

FIRST SECTION OF THE EXAM

'Morality and the Law'

Introduction:

Thesis – the law should not attempt to enforce morality

Outline of arguments:

- 1) Define morality
- 2) Outline Lord Patrick Devlin's (LPD's) views in 'The Enforcement of Morals'
- 3) Critically analyse LPD's views (using criticisms from other philosophers)
 - Make reference to the LNP same sex altruistic surrogacy case study and R v Brown and criticise the outcome in each scenario

1) What is 'Morality'?

- an abstract concept
- refers to standards of behaviour that people attempt to abide by in their everyday lives (Stanford Encyclopaedia of Philosophy)
- eminent philosophers have characterised the term differently (Plato and St Augustine said that human nature was corrupted and it was in need of divine salvation, Aristotle said that man has an instinct for goodness)
- most of these philosophers honed in on the concept of empathy and treating others as you would like to be treated (Shaw raised the criticism that you shouldn't do this as people's tastes are different)

2) LPD and 'The Enforcement of Morals'

- 20th Century English judge that was a devout Catholic
- ultimately believed that the function of the law was to enforce the morality of the majority
- believed that the function of the law was to sometimes intervene in the private lives of citizens
- thought Christian morality was the basis for the law in Western cultures
- believed that humankind needed society and society referred to a 'community of ideas'
- believed that society was held together by 'invisible bounds of common thought' and therefore concluded that there must be a public morality
- thought that society should have an unrestricted power to legislate against conduct that threatens these 'bonds of common thought'
- Proposed 'reasonable man standard' to determine which moral values should be reflected in the law
 - o Doesn't require participants to act rationally
 - o Consists of asking whether a reasonable man/women feels "intolerance, indignation or disgust" towards a particular type of conduct
 - o Proposed a jury style arrangement - "moral judgement of society must be something about which twelve men/women drawn at random might after discussion be expected to be unanimous"

3) Critical Analysis of LPD's Views

- agree that humankind needs society (without it, people would revert to living in small tribal communities and there would be no uniform healthcare, prisons, law enforcement agencies etc. – humankind would be poorer as a result)
- disagree with the balance that LPD strikes between the rights and interests of society and those of the individual
- Unconstrained power to legislate against immorality means no aspects of an individual's life falls outside the purview of the law - this is a significant intrusion into the private life of the individual – constrains people's freedom of choice when it comes to matters of private morality

- **R v Brown** (1993):

- Group of young to middle aged men engaging in consensual sadomasochist homosexual activities in private
- Activities didn't result in any permanent harm, no medical assistance was sought and every participant had a code word – no complaints were made to police
- Participants charged with a number of offences (AOBH and unlawful wounding)
- Courts discussed circumstances in which violence isn't a crime (surgery, tattooing, ear piercing, ritual circumcision etc.)
- **Majority said that need to consider the public interest**
 - o Discussed obvious dangers of serious PI and blood infection
 - o Held difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty
 - o "pleasure derived from the infliction of pain is an evil thing – cruelty is uncivilised" (moral judgement)
- **Minority said issue is not whether the appellant's conduct was morally right or wrong but whether it was properly charged under legislation**
 - o Held this was a question of private morality and balanced the interests of the individual with the general interests of society is an act for parliament, not the courts (I agree with the minority decision)

- More inclined to side with JSM and argue that liberty of the individual is paramount

- Agree with HLA Hart that a practise which offends moral feeling isn't necessarily harmful to others
- LPD characterises harm too broadly and adopts a paternalistic view towards society (assumes that people are emotional, easily influenced and lacking moral guidance)
- contrast John Stuart Mill's (JSM's) view of harm (what he refers to as the 'harm principle') – defines harm very narrowly – only considers direct harm and JSM assumes that people are rational and stoic
- these two views constitute two extremes on the spectrum – I think that the proper formulation of the term 'harm' should lie somewhere in-between

Examples of the State trying to promote a public morality:

- LNP has said that it will remove the right (through legislation) of same sex couples as well as defacto

- couples of less than two years and singles to have a baby by altruistic surrogacy
 - o Illustrates the State trying to send a signal about what it believes the 'institution of parenting' should reflect
 - o In my opinion, this law constitutes too great an intrusion into the private lives of individuals
- LNP is also rolling back provisions of Labour's Civil Partnership Act so that they will now be known as registered relationships and couples won't have access to state-sanctioned service
 - o Illustrates the LNP attempting to portray 'nuclear families' as the norm

- 'reasonable man standard' suffers from two major flaws:

- 1) the jury style arrangement that requires twelve strangers reach a unanimous decision could result in a tyranny of the majority (as people will be inclined to conform to the majority opinion) and therefore the verdict will not be unanimous in the true sense of the word
 - 2) doesn't require participants to act rationally – it simply requires participants to side with their gut feeling or an emotional reaction
- HLA Hart commented that moral sentiment can be based on "ignorance, superstition or misunderstanding"
 - A great example of this is the Salem Witchcraft Trials that took place in 1692 – people sided with their gut feeling and emotional reaction and this resulted in numerous innocent people being put to their death
 - LPD's 'reasonable man standard' is susceptible to corruption
 - I believe that rational thought (not emotion) should play a role in developing the laws that will govern our society

Conclusion:

- disagree that the State should seek to engineer a public morality
- morality is a sphere in which there's a public interest and I believe that LPD affords society too many rights and individuals too little
- LPD characterises harm too broadly and his 'reasonable man standard' is fundamentally flawed
- I'm more inclined to side with JSM's view that liberty of the individual is paramount and some aspects of an individual's private life should fall outside the purview of the law

SECOND SECTION OF THE EXAM

'Freedom of Expression'

Introduction:

Thesis – I believe that the State should legislate in some instances when it comes to freedom of expression (FOE)

Outline of arguments:

- 1) Contrast the position in AUS with that in the US
- 2) Outline JSM's views and criticise how it is linked to his 'harm principle' (that I disagree with)
 - Use **Brown v Entertainment Merchants Association** to illustrate that FOE should be prohibited in some instances
- 3) Outline Robert Bork's (RB's) arguments in favour of censorship (which I agree with)
 - Discuss **Eatock v Bolt** and how I believe the AUS court was correct to curtail FOE in this instance

1) A Comparison of FOE in AUS and the US

- AUS constitution doesn't expressly guarantee FOE, however, there is a right (albeit implied) to political communication – **Lange v ABC** and a right to freedom of religion (S 116)
- AUS position is best summarised by Lord Goff in **AG v Guardian Newspapers Ltd (No 2)** – "everybody is free to do anything, subject only to the provisions of the law"
- there are a number of laws that curtail FOE in AUS:
 - o Restrictions on placing images on cigarette packs – s 26A Tobacco and Other Smoking Products Act (this is to protect citizens from themselves)
 - o Existence of tort of defamation (illustrates that damage to one's reputation constitutes harm)
 - o Public nuisance offence (as conduct of people can offend other's sensibilities)
 - o Disturbing religious worship is a crime under s 207 CC (this type of disturbing conduct can cause people mental harm)
 - o Cannot discriminate based on race – s 18C Racial Discrimination Act

- US has a bill of rights (which is contained at the start of the US constitution)

- 1st Amendment US constitution basically says that congress shall make no law prohibiting FOE
- The implications of this are that it is very difficult to defame some in the US and US citizens are free to protest and demonstrate until their hearts are content

2) JSM on FOE

- JSM was an advocate of FOE – he discussed this issue at some depth in his text, "On Liberty 1859"
- believed that restricting FOE robs the human race of something
- argued the State should not prescribe or prohibit opinions – freedom of thought and expression are essential for growth of the human race and real wisdom comes from exploring views contrary to your own
- JSM raised three arguments in support of his views:
 - 1) Popular opinions might be false (suppressed opinions might be true) – to deny this possibility is to deny infallibility
 - 2) Even if accepted opinion is true, it is in danger of losing its meaning and relevance if it cannot be challenged and discussed
 - Understanding truth consists of dispelling arguments to the contrary
 - 3) Suppressed opinion may be partly true – FOE can bring to society's attention, 'fragments of wisdom'
- JSM raises some strong arguments in favour of FOE but his views are predicated on his 'harm principle'

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