsistent with the constitutionally recognized human rights, since the Constitution of Bangladesh pledges to ensure each citizen's right to walk, to speak or to live anywhere within the country. By the above examples we want to show that laws which do not represent moral values of society may be controversial and imperfect. So the law though not perfect ought to be respected and for this reason it should be consistent with the common morality. Philip Soper (1984) in his *A Theory of law* notes that law is *prima*

⁶ Ordinance No. 50 of 1975. This Ordinance legalises all the activities of the government and all the promulgated military rules and orders during the period from August 15, 1975 to April 9, 1979. This Indemnity Act is incorporated in the constitution as Fifth Amendment Act 1979. By this Act, the assassination of the late president Bangabandhu Sheikh Mujibur Rahman was legally justified. However, this Ordinance has been repealed on November 14, 1996.

⁷ Act XIV of 1974. According to this Act, the government may detain anyone for 30 days or more without showing any cause.

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facie obligatory although there may have some some controversy on this comment. But some thinkers believe that law *per se* does not obligate at all. They believe that good laws obligate and the bad laws do not (Brudney, 1993, p.289). It is also related with the concerned moral values of society. If the moral values are good in a society then there is a possibility of making good laws in that society. To Dworkin's (1986) view, law is the political morality which approximates more closely to ideal, correct or true morality. It is necessary to mention here that all moral values are not good that they may be followed by the law. Moral values may be developed or taught through religious feeling, proper education, developing socio-economic condition of the county. No society has yet solved the problem of law to teach morality without religion. In fact, the concepts of morality and law derive from the same society in a selective way. The concept of law is part of our cultural tradition. In the midst of law ordinary people and legal professional understand their own and other people's actions. Thus law is the conceptualization process of social reality. Morality and religion are closely connected. The moral standards are generally accepted in our society belonging to religion either Islamic, Hinduism, Buddhism and Christianity or in any other forms. For the purpose of making law the duty of the state is to secularize the different religious values which are considered as moral rules in implication. Furthermore, if a person who violates moral law could not be punished by law then he/she cannot foresee the harm he/she may cause to society. So the law must protect him/her against possible sources of harm. Besides these, immoral acts turn one away from the duties and activities that keep society going. For example, sexual interest outside the bonds of marriage threatens the order of the family on which society is based. Thus it might be claimed that society has every right to protect itself against such potential threats by its legislation. Furthermore, historically it can be said that moral sense comes at first and then law arises and so,

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moral sense of human being contributes in making a law. Throughout the above discussion we have concentrated the concept of the problem of connection between morality and law with special reference to Devlin-Hart controversy. Above all, we find that Devlin is regarded as the reconciliator between law and moral values. On the other hand, Hart emphasizes on the autonomy of law in relation to morality. But we may conclude here that law ought to reflect the common moral values of society, otherwise there will have a kind of alienation between the authority of law and the common people of society.

References

- Brudney, Daniel. 1993, "Two Links of Law and Morality", *Ethics*. Vol. 103.
- Devlin, Lord. 1972, "Law, Democracy and Morality", In (ed.), Peter A. French, *Exploring Philosophy*, Schenkman Publishing Company. Inc. Cambridge, Massachusetts.
- Devlin, Lord. 1971, "Morals and the Criminal Law", In (ed.) Richard A. Wasserstrom, *Morality and the Law* Belmont CA. Wadsworth.
- Devlin, Lord. 1965, *The Enforcement of Morals*, London: Oxford University Press.
- Dworkin, Ronald. 1986, *Law's Empire*. Cambridge University Press.
- Dworkin, Ronald. 1966, "Lord Devlin and Enforcement of Morals", *The Yale Journal of Law*. Vol. 75. No. 6.
- Encyclopaedia of Britannica*, 1982, 15th ed. Vol. 10.
- Fanon, Frantz. 1972, "Shaw V. Director of Public Prosecutions", In (ed.) Peter A. French, *Exploring Philosophy*. Schenkman Publishing Company. Inc. Cambridge, Massachusetts. (pp. 91-99).

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- Feinberg, Joel. 1988, *Harmless Wrongdoing: The Moral Limits of the Criminal Law*. New York: Oxford University Press.
- Finnis, John. "The Truth in Legal Positivism", In (ed.) Robert P. George, *The Autonomy of Law: Essays on Legal Positivism*, Oxford: Clarendon Press.
- Fuller, Lon. 1964, *The Morality of law*, New Haven: Yale University Press.
- Greenawalt, Kent. 1989, *Conflicts of Law and Morality*, New York: Oxford University Press.
- Hare, R. M. 1963, *Freedom and Reason*, Oxford: Clarendon Press.
- Hart, H. L. A. 1994, *The Concepts of Law*, 2nd edition, eds. P. A. Bullock and J. Raz. Oxford: Clarendon Press.
- Hart, H. L. A. 1983, "Positivism and Separation of Law and Morals", In Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press.
- Hart, H. L. A. 1971, "Immorality and Treason", In (ed.) Richard A. Wasserstrom, *Morality and the Law* Wadsworth Publishing Company, Belmont, California.
- Hart, H. L. A. 1966, *Law, Liberty and Morality*, London: Oxford University Press.
- Kelsen, Hans. 1961, *General Theory of Law and State*, (trans.) A. Wedberg, New York: Russell & Russell.
- Louch, A. R. 1963, "Sins and Crimes", *Philosophy*, Vol. 43.
- Lyons, David. 1984, *Ethics and the Rule of Law*, Cambridge: Cambridge University Press.
- Mackenzie, John S. 1929, *A Manual of Ethics*. London: University Tutorial Press Ltd. Sixth Edition
- Mill, J.S. 1968, *On Liberty*, London: Everyman's Library.
- Murphy, J. G. & Coleman, J. L. 2004, *Philosophy of Law*, New Delhi: Oxford University Press.

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Soper, Philip. 1984, *A Theory of Law*. Cambridge, Mass: Harvard University Press.

Sylla, Mary. 1998, "Law, Morality and Sodomy: The Bowers Majority in Bed with Lord Devlin", *National Journal of Sexual Orientation Law*, Vol. 4, Issue 1.

Wolfenden, Sir John. 1972, "Evolution of British Attitudes toward Homosexuality", In (ed.) Peter A. French, *Exploring Philosophy* Schenkman Publishing Company. Inc. Cambridge, Massachusetts. (PP. 135-141).