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RELATIONSHIP BETWEEN LAW AND MORALITY: A CRITICAL STUDY WITH SPECIAL REFERENCE TO THE THEORY OF H.L.A. HART

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I. ABSTRACT

This research paper critically examines the relationship between law and morality with special reference to H.L.A. Hart's positivist theory. The study focuses on Hart's separation thesis, according to which the existence and validity of law are conceptually distinct from the moral merit of law. It explains Hart's distinction between primary and secondary rules, the rule of recognition, the internal point of view, and his minimum content of natural law. The paper then considers Lon Fuller's response, particularly the inner morality of law and the eight principles of legality, and applies the Hart-Fuller debate to the German 'Grudge Informer' case arising from the Nazi period. The analysis also considers objections raised by Ronald Dworkin and John Finnis, together with Joseph Raz's exclusive-positivist reply, and examines Hart's later accommodation of moral criteria through the idea of inclusive positivism. The study further considers the relevance of these theories to contemporary constitutional systems, with particular reference to India and the relationship between constitutional validity, fundamental rights, and constitutional morality. The research adopts a doctrinal and analytical methodology, relying on primary and secondary legal materials, including Hart's works, Fuller's writings, leading jurisprudential scholarship, and relevant case law. The paper finds that Hart does not deny the practical relationship between law and morality; rather, he rejects the claim that moral validity is a necessary condition of legal validity. At the same time, Hart's minimum content and inclusive positivism demonstrate the practical possibility of moral criteria entering legal systems through accepted legal rules. The paper therefore treats the Hart-Fuller debate as a continuing analytical framework for understanding the distinction and

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interaction between legality, morality, and constitutional values.

II. KEYWORDS

Law and Morality; H.L.A. Hart; Separation Thesis; Inclusive Positivism; Constitutional Morality.

III. INTRODUCTION AND RESEARCH PROBLEM

The relationship between law and morality is one of the oldest and most contested questions in legal philosophy. It asks whether legal validity is, or ought to be, dependent upon moral content, or whether law is properly understood as a discrete social phenomenon identifiable by purely factual, non-moral criteria. Few twentieth-century jurists shaped this debate as decisively as Herbert Lionel Adolphus Hart, whose 1958 Harvard Law Review essay, *Positivism and the Separation of Law and Morals*, and his 1961 masterwork, *The Concept of Law*, revived and refined the positivist tradition inherited from Bentham and Austin.³

This paper critically examines Hart's account of the law-morality relationship, situates it against the natural-law response of Lon Fuller, and tests both positions against the German 'Grudge Informer' case decided by the Court of Appeal (Oberlandesgericht) at Bamberg on 27 July 1949.⁴ It then assesses the continuing relevance of Hart's separation thesis to contemporary legal systems, including constitutional orders such as India's, where moral and constitutional values are textually entrenched.

The central research problem concerns the conceptual and practical relationship between legal validity and moral value. The problem arises from the disagreement between positivist and natural-law approaches as to whether an immoral rule can still qualify as valid law. Hart separates the identification of law from its moral evaluation, while Fuller argues that the very enterprise of governing through rules contains an inner morality. The German 'Grudge Informer' case demonstrates the

³ H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harv L Rev* 593.

⁴ *Oberlandesgericht Bamberg*, 27 July 1949, (1950) 5 *Süddeutsche Juristen-Zeitung* 207; Hart, 'Positivism' (n 3) 615-21; H L A Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) ch IX.

practical difficulty of deciding how courts should respond to laws associated with an unjust regime. The problem is therefore to determine how Hart's separation thesis should be understood alongside the role of moral principles, procedural legality, constitutional values, and judicial reasoning in contemporary legal systems.

A. Research Objectives

1. To examine H.L.A. Hart's separation thesis and its significance for understanding legal validity.
2. To analyse Hart's rule of recognition, internal point of view, and minimum content of natural law.
3. To examine Lon Fuller's inner morality of law and the principal objections to Hart's positivist position.
4. To analyse the German 'Grudge Informer' case and its significance to the Hart-Fuller debate.
5. To assess the continuing relevance of the Hart-Fuller debate to contemporary constitutional systems, particularly India.
6. To propose recommendations for judicial reasoning, constitutional adjudication, and legal education arising from that debate.

B. Research Questions

1. What is Hart's separation thesis and how does it distinguish legal validity from moral evaluation?
2. How do the rule of recognition and the internal point of view support Hart's account of legal systems?
3. To what extent does Fuller's inner morality of law challenge Hart's positivism?
4. What does the German 'Grudge Informer' case reveal about the relationship between legality and morality?
5. How relevant are Hart's ideas to constitutional systems in which legal validity may incorporate moral and rights-based criteria?

6. What recommendations follow from the debate for courts confronting unjust legal regimes and for constitutional adjudication in India?

C. Research Hypothesis

The study proceeds on the hypothesis that Hart's separation thesis remains analytically useful because legal validity can be identified through socially accepted legal criteria without making moral merit a necessary condition of validity; however, contemporary legal systems may incorporate moral and rights-based criteria through their own rule of recognition, thereby producing a contingent and institutionally recognised relationship between law and morality.

D. Research Methodology

This research adopts a doctrinal and analytical legal research methodology. It relies primarily on authoritative jurisprudential writings and relevant judicial decisions discussed in the paper. The principal materials include H.L.A. Hart's *Positivism and the Separation of Law and Morals* and *The Concept of Law*, Lon Fuller's *Positivism and Fidelity to Law* and *The Morality of Law*, and the works of Ronald Dworkin, John Finnis, and Joseph Raz.

The study also examines the German 'Grudge Informer' case and the Indian constitutional context, including *Kesavananda Bharati v State of Kerala*, *Suresh Kumar Koushal v Naz Foundation*, *Justice K S Puttaswamy (Retd) v Union of India* and *Navtej Singh Johar v Union of India*. The materials are analysed comparatively and critically to identify the points of agreement and disagreement between positivism, natural-law reasoning, and inclusive positivism.

E. Literature Review

The literature surrounding the relationship between law and morality is represented in this study through the principal works already examined in the paper. Hart provides the central positivist framework by distinguishing the existence of law from its moral merit and by developing the concepts of the rule of recognition and the internal point of view. Fuller responds by arguing that legality itself contains an inner morality expressed through procedural requirements.

Dworkin challenges Hart's rule-based model by emphasising the role of moral principles in adjudication, while Finnis develops a modern natural-law account centred on the common good. Raz represents a stricter positivist approach concerning the relationship between law and morality and authority.

The existing debate therefore reveals a continuing tension between the social identification of law and the moral principles that influence legal interpretation, legitimacy, and constitutional adjudication. The present paper brings these positions together with the German 'Grudge Informer' case and the Indian constitutional context.

IV. RESEARCH AND ANALYSIS

A. The Classical Divide: Natural Law and Positivism

Long before Hart, the law-morality question had already produced two rival traditions. The natural-law tradition, running from Aquinas through Blackstone, held that an unjust law is, properly speaking, not law at all: the maxim *lex injusta non est lex* captures this fusion of legality and morality.⁵ Positivism, by contrast, emerged as a reaction against this fusion. Jeremy Bentham and John Austin insisted that law is simply the command of a sovereign backed by sanction, and that its validity has nothing to do with its moral merit.

Austin's command theory, however, proved analytically thin: it could not explain continuing legal obligation after a sovereign's death, nor could it account for power-conferring rules such as those governing wills and contracts. Hart's project was to rescue positivism from these Austinian weaknesses while preserving its central insight that the existence of law and its merit or demerit are two separate questions.⁶

B. Hart's Positivist Position: The Separation Thesis

⁵ Thomas Aquinas, *Summa Theologiae*, I-II, qq 95-96; William Blackstone, *Commentaries on the Laws of England*, vol 1 (Clarendon Press 1765) Introduction, s 2; Hart, 'Positivism' (n 3) 615-21.

⁶ Jeremy Bentham, *Of Laws in General* (H L A Hart ed, Athlone Press 1970); John Austin, *The Province of Jurisprudence Determined* (first published 1832, Weidenfeld & Nicolson 1954); Hart, *The Concept of Law* (n 4) chs II-IV.

Hart's central claim, famously termed the 'separation thesis', is that there is no necessary conceptual connection between law and morality,⁷ even though the two are frequently and contingently connected in practice. In *Positivism and the Separation of Law and Morals*, Hart argued that the question 'what is law?' is distinct from the question 'what ought the law to be?'

A rule may be valid law, in the sense of having been enacted according to the accepted criteria of a legal system, even though it is morally repugnant. Hart illustrated this through the example of Nazi statutes: such statutes could be valid law under German legal criteria of the time, while still being condemned as gravely immoral.⁸

For Hart, collapsing this distinction by insisting that immoral enactments are automatically void obscures rather than illuminates moral criticism of law, because it removes the vocabulary needed to say 'this is law, and it is iniquitous', replacing it with the weaker and more confusing claim that the rule was never law at all.⁹ Hart's positivism does not deny that morality influences the content of many legal systems, nor that judges often invoke moral standards when interpreting open-textured rules.

His claim is narrower and more precise: legal validity, as a matter of the internal logic of a legal system, depends on pedigree, that is, on whether a rule has been produced according to the system's own rule of recognition, and not on the rule's conformity with any external moral standard. This is sometimes called the 'social thesis': what counts as law in any community is ultimately a social fact, identifiable without recourse to moral argument.

C. The Rule of Recognition and the Internal Point of View

Central to Hart's account in *The Concept of Law* is his distinction between primary rules, which impose duties, and secondary rules, which confer powers to create,

⁷ Hart, 'Positivism' (n 3) 593-600.

⁸ *ibid* 615-21.

⁹ Hart, 'Positivism' (n 3) 615-21; Hart, *The Concept of Law* (n 4) ch IX.

change, and adjudicate primary rules.¹⁰ The most important secondary rule is the ‘rule of recognition’, an ultimate, socially accepted test by which the validity of all other rules in the system is determined,¹¹ for instance, ‘what the Queen in Parliament enacts is law’ in the English system, or the provisions of a written Constitution in others.

Officials must accept this rule from an ‘internal point of view’,¹² treating it as a shared standard of conduct rather than merely predicting sanctions, as Austin’s and the American Realists’ external, sanction-based accounts would suggest. Crucially, Hart maintained that the content of a rule of recognition is a matter of actual official practice; it need not, though it may, include moral criteria such as respect for fundamental rights.

This is what separates Hart’s ‘soft’ or ‘inclusive’ positivism from the ‘hard’ or ‘exclusive’ positivism of later writers such as Joseph Raz, since Hart accepted that a particular legal system’s rule of recognition could, as a contingent matter, incorporate moral tests for validity, for example, where a constitution makes conformity with fundamental rights a condition of a statute’s validity, without thereby abandoning positivism’s core claim that this incorporation is not conceptually necessary.¹³

D. The Minimum Content of Natural Law

It is a common misconception that Hart’s positivism denies any connection whatsoever between law and morality. In fact, Hart himself proposed what he called the ‘minimum content of natural law’.¹⁴ Given certain truisms about the human condition, namely human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will, any viable legal system will, as a matter of survival necessity, contain rules resembling moral

¹⁰ Hart, *The Concept of Law* (n 4) ch V, 79-99.

¹¹ *ibid* 94-95, 100-10.

¹² *ibid* 55-61, 88-91; Postscript, 254-59.

¹³ *ibid*, Postscript, 250-54.

¹⁴ Hart, *The Concept of Law* (n 4) 193-200.

prohibitions on violence, rules protecting property, and rules requiring the keeping of promises. This is a descriptive, near-universal convergence rather than a conceptual necessity; Hart insisted it does not establish that morally deficient rules are legally invalid, only that functioning legal systems tend, for practical reasons, to overlap substantially with core moral requirements.¹⁵

E. Fuller's Response: The Inner Morality of Law

Lon Fuller mounted the most sustained contemporary challenge to Hart's separation thesis, replying directly to Hart's 1958 article in the same volume of the *Harvard Law Review*, and later elaborating his position in *The Morality of Law* (1964; revised edition 1969).¹⁶ Fuller argued that law is not morally neutral machinery but a purposive enterprise, 'the enterprise of subjecting human conduct to the governance of rules', and that this enterprise carries with it an 'inner morality', a set of procedural requirements that any system of rules must substantially satisfy to count as law at all.

Fuller identified eight such requirements, famously illustrated through the parable of King Rex: laws must be general, publicly promulgated, prospective rather than retroactive, understandable, free of contradictions, possible to comply with, reasonably stable over time, and administered in a manner congruent with their stated terms.¹⁷ A system that systematically fails these criteria, Fuller argued, is not simply bad law but a failure of legality itself; it cannot properly be called a legal system at all.¹⁸ Fuller's inner morality is procedural rather than substantive: it does not guarantee that laws will be just in their content, but it insists that certain formal, moral-adjacent constraints are built into the very idea of governing through rules.¹⁹

On this basis, Fuller contended that Nazi enactments, having frequently violated publicity, non-retroactivity and congruence between rule and enforcement, were so

¹⁵ *ibid* 199-200.

¹⁶ Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harv L Rev* 630; Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969).

¹⁷ Fuller, *The Morality of Law* (n 16) 33-38.

¹⁸ *ibid* 39.

¹⁹ *ibid* 38-39.

deficient in legality that courts confronting them after 1945 were not, as Hart supposed, retroactively punishing conduct that had been lawful, but were recognising that the Nazi 'law' had, to a significant degree, forfeited its claim to be law.²⁰

F. Application: The German 'Grudge Informer' Case

The debate crystallises most sharply in the post-war German 'Grudge Informer' case, decided by the Court of Appeal (Oberlandesgericht) at Bamberg on 27 July 1949. A woman denounced her husband to the Nazi authorities for disloyal remarks about Hitler. The denunciation invoked the anti-sedition laws of 1934 and 1938, namely the Treachery Act of 20 December 1934 and the wartime Special Penal Law Decree of 1938, and it led to a court-martial that sentenced him to death; the sentence was not carried out, and he was placed on probation and sent to the front.

After the war the wife was prosecuted for illegally depriving her husband of his liberty under section 239 of the German Penal Code of 1871. The court held that her denunciation was unlawful because the statutes she had invoked were contrary to the sound conscience and sense of justice of all decent human beings.²¹ Fuller broadly endorsed this reasoning as consistent with his procedural-moral critique of the Nazi legal order. Hart, however, thought the court's approach concealed a moral choice behind the fiction that the statute had never been law.

He preferred the alternative of treating the statute as valid law at the time, while enacting frank, openly retroactive legislation to punish those who had exploited that odious law, a course that, in Hart's view, would have confronted the moral dilemma honestly rather than through the 'pretence' that no genuine conflict between law and morality had existed. Both positions agree that the informer's conduct deserved condemnation; they disagree on whether the vocabulary of legal invalidity or the vocabulary of retroactive punishment is the more intellectually honest device for

²⁰ Fuller, 'Positivism and Fidelity to Law' (n 16) 650-61.

²¹ *Oberlandesgericht Bamberg*, 27 July 1949 (n 4); Hart, 'Positivism' (n 3) 618-21; Fuller, 'Positivism and Fidelity to Law' (n 16) 652-54.

expressing that condemnation.²²

G. Critical Evaluation

Hart's separation thesis has considerable analytical strength: it provides a clear, socially verifiable test for what counts as law, preserves the possibility of trenchant moral criticism of valid law, and avoids the definitional sleight-of-hand by which inconvenient rules are simply defined out of existence. Yet the thesis faces serious objections. Fuller's procedural critique exposes a genuine connection between legality and morality that Hart's model does not fully capture: a system of secret, retroactive, or systematically unenforced rules seems intuitively to fail as law, independent of its content.²³

Ronald Dworkin, Hart's successor at Oxford, pressed a further and more fundamental challenge in *Taking Rights Seriously*, arguing that Hart's model of law as a system of rules identified by a master rule of recognition cannot account for the role of moral principles, such as the principle that no one shall profit from their own wrong, which judges treat as binding even though such principles are not traceable to any pedigree test, and which often determine outcomes in hard cases.²⁴ Dworkin's illustration is *Riggs v Palmer*, in which the New York Court of Appeals denied a grandson his inheritance under an otherwise valid will because he had murdered the testator.²⁵ No enacted rule of testamentary law disqualified him, and the court relied instead on an unenacted principle.

The case works as a counter-example to a pedigree test because the standard that decided it could not have been identified by tracing its social source. Hart's reply in the Postscript is that principles of this kind are not fatal to his account: a rule of recognition may itself admit principles, and the weight they carry in adjudication does not show that their legal status rests on anything other than official practice.²⁶

²² Hart, 'Positivism' (n 3) 619-21.

²³ Fuller, 'Positivism and Fidelity to Law' (n 16) 644-48.

²⁴ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 22-28.

²⁵ *Riggs v Palmer* 115 NY 506 (1889) 511.

²⁶ Hart, *The Concept of Law* (n 4) Postscript, 259-63.

John Finnis, reviving a more sophisticated natural-law theory in *Natural Law and Natural Rights*, argued that Hart's own 'minimum content' concession implicitly acknowledges that law is best understood as directed toward the common good, undermining strict separation from within.²⁷ From the opposite direction, Joseph Raz's sources thesis holds that the existence and content of law must always be determinable by reference to social sources alone, so that Hart's inclusive turn is a concession exclusive positivism cannot allow.²⁸

Even Hart's own Postscript to the second edition of *The Concept of Law* partly accommodated these critiques by conceding that a rule of recognition may, as a matter of contingent social fact, include moral criteria, a position that blurs without abandoning the separation thesis.²⁹ On balance, Hart's reply to Dworkin is the stronger of the two responses, because it preserves the descriptive claim that the authority of principles still rests on what officials actually accept. Raz's objection, however, exposes the cost of that reply: inclusive positivism purchases accommodation at the price of the very test of identification that positivism was designed to supply.

H. Continuing Relevance to Contemporary Legal Systems

The Hart-Fuller debate remains directly relevant to constitutional democracies, and the Indian experience illustrates why three distinct tests must be kept apart.

First, ordinary legislation is tested directly against Part III of the Constitution: a statute inconsistent with the fundamental rights is void to that extent under Article 13.

Secondly, constitutional amendments are tested against the basic structure doctrine, which the Supreme Court developed in *Kesavananda Bharati v State of Kerala*, holding that Article 368 does not empower Parliament to alter the basic structure of the Constitution,³⁰ and overruling *Golak Nath*, which had treated a constitutional

²⁷ John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 7.

²⁸ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) ch 3.

²⁹ Hart, *The Concept of Law* (n 4) Postscript, 250-54.

³⁰ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225; AIR 1973 SC 1461.

amendment as 'law' within Article 13(2).³¹ The doctrine therefore governs amendments, not ordinary statutes, and it was applied in that form in *Minerva Mills*.³²

Thirdly, constitutional morality operates not as a test of validity but as a standard of reasoning by which courts interpret rights and assess the justifications offered for restricting them. Each map onto Hart's framework differently. The first two show a rule of recognition that has, as a contingent matter, incorporated substantive moral and rights-based criteria, which is precisely the inclusive positivism Hart's Postscript anticipated.³³ The basic structure doctrine, however, is judge-declared rather than textual, and that puts real pressure on Hart's requirement that the rule of recognition rest on convergent official practice: its content was settled by the courts themselves and is accepted by other officials because the courts declared it.

1. Constitutional Morality in Indian Adjudication: From Koushal to Navtej

The contest between deference to enacted law and reasoning from constitutional values is most clearly traced in the litigation over section 377 of the Indian Penal Code. In *Suresh Kumar Koushal v Naz Foundation* the Supreme Court upheld the provision, reasoning from legislative competence, the presumption of constitutionality, and prevailing social morality.³⁴ That reasoning is recognisably Hartian: the rule had been validly enacted and remained in force, whatever its merits. In *Navtej Singh Johar v Union of India* the Court overruled *Koushal* and read down section 377, holding that constitutional morality must prevail over social morality.³⁵

It relied on *Justice K S Puttaswamy (Retd) v Union of India*, in which a nine-judge Bench recognised privacy as a fundamental right and treated sexual orientation as an essential attribute of it.³⁶ The sequence parallels the Hart-Devlin debate conducted

³¹ *Golak Nath v State of Punjab* AIR 1967 SC 1643.

³² *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

³³ Hart, *The Concept of Law* (n 4) Postscript, 250-54, 263-68.

³⁴ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

³⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; AIR 2018 SC 4321.

³⁶ *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

over the Wolfenden Report, in which Hart defended limits on the law's enforcement of morals against Devlin's claim that a shared morality forms part of the bonds holding society together.³⁷

The Indian position, on this reading, is neither Fuller's nor Devlin's. The Court did not hold that section 377 had never been law, nor did it defer to popular morality; it identified a moral criterion already incorporated in the rule of recognition and applied it. Transitional-justice contexts reproduce the same dilemma. The German Federal Constitutional Court applied Radbruch's reasoning to the East German border-guard prosecutions, holding that a justification available under the law of the German Democratic Republic could be disregarded where it conflicted intolerably with elementary principles of justice.³⁸

V. SUGGESTIONS AND RECOMMENDATIONS

First, courts confronting the legacy of an unjust regime should prefer transparent retroactive legislation to the retrospective denial of legal validity. A Radbruch-style threshold, under which positive law yields to justice only where the conflict becomes intolerable, remains defensible as a narrow exception;³⁹ but where the legislature is able to act, frank retroactivity states the moral choice openly instead of concealing it in a finding that the statute was never law.

Secondly, Indian courts should anchor constitutional morality to identifiable constitutional text and precedent. Where the standard is tied to specific provisions and to the reasoning in decisions such as *Puttaswamy* and *Navtej*, it functions as an incorporated criterion of validity; where it floats free of both, it risks becoming an unreviewable judicial preference and weakens the convergent official practice on which the rule of recognition depends. Thirdly, the basic structure doctrine would

³⁷ H L A Hart, *Law, Liberty and Morality* (OUP 1963); Patrick Devlin, *The Enforcement of Morals* (OUP 1965).

³⁸ BVerfGE 95, 96 (Bundesverfassungsgericht, 24 October 1996) (East German border guards; Radbruch formula applied); Hart, 'Positivism' (n 3) 617-21; Fuller, 'Positivism and Fidelity to Law' (n 16) 650-61.

³⁹ Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1 *Süddeutsche Juristen-Zeitung* 105.

gain in legitimacy if judgments identified, in each case, the specific constitutional provisions from which the feature said to be basic is drawn.

Fourthly, jurisprudence teaching in India should present the Hart-Fuller debate alongside Indian constitutional litigation rather than as isolated Western theory, since the sequence from *Koushal* to *Navtej* supplies a domestic illustration of the same choice.

Finally, further research should test the inclusive-positivist reading of Indian constitutional practice empirically, by examining whether and how judges treat moral criteria as criteria of validity rather than as considerations of interpretation.

VI. CONCLUSION

Hart's separation thesis performs an indispensable analytical service: it disciplines legal reasoning by insisting that the question of what the law is should not be silently answered by what we wish the law to be. Yet the debate with Fuller, sharpened by Dworkin's and Finnis's later interventions and by Raz's exclusive-positivist reply, demonstrates that the relationship between law and morality cannot be reduced to a simple binary of connection or separation.

Hart's own concessions, the minimum content of natural law and the inclusive rule of recognition of the Postscript, reveal a jurist who, while defending the conceptual separability of law and morals, never denied their deep and recurring entanglement in practice. The most defensible position, on balance, is a moderate, inclusive positivism: law is identified by social criteria of validity, but those criteria may, and in constitutional democracies increasingly do, embed substantive moral commitments, so that the separation thesis survives not as an assertion that law and morality are unrelated, but as a reminder that their relationship is a contingent achievement of each legal order, not a conceptual necessity of law as such.⁴⁰

The recommendations advanced above follow from that position: transparent retroactivity in preference to retrospective invalidity, constitutional morality

⁴⁰ Hart, *The Concept of Law* (n 4) 193-200, Postscript, 250-54.

anchored in text and precedent, and a basic structure doctrine that identifies its textual sources.

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