

## Morality and Criminal Law

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I would like to begin my paper with a quote which goes closest to what I think of the relationship between law and morality. The quote is as under:

**“Law and morality have had a long marriage with occasional desertion and judicial separation, but never altogether a divorce.”<sup>2</sup>**

Although all moralities are not capable of being enforced but the law devoid of morality shall lose its influence on society and may not be obeyed by the society. Prof. H.L.A. Hart in his three lectures before the Stanford University, under the title “Law, Liberty and Morality” discussed the use of the criminal law to enforce morality, in particular sexual morality which generated a great controversy after the publication of Wolfenden Report 1957, a committee on Homosexual offences and Prostitution. The committee in its report said :

“That homosexual behaviour between consenting adults in private should no longer be a criminal offence, which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”<sup>3</sup>

Regarding prostitution, the report says that no case can be sustained for attempting to make prostitution itself illegal<sup>4</sup>.

In relation to prostitution it further says that it is not the duty of the law to concern itself with immorality as such..... it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious<sup>5</sup>.

It would be wrong to suppose that criminal law being secular has no relation with morality. Morals and religions are inextricably joined because none of the moral codes can claim any validity except by virtue of the religion on which it is based. Similar is the case with criminal law and morality. Criminal law and morality are inherently connected. It would not be possible to separate the two even if this were thought to be good idea in principle. For centuries the criminal law has had its concern with maintaining peace in the society. But it would be wrong to infer

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2 B. Mukherjee : The New Jurisprudence : The Grammar of Modern Law TLL.

3 Para 62 of the Wolfenden Report 1957.

4 Para 224

5 Ibid para 257.

that apart from keeping and maintaining peace it has no moral contents. In crimes like theft, rape etc. where consent plays a crucial role, the criminal law admits the said consent as a good defence. However, in case of murder committed with the consent of victim, the defence of consent does not come to the rescue of the offender. The question is why such murder if committed in private is an offence. The plausible explanation is that there are certain standards of behaviour or moral principles which society requires to be observed as well in private as in public; non-observance of which may make the whole society corrupt and unstable. Therefore, the breach of such principles is an offence not merely against the person who is injured but against the society as a whole. Death caused on the basis of morality is however not so strictly covered by section 302 but attracts sections 304 which is culpable homicide not amounting to murder.

If the act committed in private were not to be treated as crime, as Wolfendane Committee recommended, number of crimes such as, attempted suicide, suicide pacts, abortion etc would not find place in the penal law of the country. Many people think that euthanasia be permitted in India like many other countries but no one hitherto has gone so far as to suggest that it should be left out side the criminal law as a matter of private morality, nor has any one come forward to suggest that the sexual intercourse should not be treated as an offence if the girl being below 16 years agrees freely. It is submitted, therefore, that they are and they can be brought within four corners of criminal law only as a matter of moral principle. Patrick Devlin has rightly said:

“It must be remembered also that although there is much immorality that is not punished by the law, there is none that is condoned by the law”<sup>6</sup>. He further says that:-

“..... criminal law as we know it is based upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else”<sup>7</sup>.

The term morality has different meanings, varying contents from place to place, so also the criminal law. Adultery, for example, is an offence in our country but not in England. It is the public morality which gives different shades to criminal law of different societies. Now the question may be why the societies are different.

It is very easy to find out the answer, from Devlin’s view, as to why the societies are different. He says what makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals<sup>8</sup>. Every society apart from having its political structure has a moral structure. In other words it can be said that every society has its two structural components of which society is built. Hindus, unlike Muslims, have adopted monogamy. It is not because of the

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6 The enforcement of morals p. 7

7 Ibid.

8 Ibid p. 9

fact that Hindu religion says so or because our society has chosen to organize itself upon it; but because people think of it as something that is good in itself and offering a good way of life for our society and that it is for this reason that Hindu, society has adopted it. Thus it is manifestly clear that for society to exist there must be shared ideas on politics, morals and ethics. Although opinions of individuals may differ as to what is good or what is bad, yet each one of us has ideas about what is good and what is evil. These cannot be kept isolated from society in which we live. If society does not approve your 'good' it cannot be pushed forward any more. Devlin has rightly said "if men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of bondage....."<sup>9</sup>.

From the above it is clear that for the existence of society morality plays important role and therefore, it is as needed as a recognized government for the existence and preservation of the society. It thus follows that society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. Because established morality is as necessary as good government for the welfare of society. It would not be exaggeration to say that societies disintegrate from within more frequently than they are broken up by external pressures<sup>10</sup>. The loosening of common moral bonds is often the first stage of disintegration, so the society is under obligation and is justified too in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. From the perusal of penal statute of any country it is clear that if any body destabilizes the government established by law he is severely punished. In England it is regarded as high treason. In India too, section 121 IPC prescribes death penalty for one who wages war against the Government of India, or attempts or abets to do. So State should take necessary steps to eradicate immorality which disturbs the even fabric of the society, and establish recognized and established morality, which, it is submitted, fall well within the legislative domain of the state. Because even for an act done in private, if there is a genuine feeling of the society against it, there seems no reason to deny the society a right to eradicate it.

Now the pertinent question is how the law maker is to ascertain the moral judgement of society. We know judiciary has developed a concept of the reasonable man i.e. man belonging to same status and quality. He is not to be confused with the rational man. The reasonable man is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man in street. He might also be called the right minded man. By applying the

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9 Ibid p.10

10 Patrick Devlin, Enforcement of Morals p. 13.

concept of reasonable man the judges have laid down several principles which every right minded person would accept as valid. It is what Pollock called 'practical morality', which is based not on theological or philosophical foundations but 'in the mass of continuous experience half consciously or unconsciously accumulated and embodied in the morality of common sense'. He called it also a certain way of thinking on questions of morality which we expect to find it in a reasonable civilized man.....<sup>11</sup>.

Immorality, then, for the purpose of law is what every right minded person is presumed to consider to be immoral.

Any immorality whether public or private is capable of affecting society injuriously and this is what gives the law its locus standi. From this one should not gather the impression that law should impinge on every nook and corner of the individual activities, and also not expect it to peep into the cranny of individual private affairs not affecting the public morality. If, however, there is conflict between the rights and interests of society and those of an individual; law should strike a balance between the two and right of each should be curtailed so as to ensure as far as possible that the essential needs of each are safeguarded.

There must be toleration of the maximum individual freedom that is consistent with the integrity of society. The privacy should be respected as far as possible but if acts done in privacy are likely to injure the public morality it should be restricted through law.

Recently in metropolitan cities PUB culture is in vogue. Sri Ram Sena has been opposing this tooth and nail. Supporters of free society see nothing wrong in such type of culture. But the question is, should we as Indians remain mute spectators to such prevailing culture taking its roots in different parts of the country. There are some acts which are so obviously wrongful and against the public interest that at the first sight one is convinced that it must constitute a criminal offence. The conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an offence. It is pertinent to refer the observation of Lord Marris in *Shaw Vs. Director of Public Prosecutions* "that the law is not impotent to convict those who conspire to corrupt morals"<sup>12</sup> Lord Hodson<sup>13</sup> also said in same vein that "I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals". It is true, of course, that "public moral" may differ from generation to generation, and may be subject to different interpretations within a single generation.

The 'PUB' culture which is becoming prevalent conveys a concrete and definite idea. Its offshoots and far reaching effects on our society cannot be lost sight of. Law should regulate and restrict its functioning. One should not gather

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11 Essays in jurisprudence and Ethics (1882) Macmillan cited in the Enforcement of morals p.15.

12 (1961) 2. W.L.R. 897 at p. 37.

13 Ibid at p. 938.

the impression that I am supporting the misdeeds of the members of Ram Sena. The manner in which they dealt with girls and other persons involved in this business is highly objectionable. It is no doubt a highly reprehensible act which they did and the manner in which they dealt with girls; but what they had in mind was an intention to save our society; and this is not bad. Because social existence depends upon co-ordination between state and individual, which in turn requires restraint in individual action. Such restraint may spring from laws imposing duties to limit liberties, or it may spring spontaneously from moral sense. Liberty and duty are jurally opposite, each beginning where the other ends. Therefore, legal restrictions may only be relaxed safely when there is sufficient control bred from moral discipline. Degree of self discipline is linked to religion but today religion is losing its appeal and consequently the influence of its moral teaching. To relax legal restraints at a time when there is less and less assurance of self discipline is the path to social destruction; which is why some reinforcement of moral discipline by law must continue.<sup>14</sup>

It may not be out of place to recall here that recently the Supreme Court refused to give relief to Maharashtra dance bar workers because such workers, in the opinion of the Court, lowered the dignity of women and could corrupt public morality.

In the line of some of western countries the gay associations are raising heads in our country and are trying to get the legal sanction. NAZ foundation challenged the validity of section 377 of the Indian Penal Code which deals with unnatural offences and makes gay sex a punishable act.

In its judgment delivered on 2<sup>nd</sup> July 2009 the Delhi High Court ruled in favour of the Non-Governmental Organization observing that the only morality that matters is the constitutional morality; meaning thereby that an act should not be termed as immoral so long as it did not violate any provision of the Constitution of India. Accordingly, the Court declared that section 377, IPC as unconstitutional because, in its opinion, the said section violates the fundamental rights guaranteed to citizens under Articles 14, 15 and 21.

The Government of NCT Delhi chose not to prefer an appeal against this decision; but a few individuals challenged the High Court decision at the apex Court. The matter is pending before the Court now. In this case Union Home Ministry filed an affidavit and stated that “public opinion and current societal context in India does not favour the deletion of the said offence from the statute book”. It may be argued that right to privacy is sacrosanct and law should not peep into the private affairs of individual. The answer to this argument can be found in the aforesaid affidavit which, *inter alia*, states that “even if it is assumed that the rights to sexual minorities emanate from a perceived right to privacy, the right to privacy cannot be extended to defeat public morality which must prevail over the

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<sup>14</sup> Dais, Jurisprudence, p. 112

exercise of any private right”.

However, the trends of change in social attitude seem to be no less emphatic than the assertions of the Government as is reflected in the attitude of 19 parents of lesbian, gay, bisexual and trans gender people who have approached the Supreme Court demanding that the State should be restrained from criminalizing their children. These parents coming from various walks of life have claimed that they know their children best, and expressed their resolve to ‘fight in courts a sustained attack by organization and private person who insist that their children’s sexuality, if not criminalized would destroy family values.’<sup>15</sup>

Homosexuality is not an offence in England. This, however, is not to suggest that India is the only country where homosexuality is punishable offence. Several countries like Algeria, Angola, Egypt, Libya, Barbados, St. Lucia, Trinidad and Tobago, Bhutan, Myanmar, Nepal, Maldives, Singapore, Solomon, Islands, and almost all the countries of the Middle East except Iraq have similar provisions in their criminal laws.

It may be noted that section 377 is one of these few provisions through which the IPC endeavors to enforce morality. The wrongs which are intrinsically wrong in itself (i.e. *malum in se*) are enforced by our laws. Offences like murder, theft, extortion, robbery, kidnapping etc are not punishable because they are crime against society but also because such acts are morally wrong. The Supreme Court taking the correct stand declared section 303, IPC as unconstitutional - as it violates Articles 14 and 21 of Indian Constitution - in *Mithu Vs. State of Punjab*<sup>16</sup>. However, whenever it found that a particular provision of law is not in consonance with moral values, our Supreme Court from time to time has corrected it. For example, section 303 provided that whoever, being under sentence of imprisonment for life, commits, murder, shall be punished with death. It means that life convict will not be heard as to why he killed the deceased, what were reasons which compelled him to take such drastic step. Does it suit the moral sentiments of the reasonable man of the society? The response to this question shall always be in negative. Further the word ‘shall’ used in above referred section made it mandatory on the part of the judiciary to award only death sentence.

It is pertinent to mention that law has not only developed moralities, by reforming and clarifying old moralities but also by creating new moralities. For instance, in olden times even polygamy was not crime but in modern times bigamy is treated as an offence. Thus monogamy has been developed as a new morality. The old religious morality has been broadened by many laws ensuring religious freedom in modern jurisprudence and by encouraging and enforcing tolerance and understanding as moral virtues, in recognition of many cultural rights of minorities<sup>17</sup>. Modern Law has, in many respects, enlarged and qualified old morals about sex.

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<sup>15</sup> See, Indian Express, February 09, 2011.

<sup>16</sup> 1983 Cri. L. J. 811 SC (F.B.)

<sup>17</sup> *The New Jurisprudence: The Grammar of Modern Law* by P. B. Mukherji J. p. 18.

Again in the field of social responsibilities and industrial jurisprudence, law has created many new moralities<sup>18</sup>. Protection of public health and good living, prevention of adulteration in food and drugs, social security provisions and necessities of life are instances where law has helped morality to grow.

**Conclusion:**

In the end, I would like to say that first of all we have to have a faith in God and a fear for sin; and if these two are present, I am sure, everything else, including, of course, the morality will naturally follow. With the morality at the helm of affairs in the society most of our ills and woes are bound to vanish. Further, it is important to note that the legislations and judgments alone cannot wipe out the vices and deep rooted social evils. For this mobilization of public opinion is essential. The print media, electronic media, social workers, NGOs, and voluntary organizations will have to come forward to create awareness among the people.

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18 Ibid