

## LAW AND MORALS

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At first sight it would seem that law and morals have structurally got so little in common that a complete separation of the two is desirable. On the one hand, morality depends for its very existence on the free choice of the individual: on the other hand, law involves the imposition *ab extra* of the norm of a society, even where this goes against the wishes of an individual. Morality is essentially concerned with the subject's free personal choice: whereas law is something external to the subject's wishes, so much so that it requires enforcement.

It would seem therefore to be a contradiction in terms to 'enforce morality': for morality, precisely, depends on the free choice of an individual. If society imposes a given type of moral activity on an individual, that activity will not be moral unless the individual freely and personally makes that action his own through a personal choice. Society can in no case *make* a person's action moral: the *free decision* of the individual makes an action moral. Therefore it would seem that society should refrain from attempting to prescribe certain types of moral action.

In favour of a complete separation of law and morals, it is also argued that the unimpeded exercise of free choice is a value in itself, and that any encroachment on a person's freedom of choice is questionable anyway.

### DEFINITION OF THE TERM 'MORALS'

Before we proceed further, I think it is worth noting that in common linguistic usage there is a distinction that comes out in the following two statements:

A bank-manager who discloses his client's secrets acts unethically.

A bank-manager who sleeps with his client's wife acts immorally.

(Analogously in Maltese we would say of the first type of activity 'mhux sew', and would label the second 'immorali').

It is not here our purpose to evaluate this linguistic usage. As a first step it is sufficient to be conscious of this distinction that

is often made. Along the lines of this distinction, 'morality' is identified with sexual ethics, whereas 'ethics' is taken in a more general sense. The result is that when people talk of law and morals, they all too often are uncritically at the back of their minds thinking about sexual ethics, not about ethics in a more general sense.

In this article, I shall not be using the term 'morals' in the restricted sense of 'sexual morality': when I talk of 'morals' I mean ethics in the most general sense, i.e. all those acts in which man freely exercises his responsibility through moral choice.

#### THE RELATIONSHIP OF LAW TO MORALS

Both as a matter of fact and as a matter of principle, law and morals are very closely linked:

(i) At the observational level, it is good to recall that moral issues of all sorts come into the legal system at all levels. Whether we talk of guarantees of a free trial for all, or of equality before the law, or of statutes against racial discrimination or murder, or of laws providing for graded taxation, or of laws allowing those who object in conscience to military service to render some other type of social service to society, we are concerned with issues where the demands of the moral law coincide with norms of the legal system, where law and morality positively meet. As a matter of sheer fact, it is impossible to describe a legal system correctly if one prescind completely from ethical issues. Morals *de facto* come into all areas of law, and not just the criminal law. And the moral issues that pervade the legal system are not just, not even principally, issues of sexual morality.

(ii) Further, morals come into a system of law as a matter of necessity and in their own right. Law can for some purposes be thought of merely as a system of norms: but it can only be *adequately* explained in terms of its end, which is to serve man, the moral subject par excellence. Law is there not for its own sake but to create for man decent conditions of co-existence. These conditions are constantly judged by man himself to be 'just' or 'unjust'. When man therefore sets up a legal system, he sets it up on the basis of his moral ideal of himself and of his society: and he *judges* the success both of the legal system and of any one particular law in terms of such an ideal. Man thereby constantly refers law, through his judgement, to law's end (that of serving man). Law therefore is necessarily and remains necessarily embedded in man's moral being; it is no more and no less than a help to man's moral existence. Any attempt to exclude morality from the legal

system fails to grasp that law and morals are related as means to end.

The real question is not, therefore, whether morals should come into law at all, but how, to what extent, on what concrete issues.

#### LAW IS CONCERNED WITH ELIMINATING WRONG AND CREATING THE POSSIBILITY OF ASSOCIATING WITH OTHER MEN

There is of course, at this stage, an important modification that must be made. Nobody can envisage or defend legislation of all possible ethical standards. Law is not there to substitute morality. To this extent I would agree with Hart and others that where possible one should allow the moral decision to be taken freely and without the coercion of the law.

But then there are situations where we have clear evidence that men regularly act and are acting unjustly towards each other, that they thoughtlessly and repeatedly hurt one another. What do we then, as men, do in such a situation? Apart from exploiting the possibilities inherent in education, can we just stand there and do nothing?

According to Professor Cotta of the University of Rome, at this stage the law must intervene to 'eliminate wrong'. This is the most original, the most basic, characteristic of law, law's *Urphänomen*.<sup>1</sup> What does Cotta mean by the term 'eliminate wrong'? He means the following: men spontaneously form friendships and express their love towards the people they like. Their ability to love all spontaneously and generously is, however, limited. Now if X and Y cannot be friends, must they be enemies? Is there no remedy, no middle way? There is: for law gives man the possibility of associating with others. If X cannot be on friendly terms with Y, at least he can be Y's associate. They can expect of each other regularity, loyalty and foreseeable conduct – and all this can find expression in a bilateral contract. What they demand of each other is a minimum of truth and reasonable conduct, some minimum imposed by the society they live in.

What, therefore, says Cotta, distinguishes law from, say, politics or ethics, is the determination positively to work out the minimum standard of ethics which is essential to guarantee that men who are not friends can at least be associates. Law does not come up to the exalted standards of ethics, but it draws on ethics in asking all men to be associates to all men; characteristic of law

<sup>1</sup>'Filosofia della politica e filosofia del diritto' in 'Primo Simposio di Filosofia della Politica: Tradizione e Novità della Filosofia della Politica' Ed. Laterza 1970, pages 69-79.

is that it refuses to tolerate infringement of the regulations designed to create sociability. Law therefore is universal, in that my associate is any person, irrespective of colour, race or nationality. Cotta adds that the more a person is a stranger, the more (paradoxically) I am interested in making him an associate, through legal rules, with a view to at least avoiding his enmity. The aim of law is not therefore and cannot be as sublime as that of morals: nor can law force me to perform a moral act, for I must choose the moral act for it to become moral. But law can lead me on to see that a certain type of action is moral and therefore can pre-dispose me for the right moral choice.

The aim of law is, on Cotta's view, universal like that of ethics: the logic of law is centrifugal, it constantly breaks the small walls of friendship to create the larger bastions of association – association cannot be seen as a substitute to morality but it is certainly not totally divorced from morality! International law is the best evidence of the centrifugal logic of law: it shows that even the boundaries of the state are insufficient. Men are forced constantly to widen their horizon, to open themselves to others at least so as to make life liveable and to prevent possible wrongs to themselves and to others.

#### THE QUESTION OF CONCRETE ISSUES

Having said, then, that law participates in ethics and has its particular moral objective in life, and yet that it does not aim at instituting a reign of ethics, the question arises: when it comes to concrete issues, which criteria shall we adopt to decide which moral issues should be legislated upon and which not? Clearly it is not enough to say that law aims at the avoidance of wrong and at creating the presuppositions of universal association between men. We must look further and formulate more precise questions so as to throw light on the concrete issue that we might have in mind to legislate upon.

I am afraid that at this stage I can only state the self-evident and say that this is the most difficult point when talking of law and morals, the point where the decision must be taken whether a concrete issue should be made a matter of law or not.

Nevertheless it is imperative to suggest a few, at least tentative guide-lines that may further our reflection. In deciding whether to legislate on a particular issue or not, I would envisage the following type of question:

– is this concrete law being proposed enforceable and will it enjoy the respect of at least a large section of society?

– will this law foster in men respect and love of one another or will it tend to turn men in egoistically on themselves? (a question of this sort might be relevant to issues of taxation, to questions of race-discrimination, etc.)

– does this law completely crush individual privacy, the right to think and have private notes, etc.? (a question of this sort might be relevant to the issue of extending police powers to search a person's home)

– would this law impose liability for actions for which the defendant is not, or is largely not, responsible? (a question relevant to criminal statutes in preparation)

– does this law, which deprives X of some of his liberty, protect a more important right of Y? (a question of this sort is relevant wherever there is a conflict of subjective rights)

In the series of tentative questions I have listed, only the first question is a general one and could have relevance for the whole area of law. The other questions are more limited in scope. They refer to concrete issues and are posited in a particular area of law. Within each area of law, such particular and more precise questions can better clarify the issue as to whether to legislate or not. Clearly even if, in instituting laws regarding taxation and in drawing up a criminal statute, I might in both cases want to eliminate wrong, I have to ask further concrete questions on each of the two statutes to decide whether to legislate or not.

## CONCLUSION

In conclusion I would like briefly to re-state the view of law and morals expanded upon above.

As a matter of definition, I defined the term 'morals' in a wide sense and took it to be co-extensive with the term 'ethics'. Contrary to common linguistic usage, the term 'morals' in this article was not restricted to the sphere of sexual morality.

Having so defined the term 'morals', I then touched upon the following four points:

(i) As a matter of pure observation, moral issues come into all areas of law and not just into the criminal law. They pervade the legal system.

(ii) As a matter of principle and in terms of what the legal system is out to achieve, morals cannot be excluded from the law, for law itself is only adequately defined in terms of its end, which is to serve man, who is the moral subject par excellence. Evidence of our constantly referring law to its ethical ideal is talk about justice, which demonstrates our ability to compare what the law



achieves in fact with our ideal of the law as an instrument in the service of man.

(iii) Law however does not aim at instituting a reign of morality in society: it is interested in at least eliminating all forms of wrong that necessarily jar with the ideal of justice, and in instituting a minimum standard of morality that allows all men to be if not friends, then at least associates.

(iv) Where concrete issues upon which to legislate are concerned, different questions are relevant and different considerations will decide whether it is right to legislate on a given issue.

Clearly, from a strictly ethical point of view, law cannot make people moral: all along, the morality of an act depends on its being enforced *ab extra*. And yet law, of its very nature and because of its particular finality, is necessarily concerned with morals. A complete dichotomy of law and morals is unthinkable.