

Censorship Bans on Art from the Perspective of *The Morality of Law*

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I INTRODUCTION

This article seeks to prove that the current developments in censorship, such as the ban of certain forms of art in anime is not a law in character from the perspective of *The Morality of Law*. This is because although this ban is law for semantic purposes, it violates the definition of natural law set out in *The Morality of Law*. It thus violates natural law and is hence not law. Natural Law is acknowledged in law; such as in common law¹.

II WHAT IS NATURAL LAW

As there are many conceptions on what natural law is, this article will use a modern 20th century concept, that of Professor Lon L. Fuller.

III NATURAL LAW ACCORDING TO PROF. FULLER

Fuller's conception of natural law can be found in *The Morality of Law*. Scholars have traced the natural law foundations of the American constitution, and this a piece of evidence that the concept of natural law is behind the legal system². Fuller uses the concept of internal morality of law as an “essential condition of that power itself”³. This “internal morality of law” is a variant of natural law as claimed by Prof. Fuller, and is procedural, governing whether a law is to be “efficacious and at the same time remain what it proports to be”⁴. Thus, “internal morality of law” are a set of rules every law must obey to be effective as law. The use of the word “morality” in no way implies that morality is universal and definite as Fuller explains that this concept “can be said to be neutral over a wide range of ethical issues”⁵. Even if it could be proven that there are universal morals, not all morals used in law can qualify to be so.

Before moving on to explain these procedural requirements, this article would like to

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1 Richard O'Sullivan, 'Natural Law and Common Law' (1945) 31 *Transactions of the Grotius Society* 117, 118.

2 Lon L Fuller, *The Morality of Law* (1964) 99.

3 Ibid 155.

4 Ibid 96, 97.

5 Ibid 162.

highlight that Fuller says that “if a legislator is attempting to remove some evil and cannot plainly identify the target at which his statute is directed, it is obvious he will have difficulty in making his laws clear”⁶. Can “obscenity”, the target of this new wave of censorship, be accurately defined in fixed terms? This article suggests it cannot as there are contradicting standards of “obscenity”. To illustrate this dilemma, this article will use South Africa in the apartheid days in *The Morality of Law* as an analogy; “the same person may in the result fall into different racial categories under different statutes... the absence of uniformity of definition flows primarily from the absence of uniformity or scientific basis of race classification”⁷. In the same way, how can you define what “promotes violence” or “promotes exploitation” when there is no way to achieve uniformity but to set artificial standards, do you simply ban everything that has the slightest element of “violence” or “exploitation” in it?

IV DOES A BAN ON CERTAIN FORMS OF ART SATISFY THE INTERNAL MORALITY OF LAW”

There are eight elements in Fuller's “internal morality of law”, but for the purposes of this argument, we will only focus on clarity, observability, and generality as all others are satisfied.

A Clarity

The most obvious way a ban on certain forms of fiction can fail to achieve “internal morality” is on clarity. To fail the requirement of clarity means that there is “enactment of contradictory rules”⁸. Fuller splits this general statement to two sections, the “the clarity of laws” and “contradictions of laws”⁹. For the purpose of this section, we will first look at “the clarity of laws”. Using the example of “lolicon art¹⁰”, this article poses a question; for the purposes of art, defines a child? Is it their height? Bust size? Facial features? Is it their mentality? The indefinite nature of this makes this ban impossible to follow without producing injustice in some cases unless you ban all forms of drawn pornography or at least set artificial boundaries; such as the legal age of consent of 18. One would have to wonder whether there is any point of legislating that law with an artificial boundary since it is so easily bent by the artist's imagination. Fuller writes that “obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without

6 Ibid 159.

7 Ibid 160.

8 Ibid. 39.

9 Ibid 63,65.

10 *Lolicon art*, in its Western meaning, is the erotic depiction of “children” or “young” characters in contemporary Japanese visual culture, notably anime and manga. “Kodomo no Jikan” is an example very close to *lolicon art* because of its depiction of children in erotic circumstances, only falling short of the definition of *lolicon art* because of lack of explicit imagery.

unauthorised revision which itself impairs legality”¹¹. Due to the flexible nature on what a “child” looks like, there will be judicial activism and the different interpretations will lead to “contradictions of laws”. This consequential judicial activism spills over to the generality.

The only exception to what has been said regarding clarity is that if you use a common sense standard such as “good faith” and “due care” as Fuller says, “sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgement that have grown up in the ordinary life lived outside legislative laws”¹². However, this does not mean “common sense” should always be used in all standards. Fuller acknowledges this and cites Hayek who says:

One could write a history of the decline of the Rule of Law... in terms of the progressive introduction of these vague formulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature¹³.

This is why offending the requirement of clarity is still possible despite using a “common sense” standard. Fuller also writes in an earlier statement that:

it is a serious mistake – and a mistake made constantly – to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rule, he can always safely delegate this task to the courts or to special administrative tribunals. In fact, however, this depends on the nature of the problem which delegation is concerned¹⁴.

Hence, there is likely little excuse for vagueness with regards to the definition of “child” with the case of “lolicon art” especially because of the wide range of ways to draw characters. There is a need to have some kind of legally clear line between what is a “child” or what is an “adult” in art. This should not be done solely by the courts because it will either be uncompromisingly broad or ineffectually narrow if the statute definition is vague. Clarity will only happen if the courts reach some kind of uniform decision, if not there will nevertheless be legal uncertainty. In fact, there will be no clarity before the courts decide on the issue anyway. The problem though is, with something as diverse as art, can you give a legally satisfactory definition of a “child” in art ?

Clarity also requires that there be no “contradictions in the laws”. One of the ways a contradiction can occur is “in the logical sense”¹⁵. An example of this can be found in *The Morality of Law*. Fuller says:

11 Above, n 2, 63.

12 Ibid 64.

13 Friedrich August von Hayek, *The Road to Serfdom* (The Definitive edition, 2007) 116.

14 Above n 2, 64.

15 Ibid, 65.

In a single statute, we may suppose, are to be found two provisions: one requires the automobile owner to install new license plates on January first; the other makes it a crime to perform any labor on that date. Here there seems to be a violation of the law of identity; an act cannot be both forbidden and commanded at the same time.

With the case of “lolicon art”, banning it on the basis that the image “looks like a child”, would cause a “contradiction of laws” with the law that states “all persons legally adults can participate in pornography”. This is especially because there is a whole industry based on “child like” pornography actresses. If images or videos are banned as child porn on the basis that the characters “looks like a child”, then there will be a clear contradiction of laws as some of these “child actresses” really do look “like children” hence materials using them would be illegal and yet legal because they are of the age of consent. This is a clear contradiction. The only way to prevent this contradiction is to legislate that only art which does not include pictures or video of real legal women depicting “child-like” characters are illegal. A question of policy rather than law rises up if this is done: Why should there be a distinction between “child-like” images merely because of their origin? If you wish to ban “lolicon art” on the basis that it encourages child sex abuse, shouldn't you ban any depiction of children at all regardless of medium? Yet, if you were to go all the way and make even real actresses unable to act because they “look like a child”, one would have to ask what kind of justification they have to discriminate in such a way, depriving the AV actress of her choice of livelihood.

As it is impossible to determine the age of a drawn character, one would have to wonder why is it not sufficient to just require the age of all drawn characters to be claimed as 18 and above since “children” are depicted in mainstream pornography anyway. That would solve the problem of making clear legal definitions and remind viewers the harsh reality that the images they see are not of children without having to cause contradiction problems. As mentioned earlier, this law would have to satisfy “the clarity of laws” and there must be no “contradiction of laws”. Thus, although not necessarily, there is great potential for this law to have no clarity.

B *Observability*

“Internal morality” requires observability, which means that legal rules will fail if they require the impossible¹⁶. The standard of proof for most criminal cases in countries with an adversarial system; is “beyond a reasonable doubt”, not the civil “on the balance of probabilities” so can you truly say, in the case of “lolicon art” that, “beyond a reasonable doubt”, a drawing is that of a child? This “beyond a reasonable doubt” requirement can potentially invalidate “common sense

¹⁶ Ibid, 70.

judgements” mentioned earlier, depending on the case. What if the character's personality is that of an adult, doesn't it make it no longer a child? What if that is not a child but a midget? Drawing simplifies bodily features and makes it near impossible to discern age in all circumstances; so how can you say that it is “beyond a reasonable doubt” a “child” to but the most extreme cases? Perhaps the only non arbitrary case of whether a character is a “child” is if you draw an infant/child to strict anatomical similarity. The likelihood of that happening in the case of anime is nearly nothing. And in the case of banning “extreme pornography” what is the criteria for its definition? Yes, you can give set categories, but these are artificial and not without an extensive grey area. Thus, these laws are attempting to define the indefinite. This will set a precedent for a law, that is impossible to follow at all times because no one will always know whether they are obeying the law; if not already done so. A ban on fiction of this kind that would not have to be arbitrary by definition cannot be achieved unless you ban all drawn pornography. In this social climate, where pornography is in culture; is going to be near impossible because no one would obey.

Furthermore, the demands imposed by an objective test on what is “obscene” or “extreme” mean that no existing test is satisfactory nor can there be one, given their indefinite nature. Definitions of this kind rely on an objective test because a subjective test can be used to warp definitions to whatever the prosecution pleases, unlike matters such as the *mens rea* (intent) of an alleged murderer to kill which is justifiably subjective. If you argue that the determination of what in fiction is a child or what is extreme is possible and should be that of a reasonable man, on the *clapham omnibus* (reasonable “ordinary” man); let it be reminded that it is a standard for the tort of negligence, which is civil law, not criminal law. Criminal law usually, if not always, requires higher standards due to the gravity of the crime. This would mean most countries with influences from the English legal system, including countries with influences from the US, like Japan; *prima facie* (on the face of it) should not use this reasonable man standard even if they already do so. “Obscenities” or “extremes” have no definite, objective meaning. Hence, all that have punished those for “artistic obscenities” have failed to truly satisfy the requirements of “beyond a reasonable doubt” and are only fulfilling artificial legislative requirements or bad precedent as even good defences can fail. Only the most extreme cases such as when the drawing is anatomically accurate to a child and/or the original work has somehow directly asserted that that piece of art is a child by its creator, is “beyond a reasonable doubt” satisfied. Though not entirely objective, it should fit the legal requirement of objectivity.

However, the author advises the reader not to draw a conclusion before reading later arguments. Regarding the example of “lolicon art” being defined, even if there was an artificial set

definition, which *prima facie* (on the face of it) is observable; as art is so flexible this would either result in a law with major loopholes or with unobservable breadth. It may be better to have not to have a law at all regarding this issue. As mentioned earlier in the “beyond reasonable doubt” part of the argument, the only somewhat objective way to stipulate a drawing is that of a child, besides the earlier example of a drawing of a photo-realistic infant/child; is if it is somehow asserted in the piece of fiction that the drawing is that of a child by the artist/creator of fiction and corroborated (supported with different evidence) that there are child like features. The former statement implies that if a drawing looks like a child to the layman and is asserted to be a child by its creator, it is “beyond a reasonable doubt” a child. This is only objective in the most extreme circumstances, as an artist can draw an “adult” and claim it as a “child”, making it no longer an “adult”. This would mean merely claiming an image to be that of a child is insufficient unless supported with other evidence as in the earlier example. One can snidely remark that the only likely objective way to determine “child” in art, is in the case of a photo-realistic “child” anyway. In the case of anime, this is not what it seeks to do. Let it be reminded that even if Fuller's “internal morality of law” can be proven to exist in this form of law, there still rests the issue of rule of law, not discussed fully in this article.

A counter-argument to the general idea of what has been said so far, in the context of observability, can be found in Fuller's *The Morality of Law* itself; which states that law should not cease “commanding the impossible” but rather “define as clearly as possible the kind of activity that carries a special surcharge of legal responsibility¹⁷”. Although it is possible to define the activity, which carries that surcharge unsatisfactorily – for instance, drawing a child is when you draw a person with no pubic hair – Fuller makes a statement later which makes this counter-argument void, even if some of these rules can actually be followed in the following paragraph onwards.

Banning certain forms of art for promoting violent or otherwise *exploitative* behaviour, when accompanied with a jail sentence if disobeyed, implies a strict criminal liability to the artist or possessor of fiction. This kind of law by Fuller's definition refers to “laws under which a man may be found guilty of a crime though he acted with due care and with an innocent intent¹⁸”. As discussed earlier, the definition of “obscene” or “extreme” is a very flexible concept, with many interpretations. This results in guilt even though one acts with due care because since the definition of what is “obscene” or “extreme” is so arbitrary, the slightest mistake, for example drawing or merely possessing the image of a character “child-like height” can be interpreted as drawing a “child” and thus guilty of the offence, taken that the prosecution can bend the definition of “child”

17 Ibid 75.

18 Ibid 77.

to prove their case. The same goes for “extreme”. Since these definitions are so unclear and indefinite, how can anyone be expected to obey them at all times? Even if you had a list of activities of what is “obscene” or “extreme”, the precise definitions of these activities may escape everyone in the case of fiction. For example, if you are legislating to ban bestiality in art, what defines an animal? What if the artist draws an alien? The lack of a clear definition applicable to all forms of art makes this law require the impossible. Australia's censorship board decided to deem “A cup” and below “child-like”¹⁹. The problem is how does one distinguish between what constitutes as “A cup” in a drawing and what is not? Variances in art by no means always intentional can make a character, which is intended to have a “C cup” look like they have an “A cup” in certain scenes. If were to follow the Australian standard, simple artistic error, which happened despite due care may cause the possessor or the image, or the artist to be guilty. Hence, censorship law in the form of banning fiction fails the observability requirement of the “internal morality” of law and is consequently not law in character. The problems of the legality of this censorship law in the case of observability spill over into generality.

C Generality

Generality is the element of “internal morality of law” that implies a failure to make a law if it fails “to achieve rules at all, so that every issue must be decided on an ad hoc basis”²⁰. Fuller says that in order for there to be generality “there must be rules of some kind, however fair unfair they may be”²¹. As with observability, the indefinite nature of “extreme”, “violent”, or even “child” will make it difficult to make a rule and avoid deciding “the issue” on an ad hoc (arbitrary) basis. Even if you could categorically list the kind of activities that are “obscene” or “extreme” such as declaring “bondage”, bestiality, or rape as part of either category; the very nature of fiction makes it impossible not to decide at the very least occasionally on an ad hoc basis; making it fail the requirement of “internal morality of law”. This is unless you want to defeat the purpose of having this kind of legislation by leaving plenty of loopholes. For example, again with “lolicon art”; if bust size were a criteria for defining a “child” in art, it is impossible to define “small” hence the only rational standard would be “without pubescent breasts”. The judge would then have to decide whether the said piece of art had “pubescent breasts” on a situational (ad hoc or arbitrary) basis since there can be no set definition. As said before, the various forms of art make it even more difficult not to decide on an ad hoc basis, such as the use of “moe”²² drawings. What kind of general

19 Mike Meloni, *Australia bans small breasts* (2010) Somebody Think of the Children
<<http://www.somebodythinkofthechildren.com/australia-bans-small-breasts/>> at 13 January 2010.

20 Above n 2, 39.

21 Ibid 47.

22 “moe” can refer to many things such as a fetish; e.g. “meganekko-moe” is a fetish for glasses. However drawings are usually cute and deformed.

rule can apply to all forms of art? Australia's censorship board however, has stipulated “A cup” and below as what qualifies as pubescent breasts²³. Then artists would simply need to draw some kind of bust slightly larger than that to escape this rule. This would mean that this law is ineffectual as an artist can simply draw something similar to an “A cup” but larger and thus still effectively draw “a child”. What makes this artificial definition ad hoc as well is the question of how do we determine the cup size of a drawing? We cannot simply measure the character's bust because it is impossible. Any artistic “calculation” would be mere estimation which is an ad hoc basis, except for perhaps if we had the image was from a 3D model. That will only be applicable for a very specific form of art. Therefore, the law may either be applied laxly or draconian-like, but in any case, ad hoc.

Or let's say for the case of “rape in fiction²⁴”, the legal requirement of rape is that people, and thus in this case characters, do not give consent to sexual activity. Is it possible to determine consent of a character since not only do they have no true existence? Furthermore, it is impossible that they have any sort of capacity since they are a product of imagination. As the definition of rape in criminal law lies on consent, if it is asserted that drawings have some kind of capacity, that of “no capacity”, as in real children; wouldn't consensual sex scenes count as rape? What makes it nearly impossible to accurately determine consent is that you cannot question a character like you can a person in a trial. It is thus technically impossible for characters in art to be raped. Let's say that a character cannot say “no” as a requirement for not encouraging rape. What if the character screams in ecstasy asking for more during coitus despite initial objections²⁵? Does this count as a “no”? If you say “yes”, it still fails generality because the legal definition of rape in criminal law requires that a person not give consent which is determined objectively. If you say “no”, you are no longer applying the general rule, and deciding on an ad hoc basis. What kind of law can satisfy the requirement of generality for something whose definition is so flexible, as in the case of fiction? The endless possibilities generated by fiction makes it hard to avoid judging on an ad hoc basis.

A law cannot contradict another law, which is the element of clarity as discussed earlier. Can you imagine an alleged rape victim claiming rape, who initially refused but then was asking for more during coitus? You cannot redefine rape in the context of fiction without affecting criminal law because of the requirement of clarity as mentioned earlier. If there was a rule determining that “all characters must be of the age of consent”, how would you determine this without using an ad hoc method in terms of art? Although it is mentioned earlier that “common sense” can bring clarity,

23 Above n 19.

24 Examples include the banned eroge (erotic game) “Rapelay”. The gameplay of “Rapelay” involves molesting then raping girls with the goal of destroying them psychologically.

25 This is the case sometimes when playing “Rapelay”, characters sometimes change from resisting you to begging for more so this raises the question of whether “Rapelay” always depicted rape.

it does not in this case bring the formation of a rule that fulfils generality as different standards apply to different pieces of art. Can you apply the same standard of “child” in CLAMP²⁶ art and “moe” art? No, because the methodology of drawing is highly different. Hence, even the “common sense” standard can have double standards when faced with different styles, making it an ad hoc rule. A ban on certain forms of art thus fails generality. Even if you could erect complex rules that enforce generality, it does not mean it will satisfy the observability element. Also, even if the rule fails the observability element, it does not mean it will satisfy the generality element. This is because of the reasons for failure outlined in this article.

V CONCLUSION

For a law to qualify as a law, it must fulfil the eight requirements set out in the “internal morality of law” in Fuller's *The Morality of Law*. Censorship law, in the form of a ban on certain forms of art, potentially fails clarity, and will fail observability and generality. These requirements are too stringent for the indefinite and diverse nature of art. In the unlikely event that there is a law that bans certain forms of art which satisfies these requirements, it is likely to be either full of loopholes and fail to enforce anything at all or so complex and specific that it will only be able to find extremely specific forms of art illegal. If there were to be a law censoring art on the basis that it depicts “children” in sexual situations, on this basis many works seen as masterpieces could be banned by this legislation as it attempts to legislate the use of “children” in fiction. It is not a far leap from art to written works as both are fiction. Once this ban affects classic literature, our rich literary history is under threat. To prevent this, any censorship on art should be opposed before it reaches that depth, perhaps even more so than non fiction.

VI REFERENCE LIST

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²⁶ CLAMP refers to a group of manga artists. A common style used by CLAMP is that of tall, slender characters inclusive of slender and long limbs. Famous examples of CLAMP art include the “Code Geass” and “XXXholic” franchises.