

CHAPTER 5
LAW AND MORALS

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5.1 Introduction

The subject of decriminalisation has some connection with the debate about law and morals. For several years, jurists and law reformers have been debating the question how far moral principles should find a reflection in the law. The question has been framed in various forms and the controversy at one stage assumed a complex form, yielding rich and profuse literature on the subject. But, in simple terms, the question at issue is this. Is conduct regarded as opposed to good morals, deserving of punishment by law in every case? If not, then in what cases should it be so regarded, and on what criteria? In the present century, the controversy was given prominence by the Wolfenden Report. But, in reality, it is of much older origin.

5.2 Mill's approach

John Stuart Mill has expressed the view that the only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others. Referring to the position of the individual, Mill has said as under:¹

"His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise, or even right."

However, Mill made one qualification, namely, that this was to apply to human beings in the maturity of their faculties only; he would not apply this principle to children or to backward societies.

5.3 Stephen's view

Stephen² discussed the relation of morals to legislation, and the extent to which people may and ought to be made virtuous by Act of Parliament or by the moral coercion of public opinion, and concluded that society has at its disposal two great instruments by which vice may be prevented and virtue promoted, namely, law and public opinion. He expressed the view that self-protection is not the only end of criminal law, and that it also seeks to persecute the grosser forms of vice. He found "the strongest of all proofs" of

1 John Stuart Mill, on Liberty (Everyman Ed. (1965), page 73.

2 James Fitzjames Stephen, Liberty, Equality, Fraternity, page 145 (R.J. White ed., 1967).

this "in the principle universally admitted and acted upon as regulating the amount of punishment".¹ This example given by Stephen is criticised by some as a *non-sequitur*, generated by failure to distinguish between two independent questions involved in this problem, namely, "what sort of conduct may justifiably be punished?" and "How severely should we punish different offences?"

5.4 Wolfenden Committee

The controversy came to the forefront after the Wolfenden Report.² The Wolfenden Report deals with homosexual offences and prostitution, and had necessarily to go into the following question:

What is the connection between crime and sin and to what extent, if any at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?"

The Committee in this context emphasised the aspect of public good. It adopted the approach, that it should not recommend criminalisation in regard to matters of private moral conduct, except in so far as they directly affect the public good.

5.5 Function of the criminal law

Examining the function of the criminal law, the Wolfenden Report recorded the view of the Committee that the function of the criminal law - "is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak "in body or mind or inexperienced, or in a state of special physical, official or economic dependence. It is not ... the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined."

The Committee unanimously recommended that while prostitution itself should not be made illegal, laws should be enacted "to drive it off the streets" since public soliciting constitutes an offensive nuisance to ordinary citizens.

5.6 Homosexuality

On the question of homosexuality, the recommendation of the Wolfenden Committee was to relax the laws in regard to acts between consenting adults in private. The reasoning of the Committee was that -

1 Stephen, *Liberty, Equality, Fraternity*, page 152 (R.J. White ed., 1967).

2 Committee on *Homosexual Offences and prostitution*, Report (1957) Cmd. 247, paragraphs 13 and 14.

"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".

5.7. Lord Devlin.

After this arose the well known debate between Lord Devlin and Professor Hart, Lord Devlin sets out to enquire as to "what is the connection between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?" To answer this, he addresses to himself the following three interrogatories:

- (1) Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgment?
- (2) If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?
- (3) If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?¹

He answers the first two questions in the affirmative. As to the third question, he argues that there is a case for "collective judgment" as distinct from a large number of individual opinions. This "public morality" is present in every human society and holds it together and hence, it is the primary function of the law in a given society to maintain the "public morality" in that society. Lord Devlin believes that conduct which arouses a feeling of "intolerance, indignation and disgust" deserves suppression by law in the interest of the integrity of a given society. For this purpose he has recourse to the "man in the jury-box". He feels that the jury provides an authentic view of current morality upon which the limit of legal intervention can be based.

5.8. Recognised morality.

Devlin believes (i) that a recognised morality is as essential to society as recognised Government, and hence, (ii) that a society has the right to make judgments in the field of morality and, (iii) that it may use the law to preserve morality in the same way as anything else that is essential to its existence. "The suppression of vice is as much the law's business as the suppression of

1 Devlin, *Enforcement of Morals* (1965), pages 7, 8.

subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private sub-versive activity".¹ He insists that in principle any immorality is capable of injuring society. He points out that society cannot set a theoretical limit to the number of people who can get drunk before society is entitled to legislate against drunkenness. The same may be said of gambling. Hence, in his thinking, there can be no theoretical limits to legislation against immorality.²

5.9 Hart's position

Professor H.L.A. Hart disagrees with Lord Devlin and supports the liberal position taken in the Wolfenden Report, and with Mill, to the effect that "the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will is to prevent harm to others". However, Hart does feel that there may be other grounds justifying the legal coercion of the individual:

There are multiple criteria, not a single criterion, determining when human liberty may be restricted ... with all its simplicities the liberal point of view is a better guide than Sir Patrick (Lord Devlin) to clear thought on the proper relation of morality to the criminal law; for it stresses what he obscures - namely, the points at which thought is needed before we turn popular morality into criminal law."³

5.10 Element of harm

According to Hart, a very great difference is apparent between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one. The value attached to the first is easy to understand; for the protection of human beings from murder or violence or other forms of injury remains a good, whatever be the motives by which others are induced to abstain from these crimes. But where there is no harm to be prevented and no potential victim to be protected, (as is often the case where conventional sexual morality is disregarded) it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves.⁴

1 Devlin, *Enforcement of Morals* (1965), pages 13-14.

2 Devlin, *Enforcement of Morals* (1965), page 44.

3 H.L.A. Hart, *Immorality and Treason*, *The Listener* pages 162-163 (July 30, 1959).

4 Hart, *Law, Liberty and Morality* (1963), page 57.

5.11 Role of morality and universal values

Hart has put forth the thesis that since all social moralities, whatever else they may contain, make provision in some degree for such universal values as individual freedom, safety of life, and protection from deliberately inflicted harm, there will always be much in social morality that is worth preserving, even at the cost in terms of these same values which legal enforcement involves. We should with Mill be alive to the truth that though these essential universal values must be secured, society can not only survive individual divergences in other fields from its prevalent morality, but even profit from them.¹

Hart agrees with Lord Devlin, that some shared morality, which he calls "universal values", is necessary to every society. Hart says -

"For any society there is to be found a central core of rules or principles which constitutes its pervasive and distinctive style of life.....

On this footing it would be an open and empirical question whether any particular moral rule is so organically connected with the central core that its maintenance and preservation is required as a vital outwork or bastion."²

5.12. Abortion.

Abortion furnishes a specific instance. Lord Devlin objects to the view that abortion is punished as a serious offence only because it endangers life:

"This gives the law a twist which dis-associates it from morality and, I think, to some extent from sound sense. The act is being punished because it is dangerous, and it is dangerous largely because it is illegal and therefore performed only by the unskilled."³

Hart adopts a utilitarian approach with respect to the question of abortion, and states that the issue should be calmly viewed as one to be decided by a consideration of the balance of harm done by the practice, and the harm done by the existing law. "But in fact the defence of the status quo is rarely conducted on such morally natural terms: the argument that abortion is itself

1 Hart, *Law, Liberty and Morality* (1963), pages 70,71.

2 Hart, *Social Solidarity and the Enforcement of Morality* (1967-68) 35 *University of Chicago Law Review*, pages 1, 10,11.

3 Devlin, *The Enforcement of Morals* (1965), page 24.

immoral or will lead to sexual immorality is usually well to the fore in the case against reform."¹

5.13 Views summed up

It will be seen that according to Lord Devlin, in theory, it is permissible to legislate and provide the sanctions of the criminal law in regard to any conduct which is regarded as immoral. But according to Hart, one has to proceed cautiously and to make a distinction between conduct which is the proper subject of criminal sanctions and conduct which is not such a proper subject.

Secondly, according to Lord Devlin, all morality form "a single seamless web", while, according to Hart, a distinction has to be made between the central core of morality and the more diffuse moral notions. In his view, legislation to provide criminal sanctions in respect of particular conduct, has to be framed on an empirical footing.

This difference of views necessarily leads to a difference of approach when deciding whether certain conduct should be punished or not. Hart would stress not only the element of harm, but also the degree of intensity of the connection between the conduct in question and moral rules.²

5.14 Approach suggested

It is suggested that we may distinguish the following aspects:

- (1) Every immoral act need not be an illegal act.
- (2) The immorality of an act may be a relevant factor in deciding whether to make it illegal or not, if it causes harm. This is not to say that morality or immorality of an act should never be taken into account in deciding whether to make it illegal or not. But there is need to take into account other balancing factors.

1 Hart, *The Morality of the Criminal Law* (1965), page 47.

Hart, "Social Solidarity and the Enforcement of Morality" (1967-68) 35 *University of Chicago Law Review* 1, 10-11.