

Law and Morality: Cessation of Conflict or a New Era of Contradictions?

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ABSTRACT: *Law and Morality have through the ages been dealt in light of Hart Fuller conflict in the papers of Jurisprudence. However, the core ramification of such a profound contradiction lie in the social systems of the modern era and thus, this paper exploits the coming of age intricacies of law and morality debate inherent in our societal interactions and relationships. The present century, which advocates liberty as the highest form of dignity, has brought about infallible confidence among people to come out in the open and publically propagate and adopt their ideals. Societal conflicts arise when such outlook is not in consonance with the morality of the majority. Law and morality, albeit being interdependent on each other for continuity, has often contented against each other on the point of varied perceptions of rationality. This research paper takes the example of abortion, homosexuality, prostitution and polygamy to depict the staggering stand of communities, law and religion. Each of the concepts has been expounded to bring out the clash among the religious morality, the propagators and the ultimate legal position of the same globally. This research concludes by addressing the conflict so inherent in human social interaction and gives a verdict on whether the conflict will cease or take a new face in the twenty-first century.*

Keywords: *Law, Morality, Conflict, Abortion, Homosexuality, Prostitution, Polygamy.*

I. INTRODUCTION

Enforcement of Morality through Law albeit being a convenient and an ideal concept is riddled with contradictions when applied in a realistic realm. Law is an enactment made by the state. It is backed by physical coercion. Its breach is punishable by the courts and represents the will of the state and realizes its purpose. Laws reflect the political, social and economic relationships in the society. It determines rights and duties of the citizens towards one another and towards the state. It is through law that the government fulfills its promises to the people. It reflects the sociological need of society.

Law and morality are intimately related to each other. Laws are generally based on the moral principles of society. Both regulate the conduct of the individual in society. They influence each other to a great extent. Laws, to be effective, must represent the moral ideas of the people. But good laws sometimes serve to rouse the moral conscience of the people and create and maintain such conditions as may encourage the growth of morality.

Laws regarding prohibition and spread of primary education are examples of this nature. Morality cannot, as a matter of fact, be divorced from politics. The ultimate end of a state is the promotion of general welfare and moral perfection of man. It is the duty of the state to formulate such laws as will elevate the moral standard of the people. The laws of a state thus conform to the prevailing standard of morality. Earlier writers on Political Science never made any distinction between law and morality.¹

For example laws regarding Prohibition in India have not succeeded on account of the fact that full moral conscience of the people has not been aroused in favor of such laws.² Laws can state what overt offenses count as wrong and therefore punishable. Although law courts do not always ignore a person's intention or state of mind, the law cannot normally govern, at least not in a direct way. Because often morality passes judgment on a person's intentions and character, it has a different scope than the law. Law can be a public expression of morality which codifies in a public way the basic principles of conduct which a society accepts. In that way it can guide the educators of the next generation by giving them a clear outline of the values society wants taught to its children. Laws govern conduct at least partly through fear of punishment. Morality can influence the law in the sense that it can provide the reason for making whole groups of immoral actions illegal.³

¹International LEGAL Protection OF Human Rights in Armed Conflict, United Nations Publication, New York and Geneva, 2011.

²Supra.

³Jurgen Hebermas, *Law and Morality*, The Tanner Lectures on Human Values, Delivered at Harvard University (Oct. 1 and 2, 1986).

In ancient times there was no distinction between law & morals. The Hindu jurist in ancient India did not make any distinction between law & morals. However, later on, some distinction came to be made in actual practice⁴. Powerful emotion and pursuit of self-interest have many times led people to break the law with the belief that they are doing so with sound moral reasons. A comprehensive philosophical and legal analysis of the gray area in which the foundations of law and morality clash, views these oblique circumstances from two perspectives: that of the person who faces a possible conflict between the claims of morality and law and must choose whether or not to obey the penal code; and that of the people who make uphold laws and must decide whether to treat someone with a moral claim to disobey differently from ordinary lawbreakers.⁵

II. THE LEGALISATION OF ABORTION

Abortion refers to intentional premature termination of pregnancy which destroys an embryo or foetus before it is capable of living outside the womb. The subject of abortion has been much contentious throughout the history. Much of the public debate about abortion concerns the question whether deliberate feticide ought to be unlawful.⁶ Morals and Laws clash starkly on the issue of legalising abortions or giving the freedom to females over unborn child they are carrying. Different beliefs have different take on the righteousness of abortions. Though the Bible does not directly teach about abortion, it condemns the practice and calls it abhorrent idea. Abortion according to Christianity is considered a curse and babies in the womb are regarded as people.⁷ The Church of England shares the Roman Catholic view that abortion is 'gravely contrary to the moral law'.⁸ Buddhists hold that life begins at conception and thus, abortion would constitute deliberately ending life.⁹ Acknowledging certain exceptions, Dalai Lama has said the abortion is negative and should in no manner depend upon the wishes of the person carrying the child.¹⁰ Hinduism, the oldest religion of the world, has strongly condemned the practice of abortions. Although in the past century, there has been a marked gap between what has been taught and what has been culturally practiced. In the past century high incidences of sex-selective and forced abortions¹¹ has been on the rise albeit it being a cultural deterrent. Islamic faith has different schools of thought but in general it does not allow abortion. Even when abortion is permitted in Islam it is done on the grounds that the unborn child's health condition will be sever if born. It does not consider the wishes, choice or health of the mother.¹² Most of these religions also do not allow abortions occurring due to rape. The key questions central to this debate are "When does life begin?", "Does foetus have a soul?", "Who has greater right to life: foetus or soul?", "When does foetus become a person", "Is abortion murder?" There is no particular or provable answer to any of these raised questions. The various belief system and religion of the world has ever since the conception of institutionalised system of faith has moulded the answer of such questions in manner they please to. They have had utmost discretion to pass ordinance in the name of so-called God and his teachings. Thus, for most of the religions of the world, abortion is a serious ethical issue. The other side of this debate proclaims logic and fairness by way of making the choice of abortion a right of the mother, irrespective of the months of gestation.¹³ The propounders of this side of the debate has strongly associated the right of a female to her body in form of Right to Abortion at her own will with Right to Privacy and Right to Freedom.

It was the first time in the landmark case of *Roe v. Wade*¹⁴ it was held in United States of America that the Right to Privacy can be extended to include Right to Abort albeit in a limited manner. However, subsequent legislations, especially under the rule of President Bush many contraceptive pills were banned under the pretext of being unsafe. This lucidly depicted how morality and conservative attitude of the party in power influenced the general practices of the inhabitants of the country. Most Latin American countries prohibit or severely restrict abortion in order to keep in conformity with Roman Catholic teachings. Egypt, Iran and other countries

⁴Ankita Mahajan, Relation between Law and Morality or Ethics, Journal for Ethical Sciences Vol. 2, 1996.

⁵Greenawalt Kent, Conflicts of Law and Morality, Oxford University Press, 1989.

⁶Patrick Lee and Robert P. George, The Wrong of Abortion, Houseman Publication Network L.A., 1992.

⁷Raymond A. Zwerin and Richard J. Shapiro, Abortion: Perspective from Jewish Traditions, Religious Coalition for Reproductive Choices (2008).

⁸The Church of England and Roman Catholic Church views on abortion, British Broadcasting Corporation, August 3, 2009.

⁹Harvey, Peter. Introduction to Buddhist Ethics, Cambridge University Press. 311–20 (2000)

¹⁰Claudia Dreifus, New York Times Interview with the Dalai Lama, New York Times, Nov. 28, 1993.

¹¹Hinduism and Abortion, British Broadcasting Corporation, Aug. 25, 2009.

¹²Religious Groups' Official Positions on Abortion, The Pew Forum on Religion and Public Life, Sept. 30, 2008.

¹³Don Marquis, Why Abortion is Immoral, Journal of Philosophy, Vol. 68, 183-202 (1989)

¹⁴410 U. S. 113 (1973).

that have completely imbibed Islamic Legal System have strict abortion laws which prohibit the act even though Islam makes provisions for preservation of women's health and life.¹⁵

An absolute condemnation of abortion is an abstraction that cannot survive in the real world where pregnancy, birth, and raising children are difficult and dangerous prospects for women. As long as women bear children, women will be in situations where they sincerely believe that ending their pregnancy is the best of all possible options. Religions have had to deal with this fact, and being unable to eliminate abortion entirely, they have had to make room for cases when abortion might be allowable.¹⁶ The utopian situation would be that the clash of Morality and Logic will lead to synthesis of appropriate laws in the legal systems of the world.

III. HOMOSEXUALITY LAWS

“God created Adam and Eve, not Adam and Steve”¹⁷

This quote summarises the attitude of morality developed along the lines of religion with regard to homosexuality. The Church has always condemned the practice of homosexuality vehemently. The Bible preaches that a man may not lie with a man in a way he lies with a woman.¹⁸ Homosexuality refers to an enduring pattern of or disposition to experience sexual, affectionate, or romantic attractions primarily or exclusively to people of the same sex and it also implies to an individual's sense of personal and social identity based on those attractions, behaviours expressing them, and membership in a community of others who share them.¹⁹ Though it has been well contended the homosexuality is not a new phenomenon or behavioural pattern, the religious police keep opposing it on grounds of being immoral and against the value based society. Homosexuality existed in society since time immemorial. It is only recently that homosexuals have left the veil of secrecy and come out in open.

Homosexuality contradicts natural aim of sexuality. In his epistle to Christians living in Rome, the Apostle Paul speaks of an undeniable “law” regarding normative human behavior that is written on the hearts of mankind “to which their own conscience also bears witness.”²⁰ Those who would reject this law find themselves in opposition to the Divine intent for mankind, a reality that every culture from the dawn of civilization has either recognized – or failed to acknowledge at its peril. The power of the innate realization that there is something fundamentally “unnatural” about homosexuality – even among those who consider themselves non-religious – should not be underestimated, and may well provide the vital motivation that will turn back the seemingly invincible juggernaut of the gay agenda.²¹ Studies citing a homosexual “gene” have been biased and flawed. Homosexuals claim that scientific studies have shown that there is a biological basis for homosexuality. Three main studies are cited by “gay rights” activists in support of their argument to Hamer's X-chromosome research, LeVay's study of the hypothalamus, and Bailey and Pillard's study of identical twins who were homosexuals. In all three cases, the researchers had a vested interest in obtaining a certain outcome because they were homosexuals themselves. More importantly, their studies did not stand up to scientific scrutiny by other researchers. Also, “the media typically do not explain the methodological flaws in these studies, and they typically oversimplify the results”. There is no reliable evidence to date that homosexual behavior is determined by a person's genes.²² A homosexual gene would not make homosexuality moral. To the extent that biological or social factors may contribute to a person's bent toward homosexual behavior, this does not excuse it. Some people have a strong bent towards stealing or abuse of alcohol, but they still choose to engage or not engage in this behavior the law rightly holds them accountable.

Religious prosecution has always been melted to those who are not like others, which most definitely includes homosexuals. It has been treated as an abomination and many so-called ‘deviants’ are forced to live either in hiding or a life of unjustified shame and guilt.

However, this prosecution on humanitarian grounds has been debated and recently, in open. With an advent of celebrities declaring openly their deviant sexual behaviour, the society is witnessing a change in the social set up

¹⁵Judith Jarvis Thomson, A Defense of Abortion, *Philosophy and Public Affairs*, Vol. 1, No. 1, 47 (1971).

¹⁶Austin Cline, *Abortion & Religion: Diverse Religious Traditions on the Morality of Abortion*, About Guide, Oct. 4, 2012.

¹⁷Victoria Clarke, What about the children? arguments against lesbian and gay parenting, *Women's Studies International Forums*, 555-570 (2001).

¹⁸Tennessee Nashville, *The Book of Discipline of The United Methodist Church 161G* (The United Methodist Publishing House 2010).

¹⁹Application for Leave to file ‘amici curia’ in support of Parties Challenging Marriage Exclusion, In re Marriage Cases, *Judicial Council Coordination Proceeding No.:* 4365.

²⁰John Finnis, *Law, Morality and “Sexual Orientation”*, *Same Sex: Debating the Ethics, Science and Culture of Homosexuality* 31-43 (Lanham-New York-London, Rowman and Littlefield 1997).

²¹Family Research Council on Opposing Views.com January 3, 2010.

²²What's wrong with being gay?, *The Christian Answers Guide* January 17, 2010.

and the norms of acceptability in the society. People are now more open to the idea of same-sex partners and fulfilling their sexual desires in a manner which they wish to without having to succumb to the whims of political, religious, spiritual or moral leader or police.

It is true that homosexuals are born gays and have no choice. Science has taught us, even what history failed to do so, that gays and lesbians do not choose to be homosexual. These characteristics are immutable, in the same manner wherein a man cannot choose to be a right handed or a left handed.²³ Homosexuality is a natural phenomenon also found in the animal kingdom. Among the approximately 1500 animal species whose behavior has been extensively studied, homosexual behavior in animals has been described in at least 450 of those species. It runs the gamut, too, ranging from occasional displays of affection to life-long pair bonding including sex and even adopting and raising orphans, going so far as the rejection by force of potential heterosexual partners, even when in heat. The reality is that it is so common that it begs an explanation, and sociobiologists have proposed a wide variety of explanations to account for it. The fact that it is so common also means that it clearly has evolutionary significance, which applies as much to humans as it does to other animal species.²⁴ Homosexuality is as old as civilization itself. Homosexuality is as old as civilization itself, and has always been a part of civilization, including this one - indeed, cross-cultural studies indicate that the percentage of homosexuals in a population is independent of culture. So even if promotion were to occur, it wouldn't change anything - people aren't gay because they were "recruited," they're gay because they were born that way, as the population statistics across cultures makes clear. As for gay marriage itself undermining western civilization, it is hard to see how the promotion of love, commitment, sharing and commonality of values and goals isn't going to strengthen civilization a lot sooner than it is going to undermine it. Gay sex does not "betray" male, female traits Making love to another man betrays everything that is masculine. There are plenty of very masculine gay men in my day, including bull-riding rodeo cowboys and a Hell's Angel biker type, who, if conservatives suggested he is a limp-wristed fairy, would likely rip your head off. There was a long-honored tradition of gay relationships among the tough and macho cowboys of the Old West, and many diaries exist detailing their relationships. Plenty of masculine, respected movies stars are gay. Indeed, Rock Hudson was considered the very archetype of a masculine man. Came as quite a shock to a lot of macho-men to find out he was gay! So what's wrong with all these kinds of men expressing love for each other? Why is that so wrong? A society that devalues love devalues that upon which civilized society itself is based. Should any form of that love for one another be discouraged?²⁵

The legal status of homosexuality is in doldrums. Even in the most modern era of human race very few legal systems have accepted same-sex intimate relationships, let alone allow them freely. In India, any kind of sexual relationship "against the order of the nature"²⁶ is strictly prohibited. This term includes homosexual relationship under its ambit. In the territory of India, legally Homosexuality is a social vice and the state has the power to contain it. Decriminalising homosexuality may create a breach of peace. If it is allowed then the evil of AIDS and HIV would further spread and harm the people. It would lead to a big health hazard and degrade moral values of society." A view similarly shared by the Home Ministry.²⁷ However, in a recent judgment of *Naz Foundation v. Govt. of NCT of Delhi*²⁸ homosexuality has been allowed to a limited extend. Uniformity in such laws throughout the country is yet an unrealized.

IV. PROSTITUTION

Prostitution is a profession where one gives sexual service for money. It is often considered to be world's oldest profession.²⁹ Since mid-1980s, the debate about how to address prostitution legally has become a subject of legislative action. Some countries in Europe, most notably the Netherlands and Germany among others, have legalised and decriminalised systems of prostitution, which includes decriminalizing pimps, brothels and buyers, also known as customers of 'johns'. Other governments such as Thailand, legally prohibit prostitution activities and enterprises but in reality tolerate brothels and buying of women for commercial sexual exploitation, especially in its sex tourism industry.³⁰ The practice of prostitution has been quite ancient. In ancient India there was a renowned practice of having "brides of the town" who were in common parlance, prostitutes. Also, the courtesans of the ancient India were duly respected and were supposed to be well versed

²³Ted Olsen, The Conservative case of Gay marriage, Newsweek, January 12, 2010.

²⁴Scott Bidstrup, Gay Marriage: the Arguments and the Motives (2004).

²⁵Scott Bidstrup, Gay Marriage: The Arguments and the Motives (2004).

²⁶Section 377, Indian Penal Code, 1860.

²⁷Delhi Court Pulls up Centre for Doublepeak; Gay sex immoral, govt tells HC, Times of India, September 27 2008.

²⁸WP (C) No. 7445/2001. Date of decision: 2nd July, 2009.

²⁹Ronald B. Flowers, The Prostitution of Women and Girls 5-6 (1998).

³⁰Janice G. Raymond, Ten Reasons for Not Legalising Prostitution, Journal of Trauma Practice 2 (2003).

with the seven arts and skills of life. The practice of selling one's own body for money has been a historical one well accepted and practiced in the society. According to a Human Rights Watch report, Indian anti-trafficking laws are designed to combat commercialized vice.³¹ The primary law dealing with the status of sex workers is the 1956 law referred to as The Immoral Traffic (Suppression) Act (SITA). According to this law, prostitutes can practice their trade privately but cannot legally solicit or 'seduce' customers in public. A BBC article, however, mentions that prostitution is illegal in India; the Indian law does not refer to the practice of selling one's own sexual service as "prostitution".³² Clients can be punished for sexual activity in proximity to a public place. Organized prostitution (brothels, prostitution rings, pimping, etc.) is illegal. As long as it is done individually and voluntarily, a woman (male prostitution is not recognized in the Indian constitution) can use her body's attributes in exchange for material benefit. In particular, the law forbids a sex worker to carry on her profession within 200 yards of a public place. Unlike as is the case with other professions, sex workers are not protected under normal labour laws, but they possess the right to rescue and rehabilitation if they desire and possess all the rights of other citizens.

In practice SITA is not commonly used. The Indian Penal Code which predates the SITA is often used to charge sex workers with vague crimes such as "public indecency" or being a "public nuisance" without explicitly defining what these consist of. Recently the old law has been amended as The Immoral Traffic (Prevention) Act. Attempts to amend this to criminalize clients³³ have been opposed by the Health Ministry³⁴, and has encountered considerable opposition. In an interesting and positive development in the improvement of the lives of female sex workers in Calcutta, a state-owned insurance company has provided life insurance to 250 individuals.³⁵ Over the years, India has seen a growing mandate to legalize prostitution, to avoid exploitation of sex workers and their children by middlemen and in the wake of a growing HIV-AIDS menace.³⁶ Prostitution today has become a commercial activity like any other. It is profitable and helps in subsistence of millions of sex workers who would otherwise have been unemployed. A street earns roughly around \$25-\$30 an hour.³⁷ In spite of the practice of prostitution being widespread and world prevalent, call-girls in very few nations have a legal status. In most of the parts of the world, prostitutions do not enjoy equal rights and have been suppressed and looked down upon. Hence, this gap between public morality and law has yet to be effectively addressed to and handled with appropriate laws.

V. POLYGAMY

Polygamy is a marriage which includes more than two partners. There are two forms of Polygamy, one which includes the female having multiples spouses and the second involving the male to have multiple spouses. Though this is an accepted part of living in many tribes and culture and has historical as well as mythological roots, it has, over the years, gained the status of being illegal and has been a victim of massive legal criticism. Complex laws of Polygamy can be very well expounded upon by taking up the case study of India, a secular country which houses a vast population of Muslims among its other culturally and religiously diverse groups.³⁸ In India, polygamy for general public is strictly banned and a punishable offense.³⁹ The term general public refers to the entire sect of population except for followers of Islam. Simply meaning, if one follows Islam, he can legally have more than one wife. Even if one converts to Islam he is entitled to four wives, a law which fails the test of Right to Equality enshrined in the country's constitution.⁴⁰ This is a sheer discrepancy and failure of uniform code and laws for all.

VI. CONCLUSION

All the above illustrations depict the interplay of morality and law. As the society keeps progressing and developing, its needs keep changing and become ever-widening. In such a situation, it is necessary to realise and accordingly choose between law and morality. Also, it has been well shown through the pages of history that without moral sanction no law, howmuchever noble its cause may be, cannot sustain in this world of ours.

³¹Sudha Rani, Prostitution: A burning issue in India Today, Meri News, April 7, 2008.

³²India court raises question of legalising prostitution, British Broadcasting Corporation, December 10, 2009.

³³Editorial Opinion, Sex Workers need Legal Cover, The Times of India, June 25, 2010.

³⁴Sex workers' clients shouldn't be penalised, The Times of India, Mar. 12, 2007.

³⁵India Sex Workers get Life Cover, British Broadcasting Corporation, May 1, 2008.

³⁶India's Sex trade exposed, The Independent, Nov. 29, 2008.

³⁷Steven D. Levitt and Sudhir Alladi Venkatesh, An Empirical Analysis of Street Level Prostitution, The Independent, Sept. 20, 2007.

³⁸Sir Matthew Hale, The History of the Common Law in England, 37-38 (2nd Ed. 2002).

³⁹Code of Criminal Procedure, Act of Indian Parliament.

⁴⁰Hallaq, Wael B., Law and Legal Theory in Classical and Medieval Islam. Brookfield, Vt.: Variorum (1995).

As propounded of great thinkers of our age that the development of every concept or widely accepted perception of righteousness is thesis.⁴¹ When with time such a concept matures and starts afflicting the society with evils in forms of dogmas and backwardness in form of negative morality as in the present case, its critiques begins to emerge known as anti-thesis. The clash of the two opposing views lead to a mid-way path or a combination of the duo known as synthesis. In the similar manner, moralities in multi-level clash lead to either a law or a solution by the sovereign, which albeit solving the uprising clash temporarily become the thesis for the upcoming generation and hence, subject to conflicts and newer solutions.

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⁴¹Christine Hertel, *An Overview of Legal Systems*, Notarius International, Vol.1 Issue 02 (2009).