ROLE OF PRINCIPLES OF MORALITY AND ETHICS IN THE PROCESS OF CRIMINALISATION AND FRAMING OF CRIMINAL LAW POLICIES – AN ASSESSMENT

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Keywords: Principles of Morality, Ethics, Factors of Criminalisation, Criminal Policy, and Criminal Law.

Introduction:

Ethics, morality and public morality have always influenced legal policies especially criminalisation in all societies. They are in fact the most important factors which sets social order and criminal law policies. Various legal systems have declared various acts as illegal and criminal for being against the principles of morality and ethics.

The paper aims to assess the role which morality and ethics plays as the factors of criminalisation and in framing the criminal law policies of States. It paper with appropriate illustrations demonstrates the effect of morality and ethics on law especially criminal law.

Morals and Ethics – Conceptual Analysis:

Gert (2006) defines morality generally refers to a set of beliefs about what is good or bad, a code of conduct or a guide to behaviour that is considered to be overriding, but generally confined to a specific culture of society. It indicates certain acts as offensive to the sensibilities of the general populace. 2

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2 For the purpose of this paper, the terms ethics and morals are used interchangeably and assigned same meaning.
‘Ethics refers to two things, namely, firstly to well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues. Ethics for example, refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander and fraud. Ethical standards also include those that enjoin virtues of honesty, compassion, and loyalty. And ethical standards include standards relating to rights, such as the right to life, the right to freedom from injury, and the right to privacy. Such standards are adequate standards of ethics because they are supported by consistent and well-founded reasons.‘

“A code of ethics is a set of moral beliefs and behaviors put in place by a group of people that all agree to live by. Once in place, the beliefs and behaviors help keep society on a status quo. They also gives everyone involved a certain level of expectation.”

**Concept of Crime in the Context of Principles of Morality:**

According to Joel Feinberg, Crime is “the expression of the community’s hatred, fear or contempt for the convict which alone characterizes physical hardship as punishment.” “Crime is a conduct, which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community….. Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered, compendiously, as constituting the

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punishment." It is this community’s condemnation, based on principles of morality, which distinguishes criminal liability from civil liability in terms of the punishment.

**Morality as a Basis of Criminalisation:**

*Morality can be stronger than jail.*

The value of a human life, respect for others, a right to privacy and tolerance of difference, for example are moral values that seem to remain through shifting social upheaval, war and even massive social change. It is the interpretation and application of these basic values that shifts over time and may cause the reassessment of public law. While ‘ethics’ refers to ‘a set of principles of right conduct’, ‘a theory or a system of moral values’.

According to Moore, there seems to be no distinction between law and morality and a [morally] good person is the one who will do what is lawful. Though all criminal laws are not completely based upon the principles of ethics and morality, yet it is to certain extent true that the laws often are influenced by them. Criminal laws are more influenced by such principles. They form to be the most important factor of criminalisation. Nevertheless, many laws are informed by, and created by, morality, especially those involving sex and sex acts. Similarly ethics need not by itself be laws, but law often incorporates ethical standards to which most citizens subscribe though not always.

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6 Ibid.


8 Belinda Carpenter and Sharon Haynes, Crimes against Morality, available on [http://gut.academia.edu/SharonHayes/Papers/144952/Crimes_Against_Morality](http://gut.academia.edu/SharonHayes/Papers/144952/Crimes_Against_Morality), last visited 9th October 2011.


10 Ibid.

11 Supra 3.
The very reason to regard crimes as ‘wrongs against society’ unlike civil wrongs is the relationship between morals and criminalisation. ‘There is only one explanation of what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behaviour or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole.’

Relevance to Criminal Justice Systems:

The very foundation of criminal justice systems across the world lies in the principle of ‘fairness’ which further is linked with the principles of morality and ethics. According to Elizebeth (Lisa) Thompson, “the concept of criminal justice assumes a person will receive the justice he deserves. Conflicts occur when, in very similar situations, the result of justice is different. Ethics and morals determine a standard for fairness in criminal justice.”

The principle of “Equals should be treated equally and unequal’s unequally” which is one of the fundamental principle of major legal systems including the criminal justice system emanated as a moral value. Plato, Aristotle and John Rawls philosophies of law is also linked with principles of morality and ethics. According to Rawls, corrective or retributive justice refers to fair punishments and criminal justice in general. Relevant factors in sentencing such as the nature of the crime and the motives of the offender result in increased or lesser sentences. Court precedence has determined these factors, in part, due to a sense of fairness.

Relevance to the Machineries and Agents Administering Criminal Justice System:

For the justice system to work properly, especially the criminal justice system, a strong and clear code of ethics is critical. Ethics is particularly important for those who are in a position of power and prominence, as these individuals have the greatest influence on society. Members of the criminal justice system make extremely critical decisions every day and their choices have a profound effect on our lives. It is therefore imperative that these men and women do what is right and are free of biases. The code of conduct, role and responsibility of agents and machineries administering criminal justice system are also determined on the basis of principles of morality and ethics. To illustrate, every State requires its police officers to act according to “accepted moral standards including treating citizens without partiality.”

The agents and machineries administering criminal justice system are required to adhere to the principles of fairness, well being of society, honesty, impartiality, confidentiality, etc which are all nothing but principles of morality and ethics. Thus, in criminal justice, a code of ethics is especially important for many reasons, the most important of which may be the very knowledge of the criminal justice system. Because this knowledge is so powerful, a strict code of ethics must be enforced to best facilitate society.

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15 Why Is Ethics Important in Criminal Justice? | eHow.com
16 Ibid.
17 Ibid.
18 Supra 14.
19 Supra 4.
The Academy of Criminal Justice Sciences, in its code of ethics, explains as follows: "Members of the Academy are especially careful to avoid incompetent, unethical or unscrupulous use of criminal justice knowledge. They recognize the great potential for harm that is associated with the study of criminal justice, and they do not knowingly place the well-being of themselves or other people in jeopardy in their professional work."21

Cyndi Banks in “Criminal Justice Ethics: Theory and Practice,” mentions numerous ethical issues including: "ethical problems in the use of authority," "ethical problems in information sharing," "ethical issues dealing with human right issues" and "ethical issues in the media reporting of crime." 22 Such conflicts and problems arise due to conflict in the perception of ethics which varies from person to person and situation to situation. Thus it is essential to balance the interests of public as well as private and thereby formulate general rules of ethics and morality which shall prevail the private ethics.

*Mala in se* are the crimes which are criminalised at all times and in all societies. Criminologists consider certain wrongs as *‘mala in se’*, that is, ‘wrong in itself’ thus deserving criminalisation for being ‘immoral’. The Natural law School regards morals and ethics as the main source of laws and in fact they regard law and moral as one and the same. Being against natural law and principles of ethics and morality, they are condemned in all societies, irrespective of variations in political, social and economic factors of each society. Culpable Murder, rape, etc. are some of such offences criminalised under all legal systems. Child trafficking, obscenity, bestiality, etc. are also some of the offences criminalised for being immoral.

20 The Academy of Criminal Justice Sciences (ACJS) is an international association established in 1963 to foster professional and scholarly activities in the field of criminal justice. ACJS has approximately 2,800 members, representing every state in the United States, many countries, and virtually every institution of higher learning with a criminal justice/criminology program. For details see: http://www.acjs.org/pubs/167_664_2906.cfm.  
21 Supra 15.  
22 Ibid.
Changing morals:
There are certain morals which remain static forever and the wrongs criminalised on the basis of such morals remains criminalised for ever and at all places. They may also vary from society to society, community to community and accordingly are treated in different societies in different manners. These moral values and ethics which change and shift in its essence from time to time and accordingly transforms the criminal law of concerned society. What was regarded as moral and ethical at one time may be considered as immoral at another time and similarly vice-versa. As a result of these shifts in moral perceptions we have seen a massive increase in the legislation and regulation of non-normative sexual behaviour.\(^{23}\)

Crimes of ‘mala prohibita’ nature being dependent upon State’s declaration to be criminalised are different in different States, some of which are based upon the principles of morality and ethics, specific to such States. In some States, they are criminalised while in other they are not. Bigamy, prostitution, publication, pornography, etc. are some of such acts which are criminalised in some States while not so in other.

In India also the decision of Nazz foundation case\(^{24}\) is one of the indications of such shift in moral perceptions of homo-sexuality. Homosexuality was once considered as immoral and hence criminalised under both English as well as Indian laws. Today, many don’t regard it as unnatural, unethical and immoral in India. This shift is not just in the law but also in the general perception of the act and about its association with the principles of morality. It was the civil rights movement that raised awareness of civil liberties and human rights which also generated an attitude of greater tolerance of other acts that were previously regarded as immoral and which were in fact until very recently illegal, such as homosexuality, prostitution, etc.\(^{25}\) At the same time, euthanasia committed to relieve another from pain may be considered by many as moral but may not be legal in many States.

\(^{23}\) Supra 8.
\(^{24}\) 2009 (160) DLT 277
\(^{25}\) Supra 8.
Sometimes even an act declared as crime, if in conformity with public morality has made such a law a failure. The current approach of making beggary which is not ‘mala in se’ (meaning ‘wrong by itself’) and not being immoral is however declared as a wrong for being ‘mala prohibita.’ In this case, the anti-beggary law being against the principles of morality has failed to achieve its object of regulation beggary in India.

**Morality and ethics in relation to punishment:**

What is generally and socially condemnable deserves punishment. This social condemnation of an act is usually based on the principles of morality. It is moral delinquency which is usually regarded as an error deserving punitive sanctions in all societies. According to Professor Gardner, ‘the essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a courtroom; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community’s hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.’

Jean Hampton in her essay ‘The moral education theory of punishment’ argues that punishment should be intended to teach the wrongdoer that her action is morally wrong and should not be repeated. Thus the moral education theory of punishment “maintains that punishment is justified as a way to prevent wrongdoing insofar as it can each both wrongdoers and the public at large the moral reasons for choosing not to perform an offence.” Condemnation of criminal conduct by community in terms of

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26 Supra 5.
principles of morality, clubbed with the essence of retribution, reformation or compulsion which will achieve the object of such punishment.

Thus it is clear that criminal law to a large extent is “based upon moral principles. In a number of crimes its function is simply to enforce a moral principle and nothing else. The law, both criminal and civil, claims to be able to speak about morality and immorality generally.”

Public Morals V. Private Morals:

“Society means a community of ideas, without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. 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 the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.”

– Lord Devlin

28 Lord Devlin, Morals and the Criminal Law.

In order to consider each for the purpose of criminalisation, both public as well as private morals are relevant factors. Just because an issue is relating to private morality and does not concern public morality, the criminal law will not over see it. ‘The law will not allow its processes to be used by those engaged in immorality of any sort, for example, a house may not be let for immoral purposes; the lease is invalid and would not be enforced. But if what goes on inside there is a matter of private morality and not the law's business, why does the law inquire into it at all?’\textsuperscript{30} Similarly suicide, attempted suicide, abortion, incest, etc are relating to private morals yet are criminalised by many legal systems.\textsuperscript{31}

The issue of legalising of homosexuality and prostitution was investigated by the Wolfenden Committee headed by Sir John Wolfenden who in his report said that law should not be concerned about immorality. The issue was further deliberated by jurists such as Hart, Lord Patrick and Lord Devlin. The main argument was that homosexuality should be decriminalisation on the basis of freedom of choice and privacy of morality.\textsuperscript{32} However Devlin argues that law without morality “… destroys freedom of conscience and is the paved road to tyranny” and hence the criminal law must respect and reinforce the moral norms of society in order to keep social order from unravelling.\textsuperscript{33} He finally suggested that Privacy should be respected; law should only intervene when society won't tolerate certain behaviour and law should be a minimum standard not a maximum standard.\textsuperscript{34}

When the issue of punishing victimless crimes such as homosexuality came, jurists expressed different views. John Stuart Mill proclaimed in 1859 that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."\textsuperscript{35} While Justice White in

\textsuperscript{30} Supra 12.
\textsuperscript{31} Ibid.
\textsuperscript{32} Sixth Form Law, available at http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm, last visited on 18th October 2011.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{35} Devlin, quoting John Stuart Mill, On Liberty, p. 75
1986 said that "victimless crimes . . . do not escape the law [even] when committed at home and private consensual sodomy could be criminally prohibited by state.\textsuperscript{36}

Adding to the debate, Hart argued as to why the conventional morality of a few members of the population be justified for preventing doing what they want. Moving further ahead, Dworkin said that if behaviour is a Basic Liberty (like sex), this should never be taken away, even if someone has a different way of 'doing' sex.\textsuperscript{37}

Thus, it is clear that our society is based on certain social norms and conventions that suggest that, as a society, we share some common values.\textsuperscript{38} Conflict between the two is seen cases such as homosexuality, prostitution, etc are the issues upon with public morality differs from the private.

**Morality In Relation To Factor of Harm:**

“Immorality for the purpose of the law is what every right-minded person is presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does, this is what gives the law its *locus standi*."\textsuperscript{39} Thus often, what is usually harmful to society and its members in general is perceived as immoral by the society and in turn criminal according to law.

**Indian Criminal Laws vis-à-vis Principles of Morality and Ethics:**

*Criminal Law represents the morals, values and expectations of the society in which we live. ... the Criminal Law and Criminal Justice Administration are the touchstones of our society's morals and values, and they involve the pursuit of justice and fairness (especially for the under-privileged and

\textsuperscript{36} Bowers, 478 U.S. National Journal of Sexual Orientation Law, Vol. 4, Issue 1, at 186

\textsuperscript{37} Supra 32.

\textsuperscript{38} Supra 8.

\textsuperscript{39} Supra 12.
Indian substantive criminal law, the Indian Penal Code like other criminal legal systems requires the proof of both actus reus and mens rea elements in order to establish criminal liability upon a person. These concepts of actus reus and mens are nothing but the notions of morals which considers punishing a person who has not committed a wrongful act or who has committed it but without a guilty mind is unethical and immoral. The grounds of general defences such as private defence, acts done due to necessity, acting in good faith, etc are all manifestations of moral values. Even provocation, exceeding private defence right while acting in good faith, etc which diminishes criminal responsibility are also based upon the principles of ethics and morality.

It is true that since time immemorial ethics and morality are playing an important in conceptualising and thereby devising criminal law policies of India. India has recently witnessed violent outbursts over trivial incidents ranging from kissing in public, to holding hands or dancing in bars, all in the name of public morality. Public opinion and social sanctions helps in effectively implementing criminal law policies, as long as they are in accordance with factors such morals and ethics. Most of the socio-economic offences such as drug abuse, food adulteration, have been popular and effective laws in society for being in accordance with these factors. In fact the recent public demand for a strong anti-corruption law such as ‘Jan lokpal’ has back up of social claim for being in strong compliance with public moral and ethics. Various criminal laws enacted by Indian State have failed to impact society for being against the principles of morality.

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The anti-beggary laws of India has failed to achieve its objective as it is considered more as a part of custom, community practice and morals. As the practice of begging and giving alms was socially accepted practice of India since time immemorial and got attached with principles of morality of the State.

The 2009 Delhi High Courts decision in Naz Foundation vs. UOI and Others\(^42\) decriminalising homosexuality in a way has redefined the concept of morality in India and has raised new arguments relating to the relevance and priority of public and private morals. The court held that criminalisation of consensual sex between adults in private violates the constitution’s guarantees of dignity, privacy, equality and freedom form discrimination / non-discrimination, based on sexual orientation.

The above four concepts, on which the entire decision was, based in fact the versions of morality. “In order for the dignity of each person to be protected, there must be a right to privacy that protects against arbitrary state interference with personal autonomy. Similarly equality is meaningless without a corresponding prohibition non discriminating against certain classes of people.”\(^43\) The court in this case clarified that public morality cannot be justified to limit fundamental rights by saying that “Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. popular morality, as distinct from a constitutional morality derived from constitutional values is based on shifting and subjective notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interests, it must be “constitutional morality” and not “public morality”.

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\(^{42}\) Supra 24.

\(^{43}\) Alternative Law Forum, Bangalore, India, The Right that dares to speak its Name, Naz Foundation vs. UOI and Others, Decriminalising Sexual Orientation and Gender Identity in India, 2009, http://www.tarshi.net/downloads/The_right%20that_Dares_to_Speak_its_Name.pdf, last visited on 18\(^{th}\) October 2011.
Crimes against morality:

Most of the criminals including India’s have a separate category of offence criminalised in the name of ‘crimes against morality. According to the general perception, all crimes have a general moral basis, condemned as wrong or bad and proscribed by society, yet there is a specific group of offences in modern democratic nations labelled crimes against morality. All these offences have in common certain features, namely, they have a sexual basis and are often argues to do sexual harm, in both a moral and / or psychological sense, as well as physically, they are victimless crimes, especially when the acts occur between consenting adults, they are considered essentially private acts but they often occur, and are regulated, in the public domain and they all have only relatively recently (i.e. in the past 150 years) become identified and regulated by the state as a criminal offence. Crimes against morality in many societies, also includes drug use, gambling, adultery, bigamy.

In fact the offences in the name of moral turpitude is regarded by many legal systems including US and India as a separate category of crimes by their criminal laws moral turpitude means “conductor that is considered contrary to community standards of justice, honesty or good morals.” Indian Penal Code classifies crimes under various categories, namely, crimes against the state, human body, property, religion, marriage, morals, etc.

Should morals and ethics be considered in criminalising?

Laws regulating public morality have sometimes been criticized as contributing to a ‘crisis of over criminalization’. Over criminalisation refers to the idea that laws

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regulating public morality may result in a substantial diversion of police, prosecutorial and judicial time, personnel and resources. 46

As a quick aside: it is unfortunate that the word "morality" has become associated with conservative values, because the obvious invalidity of those values to many people tarnishes their attitude towards morality as a whole. And that is a damn shame. When conservative groups advocate bigotry masquerading as "family values", we need to recognise the injustice of this, and instead stand up for what is right. But I digress - this isn't intended as a post about how liberals need to reclaim the moral high ground.

Morals are only one of the important sources of criminalisation and should not be over emphasised while criminalising an act. It is essential to consider other factors such as social perception; harm caused by the act, utility of such criminalisation, public policy, etc. The agitations in the name of ‘moral policing’ against celebration of Valentines Day is definitely condemnable and must not be brought under criminal law.

Morals are important considerations of policies, but no invasion of rights and liberties of individuals should be allowed in the name of morality unless it is morally justified. Thus, law must rely upon morals as long as they are safe and are for the benefit of the ‘greatest numbers’.

**Conclusion:**

The criminal laws and policies and what manner in which criminal justice system should administer depend upon the principles of ethics and morality. Though it is inappropriate to say that the law in its entirety be modelled on ethics, yet it is true that that ethics are its important considerations. Within the criminal justice system, ethics is germane to most management and policy decisions relating to punishment and is

the rational used in making these decisions, such as whether to rehabilitate, deter, or impose just deserts. \(^47\)

Morality is a sphere in which there is a public interest and a private interest, often in conflict, and the problem is to reconcile the two. This does not mean that it is impossible to put forward any general statements about how in our society the balance ought to be struck. Such statements cannot of their nature be rigid or precise; they would not be designed to circumscribe the operation of the law making power but to guide those who have to apply it.\(^48\) Whenever ethical dilemmas emerge it is essential to formulate policies which do not deviate from general good and at the same time it must even respect the constitutional values which in itself are moral values. Ultimately what is essential is to integrate our law, polices and way of life with sound moral and ethical principles, as long as it is in concurrence with our basic constitutional values and public interest.

"Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government... the suppression of vice is as much the law's business as the suppression of subversive activities."

- Devlin\(^49\)

\(^{47}\) The Importance of Ethics in Criminal Justice, available at http://www.sagepub.com/upm-data/4031_Banks_Chapter_1_Proof.pdf, last visited on 2\(^{nd}\) October 2011.

\(^{48}\) Supra 12.

Purpose: The paper aims to assess the role which morality and ethics plays as the factors of criminalisation and in framing the criminal law policies of States. It paper with appropriate illustrations demonstrates the effect of morality and ethics on law especially criminal law.

Design / methodology / approach: The paper adopts descriptive and explanatory approach of making the assessment of impact of morality and ethics on criminalisation and criminal law policies. The paper being purely doctrinal research paper relies to some extent upon the opinions of jurists and criminologists in making the assessment.

Findings: The research and analysis undertaken by the author will provide practical and more effective guidelines for criminal law makers so as to make laws in conformity with morals and ethics and as a consequence sets social standards as an appropriate factor of criminalisation. The results of the research divulge strong relationship between the framing and implementation of criminal law and principles of morals and ethics.

Research Limitations / implications: The research is limited to doctrinal writings of criminal law jurists and criminologists and some selected case laws and to the analysis of thoughts in such writings in relation to the theme of paper.

Practical Implications: The paper will help in practically assessing the impact of principles of morality and ethics on criminalisation and criminal policies and thereby helps criminal law policy makers in framing laws with practical implications so as to make them more socially accepted and thereby effectual in its results.

Originality/ value: The paper though relies upon doctrinal research data’s, opinions of jurists and criminologists, yet presents original and analytical thoughts about the impact of principles of morality and ethics on criminalisation and criminal policies.

Keywords: Principles of Morality, Ethics, Factors of Criminalisation, Criminal Policy, and Criminal Law.

Paper type: Research Paper