



WORK MATTERS

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COLUMN

Individual Protection: A Foundation For Harmonised Societies. A Liberal View.

A liberal view, simply, is the individual being respectful and accepting of behaviour or opinions different from one's own favourable to individual rights and freedoms. Liberalism is based on the moral argument that ensuring the right of an individual person to life, liberty and property is the highest goal of government. There are instances of conduct of the individual that requires state intervention but there is also conduct of the individual that is tolerant. It is this tolerance and freedom to make personal choices coupled with least interference from the state on individual rights that provides a useful foundation for societies to be in harmony.

Mankind is governed by two sovereign masters, pain, and pleasure and at its center is morality – morality which is ‘divorced’ from what we ought to do because some think morality is ‘as a set of rules laid down by God or as a set of socially imposed rules with the function of reducing conflict in society.’ Morals play an essential role in governing social structures regarding ethical conduct but also legal conduct. Individual protection may be from state interference of individual freedom of choice and action or from the actions of individuals. John Stuart Mill posits the ‘harm principle’ which contents that state interference with individual liberty is justified only to prevent harm to others. Gerald Dworkin states that ‘there can be wrongful acts that do not harm or do not harm anyone other than the agent who is performing the act. These are acts that do no set back interest or violate anyone's rights – victimless immoralities – no one is wronged.’ For example, drug use, abortion, homosexuality, euthanasia, and prostitution. Although these are victimless immoralities, Professor Hart writes that many individuals need protection from their own foolish choices, and therefore some ‘paternalism’ in the state is needed. Here liberty, and private and public morality intersects.

Should immoral conduct be subjected to criminal conduct? While some jurists agree that immoral conduct should be punished, others, however, argue that it is not a legitimate function of the state to punish conduct sim-

ply on the grounds that it is immoral. The Wolfenden Committee 1957 stated that ‘it is the law's function to preserve public order and decency to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others... 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.’ It stated further that it is important for the law and society ought to give to the individual freedom of choice and action in matters of private morality and there must remain a realm of private morality and immorality, which is, in crude terms not the law's business. Law should only intervene in the sphere of public and private morality if it is for the common good of society. Lord Devlin writes that there is much immorality that is not punished by the law, for example adultery and fornication, there is none that is condoned by the law, for example adultery which is a ground for divorce. He writes further that if society is not affected – collective judgement – or does not consider the conduct immoral or unnatural, then there can be no case at all for intervention. This echoes Mill's ‘harm principle’ that infringement of individual liberty is prohibited since no imminent, direct harm to others in the community thus providing a useful foundation for societies to be in harmony.

The enforcement of a morality is dependent on the changing standards of conduct or morals in the society. However, ‘if a vice is so abominable and its mere presence an offence then cannot be denied the right to eradicate it’. Lord Devlin's statement encroaches on individual liberty and freedom. He argues that society has a right to preserve its own existence and insist on some conformity, through the use of the institutions and sanctions, and to punish immorality by law but society is free to enforce rights when it raises to ‘intolerance, indignation and disgust’ and that the survival of society is at stake when public morality is challenged, – shared morality. His argument justifies limiting individual liberty. Hart asserts that to suggest that every practice the society views as profoundly immoral

and disgusting threatens its survival is absurd. Devlin on the other hand contends that any deviation and any subversion from a society shared morality are capable in their nature of threatening the existence of society. If the state were to attach regulations to every immoral conduct, then it drastically minimizes the maximization of liberty – Rawls first principle of justice – a violation of fundamental principles of liberty and the good of community. Hart's justification for the violation of the principle of liberty is needed because it directly interferes with fundamental rights, freedoms, and equality – all elements of maintaining the foundation for societies to be in harmony. His argument is supported by Bentham's utility rule in that the preservation of individual liberty is in the interest individual happiness and collective happiness of the community.

Concluding, what may be immoral conduct to one individual may not be immoral in the eyes of another. This is beauty of liberty – the liberty to be completely autonomous in reason, reason that shape our lives individually within the remit of fundamental freedoms, and rights, that allows us to be respectful of differing views on morals and morality. Unless an individual's conduct, based on the collective judgment of the community, threatens the harmony of societies only then state intervention is warranted. Until such a threat presents itself, the courts must continue to articulate and safeguard individual rights against undue interference by other social institutions, thereby providing a useful foundation for societies to be in harmony.

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