

CRIME AND WHAT MORALITY?

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In the progression of human civilization, the questions of morality have always prevailed in the fabric of society. The idea of an ultimate morality is, already in itself essentially a form of coercion of the people to conform to a particular set of standards. ‘You cannot kill’. ‘You must not steal’. It subscribes to the idea that all human beings are created equal –

not in that they have the same biological anatomies – rather that we are created equal in mind, have cast-iron, invariable opinions, and that any form of conflicting, differing ideas are hence immoral or disobedient. It is difficult, by any means, to say that

there is only one form of morality. If one were to equate morality with religion, the obvious argument that arises points to the fact that there are so many religions, each with their unique dogmas, each claiming to be the true and ideal form of morality. This occurrence merely enunciates the fact that morality is as much a mystery to mankind as the Stonehenge is to archaeologists.

All the same, it is necessary for our current purpose to look past the baffling wide picture and focus on the more specific questions. In this essay, analyses, discussions and arguments will be made on the issue of why certain acts are considered criminal by society. From there it will move on to the questions of whether the law criminalizes all immoral acts and ultimately whether the law should respect individual privacy or suppress individual

freedoms in prosecuting socially unacceptable conducts. Comparisons between enacted statutes and case law in the jurisdictions of Malaysia and the United Kingdom (UK) will be made throughout the essay on each of these issues.

In the language of political philosophy, and on the subject of crime and morality, two bodies of belief stand out amongst the plethora of ideologies - Libertarianism and Authoritarianism. The Libertarian view holds that all persons are the absolute owners of their own lives, and should be free to do whatever they wish with themselves or their property, provided they allow others the same liberty and do not harm others in exercising that freedom.¹ This view is expanded by English philosopher John Stuart Mill in his work 'On Liberty' (1859), in which he states that:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. 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. His own good, either physical or moral, is not sufficient warrant... The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.²

¹ John Vallentyne, 'Libertarianism' *The Stanford Encyclopedia of Philosophy* (2002). <<http://plato.stanford.edu/entries/libertarianism/>> accessed 9 March 2010.

² John Stuart Mill, *On Liberty* (1st edn, John W Parker and Son 1859) 21-22.

Hence, in taking the Libertarian direction, an act that harms others and infringes upon their liberty is wrong and immoral, and thus should be criminalised. This statement is of course not made without a certain extent of simplification.

Conversely, the Authoritarian view refers to the principle of submission to authority, as opposed to individual freedom of thought and action. It pertains to a system where individual freedom is held as secondary to the authority or power of the state.³

In contrasting both principles, Authoritarianism places the importance of the authority of the state over any form of individual freedom and liberty. Libertarianism, alternatively, speaks of the weight of individual liberties over government authority. By a more realist perception however, this is not to say that under the rule of an Authoritarian government, its people are entirely devoid of their privacies or individual freedoms, it plainly means that the government can take these rights and freedoms away from them whenever it purports it necessary, when dealing with crime and the enforcement of morality. Correspondingly, a Libertarian government does not unconditionally advocate a total abolishment of all and any rules or regulations; instead it seeks for the minimization of state power, especially over matters concerning individual freedoms. It would aim, by the imposition of laws, to protect the infringement of individual liberty, and to prevent harm to others by means of passive – rather than active – regulations.

³ Dictionary.com, LLC, 'Authoritarian'

<<http://dictionary.reference.com/browse/authoritarian>> accessed 11 March 2010.

Historically, there have been more Authoritarian governments than Libertarian ones: Germany under the Nazi regime, absolute monarchies such as France before the French Revolution, and on a more contemporary dimension, North Korea under the seemingly perpetual rule of the Korean Workers' Party and Myanmar. Nevertheless, it is difficult to label a government as being completely and perfectly Authoritarian or Libertarian. There is no difference when attempting to categorize the governments of Malaysia and the UK. Nonetheless, it is a general trend to be seen that most governments in the world are moving towards being more Libertarian, and that both the UK and Malaysia are heading in that direction as well, with the UK being perhaps more advanced along the line.

In the UK for instance, the considerable attention on the subject of individual privacy led to the introduction of the Human Rights Act 1998 which incorporated the European Convention on Human Rights (the Convention) into English law.⁴ Few could doubt that this had a considerable effect on the developing protection of human privacy in English common law. Article 8.1 of the ECHR⁵ provides for an explicit right to respect for a private life. Furthermore, Section 2(1) (a) of the Human Rights Act 1998⁶ also requires the judiciary to have regard to any 'judgment, decision, declaration or advisory opinion of the European Court of Human Rights' in developing the common law on issues relating to a Convention right. Still, the Convention was ignored in the decision of the House of Lords in the case

⁴ Human Rights Act 1998, s 3(1) provides that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

⁵ 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

⁶ 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights.'

of *Wainwright v Home Office*,⁷ where an attempt to establish that a right exists under English law to sue for invasion of privacy was rejected.⁸

Traces of blatant Authoritarianism can further be seen in issues regarding pornography⁹ and sadomasochism¹⁰ in the UK. Both pornography and sadomasochism are perceived as being immoral in the eyes of society because they can potentially cause harm to the individual and hence society by extension. Through an Authoritarian lens, because pornography and sadomasochism are generally considered to be immoral, it would indubitably seem fair that ‘offenders’ are criminalised, even if the harm is limited to the individual himself. However, as one can deduce this intention seems unfair under the Libertarian view, where one would imagine that as long as the parties to a sadomasochistic act are consenting their acts should not be criminalised, and similarly as long as a person owns pornography for his own use and does not share it with, or in the course of producing it involve parties not consenting, the law should not view them unfavourably. In other words, by a Libertarian standard, sadomasochism and pornography should not be made crimes as long as they do not cause harm to others.

Nevertheless, several developments in the law have pointed to the UK’s Authoritarian attitude towards both subjects. Examples of this in the

⁷ (2003) UKHL 53.

⁸ Clare Dyer, ‘Law Lords Rule There is no Right to Privacy’ *The Guardian* (London, 17 October 2003).

<<http://www.guardian.co.uk/uk/2003/oct/17/lords.prisonsandprobation>> accessed 7 March 2010.

⁹ The representation in books, magazines, photographs, films, and other media of scenes of sexual behaviour that are erotic or lewd and are designed to arouse sexual interest.

¹⁰ The deriving of pleasure, especially sexual gratification, from inflicting or submitting to physical or emotional abuse.

subject of sadomasochism can be observed in the case of *R v Brown*.¹¹ A group of men had *consensually* engaged in sadomasochistic homosexual sexual acts resulting in the 'victims' sustaining injury but were still convicted for 'malicious wounding'¹² and 'assault occasioning actual bodily harm'¹³ under the Offences Against the Person Act 1861. The court here displayed clear nonchalance towards the 'victims' obvious consent. On the subject of pornography, a man was prosecuted for possessing 'extreme' images involving women and animals under Section 63 of the Criminal Justice and Immigration Act 2008, which applies whether or not the participants consent.¹⁴

Still, it must be noted that the judicial decisions in the aforementioned examples were not made without considerable din and disquiet. As a general trend, it can be argued that the Libertarian movement is becoming increasingly prominent in British politics and legislation.¹⁵

At the present time, Malaysia still does not have a specific statute to address the concerns on individual privacy although there has been some

¹¹ (1993) 2 All ER 75.

¹² Offences Against the Person Act 1861, s 20 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence, and being convicted thereof shall be liable... to imprisonment for a term not exceeding five years.'

¹³ *ibid* s 47 'whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable... to be imprisoned for any term not exceeding five years.'

¹⁴ 'St. Helens Man Guilty of Animal Porn Images Charges', St. Helens Star (Merseyside, 9 June 2009).

<http://www.sthelensstar.co.uk/news/4427000.Man_guilty_of_animal_porn_image_charges/#> accessed 12 March 2010.

¹⁵ Jason Walsh, 'Libertarianism Limited', The Guardian (London, 7 April 2006). <<http://www.guardian.co.uk/commentisfree/2006/apr/07/libertarianismleftbehind>> accessed 7 March 2010

legislative effort in introducing protection for personal data to a certain extent through the Personal Data Protection Act 2010. The Federal Constitution of Malaysia itself does not specifically recognize the right to privacy, but does provide for several vaguely related rights, including freedom of assembly (albeit limited in the interests of security and public order) and speech (albeit once again restricted in the interests of security and public order).¹⁶

Why are certain acts in society considered as being criminal in nature? The plain and simple reason is because it goes against the morality of that society. Thus, the aim and purpose of criminalizing certain conduct is quite simply to enforce and to uphold that morality. This seems logical enough, because it makes sense that wrong acts are punished. But what is the morality that is being enforced? Why should one form of morality take precedence over another? Simply because it is what the majority voted for? By the looks of things, that is exactly what it is. What is illegal is what the majority does not like, to put it in the crudest terms. Since it is impossible to refer to one ultimate set of moralities (because there is none) society has moved to conjure its own form of morality. A law is not made upon the morals of any individual but upon the morals of society as a majority. This view was rejected by British lawyer, judge and jurist Patrick Devlin in his work 'The Enforcement of Morals', where he states that

It is surely not enough that [moral judgements] should be reached by the opinion of the majority... English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected

¹⁶ Federal Constitution, Art 10.

to reason about anything and his judgment may be largely a matter of feeling. It is the viewpoint of the man in the street... For my purpose I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.¹⁷

However, it can be argued here that the idea of a 'reasonable man' is not feasible, as the term 'reasonable' is a subjective one. What Devlin considers to be 'reasonable' might be wholly ridiculous to another. And who is to determine what is 'reasonable' and what is not? The argument of conscience is null here because, contrary to what we may choose to believe, conscience is not uniform from one human mind to another. A person who grows up in a tribal environment where it is the ritual of his tribesmen to kill another human being as a symbol of manhood, or to offer human sacrifices to their lord or deity, would naturally grow up with a conscience that looks at human killing as less a heinous murder than an acceptable custom. This further accentuates the point of the subjectivity of the concept of being 'reasonable'. As with all subjective matters, the power of the majority is usually the deciding factor. It is what Nietzsche refers to as 'herd morality'.¹⁸

At the same time, the 'majority' is not a fixed entity, in that it is made up of human beings who have opinions that may be influenced or change with time. Hence, the opinions and morality of the majority are prone to alteration. For this single reason, many laws have seen changes and amendments, and it is not unnatural. In addressing the question of whether

¹⁷ Patrick Devlin, *The Enforcement of Morals* (1st edn, OUP 1965) 75.

¹⁸ Friedrich Nietzsche, *Beyond Good and Evil* (1st edn, CG Naumann 1886) Section 202.

the law criminalizes all immoral acts, it can be argued that it does, *to the best of its ability*. There are exceptions. Although homosexuality is still to a considerable extent considered to be immoral in the UK, it is much harder to prosecute a person for his sexuality (which is in essence more a psychological matter and hence intangible) or how he feels, than to prosecute actual actions. The UK has attempted to use ‘sodomy’ in the past to criminalise homosexuality. The laws in Malaysia, the UK, or any other society for that matter, criminalizes all acts they each distinctively deem as immoral, but it has to be acknowledged that the term ‘immoral acts’ has come to encapsulate different definitions through time. What is seen as moral and acceptable in the current society might not have been moral 70 years ago, and might no longer be moral in another 70 years time. In other words, morality is a constantly evolving entity, and as a reflection of that, the laws of Malaysia and the UK, or of any other country for that matter, have also evolved with time. Evidence of this changing morality can be seen in the development of laws that govern conducts such as marital rape and sodomy.

The classic view on marital rape is perhaps best summed up by Sir Matthew Hale, Chief Justice in 17th Century England who wrote in *The History of the Pleas of the Crown* that:

...the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband which she cannot retract.

Following the argument that the law criminalizes acts that it deems to be immoral, it seems to be accurate in this case as laws against marital rape were

not enacted until recently when the morality of society began to change to view it as a bad thing, concurrent with the rise of the feminist movement from the 1990s till present. Marital rape was only made a crime in 1991 in the case of *R v R*.¹⁹ More recently, the Sexual Offences Act 2003 was implemented, in which noticeably Section 1 does not make a distinction on whether or not the accused in a rape is the victim's husband.

In Malaysia, the Criminal Procedure Code (Amendment) Act 2006 and the Penal Code (Amendment) Act 2006 under which the new, amended Section 375A states that

any man who during the subsistence of a valid marriage causes hurt or fear of death, or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years.

Though this law is still insufficient, as it technically still does not criminalise marital rape, it should be seen as a step forward towards recognizing forced sexual intercourse in marriage to be rape.²⁰ In fact, Malaysia has seen its first prosecution under the new law when a man was prosecuted and sentenced to the maximum of five years in jail.²¹

¹⁹ [1992] 1 AC 599.

²⁰ Wong Li Za, 'Arresting Marital Rape' *The Star* (Kuala Lumpur, 26 November 2007) <<http://thestar.com.my/lifestyle/story.asp?file=/2007/11/26/lifefocus/19519427>> accessed 14 March 2010.

²¹ 'Malaysian Man Convicted of Marital Rape Under New Law' *JakartaGlobe* (Kuala Lumpur, 6 August 2009) <<http://thejakartaglobe.com/home/malaysian-man-convicted-of-marital-rape-under-new-law/322448>> accessed 14 March 2010.

Taking a similar route to marital rape, the laws on sodomy, particularly in a homosexual context, are a clear indication of society's changing values. The ancient Greeks did not even have terms or concepts that correlate to the modern ideas of heterosexuality and homosexuality. There is an abundance of material from ancient Greece, and similarly in ancient Rome and China, relating to issues of homosexuality, ranging from dialogues of Plato, such as the *Symposium*, to plays by Aristophanes, and Greek artwork and vases.²² The first legislation in England to criminalise sodomy was the Buggery Act of 1533 (25 Hen. VIII c. 6). The Wolfenden Report on homosexuality and prostitution published in 1957 (the Report)²³ paved the way for the enactment of the Sexual Offences Act 1967 which partially decriminalised homosexual acts between two consenting men in private.²⁴ Eventually, the Sexual Offences Act 2003 was implemented where the offences of gross indecency and buggery were deleted from statutory law, and sexual activity between more than two men is no longer a crime in the UK. The Report is interesting in that it stated that:

...there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.²⁵

This would seem to suggest that the Report thought of homosexuality as being immoral.²⁶ Devlin rejects this point by saying that 'I do not think that

²² Brent Pickett, 'Homosexuality', *The Stanford Encyclopedia of Philosophy* (2006). <<http://plato.stanford.edu/entries/homosexuality/>> accessed 14 March 2010.

²³ Report of the Departmental Committee on Homosexual Offences and Prostitution (1957).

²⁴ Sexual Offences Act 1967, s 1.

²⁵ Prema Devaraj, 'Furore Over Marital Rape' *Aliran Monthly* (Kuala Lumpur, 7 April 2004) <<http://aliran.com/archives/monthly/2004b/9m.html>>, paras 20-21.

one can talk sensibly of a public and private morality', and subsequently was of the opinion that an act of immorality should be held as being a criminal offence simply because it is immoral.²⁷ If one were to follow Devlin's logic then it makes natural sense that homosexuality is no longer considered immoral in the UK as it is no longer a crime in law provided it is committed in private between consenting adults. In Malaysia, homosexuality is still a crime and homosexual and heterosexual sodomy is prohibited under Section 377 of the Penal Code.

It is clear to see here that the states of Malaysia and the UK are wrought in a complicated struggle between moving towards a more Libertarian ideal while holding on to the more archaic, or rather, traditional Authoritarian position. Our opinions are constantly changing in a way that would unsurprisingly cause our governments to continually challenge their perspectives. The one constant that remains is a society's need for a morality, and for the enforcement of that morality. It is difficult by any means for anyone to provide an unbiased opinion on the subject of Libertarianism versus Authoritarianism because everyone is influenced by the environment they grew up in and the ideas of that environment in that particular time and age. However, it is also important that a society does not rest on its laurels and ceases to change, because although change has often in history seem to cause nothing but friction and trouble, to quote Harold Wilson 'he who rejects change is the architect of decay. The only human institution which rejects progress is the cemetery.'²⁸ Change is ultimately necessary.

²⁶ Graham Hughes, *Morals and the Criminal Law* (1st edn, Basil Blackwell 1968) 189.

²⁷ Patrick Devlin, *The Enforcement of Morals*, (1st edn, OUP 1965) 79.

²⁸ Harold Wilson (Speech to the Consultative Assembly of the Council of Europe) (Strasbourg, 23 January 1967).

But what change exactly should we be working towards? Taking the previously mentioned arguments into account, it can be contended that what both Malaysia and the UK need are not to become wholly Libertarian or Authoritarian, but instead to strike a balance between the two political philosophies in a more efficient manner. Libertarianism is all-glorious in its purpose of being individual-centric, but a completely Libertarian government already has a name for it: anarchism. This is because although Libertarians may argue that Libertarianism does not promote a stateless society, they forget to consider the attainability of their ideal. It requires one to forgo long-ingrained cultures and traditions, which might be exceedingly difficult for a new nation and the relatively traditionalist and religious society, such as Malaysia. A state that has no authority over individual liberties is one that has no power to exercise its duty in protecting exactly those said individual liberties. How is the state meant to prove a crime and hence prosecute immorality without somehow encroaching upon someone's privacy? Individual privacy and liberties should not come at the cost of a disorganised and dysfunctional society.

This is the same at the other end of the spectrum. Becoming wholly authoritarian by suppressing conduct that the state considers to be socially unacceptable is a call for calamity. George Orwell famously paints a sordid picture of this scenario and society in his dystopian masterpiece on authoritarian regimes, *Nineteen Eighty-Four*.²⁹ Authoritarianism is a tried, and tested, and failed formula because it is so susceptible to corruption. All it takes is one bad state for an entire society to collapse into the rubble of the Roman Empire.

²⁹ George Orwell, *Nineteen Eighty-Four* (1st edn, Plume 2003).

In conclusion, the issues of what society deems to be criminal, and the purpose of criminal law is not in question, it is all subject to the moralities of the society. The only question at hand, which is the most difficult one, is the one that concerns morality itself. Perhaps there is not even such a thing as *morality*, only altruism, and even this seems to be selfishness under masquerade. There is no ultimate moral code that rewards bad with the bad or good with the good. It is we who do so. Throughout this essay there has been much mention of the word 'harm'. It connotes something bad, and an act that is determined to be 'harmful', is as a corollary, also immoral. But who exactly is it that decides what harm is? We do. Who decides what is immoral and what is not? We do. We decided long ago that we must have something to do with the Gods or universe-at-large. What amounts to good or bad is besides the point, only 'does well in the given social context' and 'does not do well in the given social context' is relevant - the former being considered by a majority as either 'good' or 'right' behaviour, and the latter considered 'bad' or 'wrong'.

That is how society runs. This is how society will persevere to run, and this is how society will always run.