

# *Investigation about Legitimation to Legislate Morality*

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**Keywords:** Ethics, Morality, Legislative procedure, Legitimacy

**Abstract:** The law needs to obtain moral legitimacy, which is a fundamental judgment of legal philosophy and a necessary condition for the generation of a harmonious legal culture. It is also determined by the special position of moral discourse in the rational structure of human practice. This legitimacy cannot be transformed into the authenticity of knowledge meaning. Its foundation is not some object existing in the form of "reality", but the "ought to be" norm established by the rational subject itself. Based on this, in the democratic legislative process based on appropriate rational assumptions, abstract practical rational subjects transition to equal participation subjects in reality, and formal universal moral norms inject substantive legitimacy with modern characteristics into the empirical legal system.

## **1. Introduction**

It is legitimate to use law to prohibit some immoral behavior. Although these two subjects seems opposite to each other, they have strong links intrinsically. In daily life, people follows mainly follows not only the laws but the beliefs. And these belief, in other words, are the common sense in their moral ethics generally. But these beliefs, the morality, are vague sometimes, which can be regarded as the unwritten law. And that is the reason why the morality lacks punishment on the breaching behavior. However, the laws do. Because the laws are written with authority and the punishments are clearly stated. So the laws, which extract the belief and express them systematically, can be considered as the updated form of morality. The laws not only substantiate the morality but the offer the measure to regulate the morality effectively, which means the punishment in laws are the strong tool to guarantee the function of morality.

## **2. Two different voices in the academic researches**

There are two different voices in the academic researches. Some people are in favor of that the laws can't be utilized to legislate the morality. The most famous example here is the Kantian, who insisted on the morality motivated is by the good will. So many people cited his opinion to support that the morality can't be implemented by law. Besides, they thought it is impossible for external forces to influence the inner state of people, including the attitudes, desires and preference eventually<sup>[1]</sup>. It sounds reasonable to some extent. If the behaviors are accelerated by the good will, the behavior would be corresponding to the public's judgment to what is good for society and what is bad for the others. And the people would avoid taking actions which are immoral. In this situation,

if the laws still are used to legislate the morality, it is the adherence to practice of formalities for formalities sake.

## 2.1 Different understanding to what will is good

However, different people have different understanding to what will is good. For an example, if humans are born with good will and tend to help the others, a fifteen-year-old boy would harbor a criminal because he thinks helping the others is good. However, when he grows up, the things might be changed because his values have been improved. Except from the age, the gender, race would matters in understanding of what is good will. So this precondition about incentive of people's behavior is too strict. Free from this precondition, many people act with bad will. It is more difficult to do with this situation without the legislation on morality; on the other hand, it can be denied that the external forces definitely can change people's internal states of mind because the values accumulated from long-period experience in life and study are rooted in people's heads. Sudden external force can't change people's psychological world in a short time. However, the external laws can bring up even improve their morality. Because people would avoid or stop the behavior explicitly prohibited in law documents for that they are afraid to be punished by the laws. For an example, the laws can't change the desires of someone who are addicted drug, but they can lessen the frequency they take drugs because the laws limits the flow of drug and sales of drug. Gradually, he would be less relied on the drug for the sources of drug decreasing. Perhaps he would change his addiction someday due to the strong enforcement of laws. Another point of view is that laws should be utilized to legislate the morality. Some morality would gain support of majority of people but they are not acceptable and improper in the democracy and human right. So the laws to legislate the popular morality, like forced marriage, should be enacted.

Typical example is the enforcement of Bill of Rights just needed few votes. Unless the supporting power is extremely strong, some laws should be enacted to follow the spirit of democracy and human right<sup>[2]</sup>. But sometimes some popular morality would not follow these spirits. Besides, laws can push the public to advance human right without mandatory measures. In last 20 years of 20 century, USA enacted the laws to increase the difficulties of divorce without implementation, but it really aroused the public's concern and they started to take divorce for serious thing<sup>[2]</sup>. In sum, if the morality is not legislated by the laws, the human right and democracy can't be protected. But some peoplesupport the both opinions. King is one of them. In 20C 60s, many American believed no any law can change the Caucasian's prejudice to the black people in USA because there are any frequent interactions between two races and the actions of congregations, parents and teachers lacked. These prejudice problems were planted in the people's minds deeply, which can't be correct by the laws. King agreed that morality can't be decided by the laws. It is useless to fight for democracy only by laws. However, he also argued that law can't make Caucasians and black people fell in love with each other but the laws could decrease the hurt from Caucasians on black people. The law still needed to be enacted to show the importance of pain of black people<sup>[3]</sup>. Besides, King had faith in the integration of law and morality. He identify the scientific their relationship at that time: equality and justice are the belief of American, but the Caucasians' attitudes breached their faith. This needed the laws to correct. To achieve the belief of people, laws, as the tools, are necessary<sup>[3]</sup>. It seems that King prefer to believe laws should legislate the morality. So morality is good sometimes but if people's actions are away from it, the law should be used because the law would force the people to behave with the morality.

## 2.2 Some difficulties in defining legislation and morality

Many researchers and evidence are in favor of that laws should legislate the morality. Because

law coming from the morality protects the morality as feedback: Following the example stated in second paragraph, the impact of anti-discriminations law on black people is significant. After the laws implemented to protect rights of black people, the rate of marriage between Caucasians and black people rise; According to Beem <sup>[3]</sup>, diligence and perseverance, democracy and freedom are the core values of American, James thought laws should be enacted to strengthen the form of these values; In 1996, USA took a welfare reform to subsidize the dependent children. Many American were afraid that it will encourage indolence, dependence and families breaking. But the consequence is opposite. But the law, Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), were implemented subsequently and emphasized the equality, reciprocity, dignity of work, responsibility of work etc. This law fits the values of American more. So many people who used to accept welfare become the working man, although they were still poor. But they had the jobs. So American tended to praise them and they were more willing to accept the aid of government and public organizations.

But there are some difficulties in defining legislation and morality, especially what is “good morals”. Some libertarians think it is improper to legislate for morality. But some reformers and conservatives think laws can be used to represent the morality. Perhaps morality is a kind of unwritten law in everyone's mind according to the former, but the morality should be presented by enforcements according to the latter. If the society can run as saying of Spragens (2001), everyone hold the good morals in order to build up a harmonious society. Then there is no need for government to enact the law. Because it is hard for government to judge what morals are good without partiality, which exceed the government's abilities and responsibilities. If everyone who aims to build up a good society, there no need for someone to impose the morals which are good in his minds on another. Because the concepts of good morals are controversial.

### 2.3 The disadvantages of legislation on morality

But the disadvantages of legislation on morality can't eclipse its advantages. There three ways that the laws can bring up the public's good morality. Firstly, the laws tell us what morality is good and seriously to warn we should follow it, especially in a liberal and democratic society (Spragens, 2001). Everyone has the right to protect their right to talk, to enjoy the life and equally works. However, some people would deprive their rights. The laws could tell the society that human right is important and list punishments to prevent the “bad morals” which hurt the others' human rights. Secondly, the laws can be the tool to express the sense of social morals, and recognize the values of the public and assume the responsibility to support morality (Spragens, 2001). The legislation is a kind of symbol of advanced culture. The mature and advanced society should include a systematical and scientific legislated morality. Otherwise this society would be thought that the sense of morality lacks. And legislated morality can guarantee the persistence of culture. In many modern societies with long history, like China, the Chinese's core values, in other words, the good morals are transmitted of thousands years. This can be attributed to their legislated morals. So the law is the strongest power to support the morality and the main subject to protect morals is law. Thirdly, the law can offer the incentives for the public to bring up good morals on their own initiatives <sup>[1]</sup>. Except from the punishment, the legislated morality could offer the sense of achievement for the public. Given the correct direction for the people to behave, they would attain honor when they obey the laws. And these honors can come from government, like titles, or the people themselves, like sense of fulfilment.

### 3. The necessity of legislated morality

Here are some cases discussed to analyze the necessity of legislated morality.

The first one is the “harmless wrongdoing”. In the liberal society, there is a controversy: some behaviors don't not only the others but themselves. There is no victim and these activities happen with the permission of each other. But they are immoral. Some people think the governments have no right to interfere in these private things. For examples, the sex between father and daughter, the sex between human and pets and the sex in other abnormal relationships are the cases meet the definition of “harmless wrongdoing”.

### 3.1 Harmless wrongdoing should be governed

In my opinions, these cases could have victims to some extent. For the public, if these things are leaked out, they will feel sick and get hurt psychologically. For their relatives and family members, these would seriously hurt them and even break their families. Actually, the law enacted to prevent these things can lessen the potential hazard rather than the explicit hazard. On the opposite, if the laws don't prohibit these, the public would think they are officially authorized. Except those who feel disgusted to these, some people who are addicted to these kinds of abnormal sex would take actions to attain these fun without hesitations and fear.

After that, the possibilities that father rapes daughter and the human abuse sexually pets might increase. The elements unsteady the society increase. So there are the victim existing, but these victims are potential and invisible.

Besides, these harmless wrongdoing should be governed by the laws to some extent. As is stated before, the laws have the function to express popular values in the public by the legislated morality. Let's see some comparisons. In Holland, people can divide sex and love rationally, majority of them enjoy sex affair and they can accept prostitute is a decent job. So the legislation admits and protects sex industries. However, in China, majority of Chinese thinks extramarital affair is not acceptable and prostitute is dirty. So the law in China prohibits sex industries to express the major morality of Chinese. Because these “harmless wrongdoing” are bad morals in major regions and countries, so they should be prohibited by laws. If the government don't manage these activities, the public would lose confidence in them because they can't assume the responsibilities to protect their morality. And then the public would doubt on the every decision of government, making the society runs slowly.

Some things seem harmless but there are lots of victims in fact. For the violence of HK in 2019, a leader of reactionaries, Denise Ho, said the protestors occupied the Legislative Council and broke the infrastructures were acceptable. Because they didn't hurt the others, they just broke the subjects without lifves to achieve their liberalism. I think it is an unreasonable argument. There are many victims actually. Firstly, although the subjects have no life, they are bought by the tax from the public. They had broken the property of the public actually. Secondly, they prevent the normal operation of the council, influencing thousands of people's welfare. Thirdly, they hurt not only the economy of HK but all Chinese's emotion. And the bad politicians would interfere in these activities and hurt the China further. It causes extremely serious consequence. She can't argue in an implausible manner that there is no hurt on any people so it is harmless. She breaks the connection between majority's morality and legislation. The laws should seriously to punish these kinds of behaviors.

### 3.2 Legislated morality is a kind of effective Paternalism

The second one is legislated morality is a kind of effective Paternalism. Lo had defined Paternalism<sup>[4]</sup>. It means that government will act like a father or treat people as if they were children. And Lo<sup>[4]</sup> had mentioned that during the Opium War, John Stuart Mill supported that Chinese have the rights to enjoy and buy the opium, and it was violating the Chinese's human right that Qing government prohibit these trade. So John Stuart Mill is typically against the Paternalism.

### 3.2.1 The irrationality of paternalism

From the characteristics of Paternalism, the unreasonable points his saying will be pointed out as follows:

Firstly, the purpose of paternalism is for the welfare, needs and interests of the persons, which is mainly divided into two situations: one is to prevent them from hurting themselves; another one is to promote their interests. At that time, Opium, as the newcomer in China, will seriously hurt the Chinese. Because the Chinese had not realized their potential hazards: Opium will hurt their body and brains; and cost them lots of money to buy the Opium. What is the most serious is that the Opium had the strong appeal for those who lack strong willpower. Suppose the Chinese knew the hazards of Opium, but they lack inner control to get far away from the Opium. So they can't help themselves falling in the trap of Opium, hurting their body, minds and families finally. So when the Chinese were not fully informed and non-voluntary, the government should legislate the morality to tell them what are "good morals" and limited their uncontrolled addict to Opium. It is ridiculous to say the prohibition on Opium is hurting the people's freedom and human rights. If the government didn't implement Paternalism, it is hurting the people's welfare.

### 3.2.2 Paternalistic measures restricting the freedom or rights of the people

Secondly, paternalistic measures are bound to restrict the freedom or rights of the people to varying degrees inevitably. Legal paternalism can be divided into direct paternalism and indirect paternalism for different compulsory objects. The former is a restriction on the freedom of the beneficiary. For an example, the law requires drivers to wear seat belts; the latter is a restriction on the freedom of the subject opposite to the beneficiary. The beneficiary may not always be the person whose freedom is restricted. For an example, it is forbidden to take the consent of the victim as the defense of the legal responsibility of pushing and dragging. This legal restriction mainly affects the perpetrators and limits their behavior, and to protect is the willing victim. When Qing government prevented UK from selling Opium in China, it is protecting the Chinese welfare although some Chinese were willing to be hurt by the Opium. In this case, Qing government followed the indirect paternalism. The law to prohibit this kind of trade was expressing the sense of morality and assuming the protection of morality. When the Qing government enacted the law to require Chinese not to take Opium and punish this purchase behavior. It followed the direct Paternalism. It was forcing its Children to obey the morality. Because at that time the Children lacked strong willpower to resist the temptation. They needed the law to supervise them. This case shows the importance of legislated morality.

## 4. Conclusions

In sum, law and morality have strong connections. 1) mutual restriction. Law is through legislation, implementation and enforcement to promote social harmony and stable development. While morality is to promote the abolition, modification and implementation of laws by scientific and correct evaluation; 2) there will be some moral provisions in the laws and regulations, and the legislated things will appear in the moral norms. Many rules and regulations in the law are evolved through moral norms, which contain moral spirit; similarly, there are many legal provisions in the moral norms. Especially in the value level, there is a close relationship between them. It can be easily seen that they are mutually penetrating and overlapping; 3) they are the results of mutual transformation and mutual absorption. The fundamental purpose of law and morality is the same, which is to ensure the harmonious and stable development of society. Specifically speaking, morality is the basis of law. What is stipulated in the code of ethics will also be reflected in the law,

which also reflects the result of legalization of morality. It can be seen that they are mutually absorbed; 4) interaction in the implementation process. Law and morality interact in the concrete implementation process. In the development of society, law and morality play important roles in maintaining social stability. It is worth noting that the law should be based on morality and should not be regarded as omnipotent. Therefore, only the organic integration of law and morality can better promote the harmonious and stable development of society.

The morality should be legislated, which will not only benefit itself by the forms of laws but advance the progress of society.

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