

LAW AND MORALITY –II

The second aspect of this discussion is associated with Hart – Devlin debate . This debate has stood the test of time and has found room in the famous Naaz Foundation case . The groundbreaking judgment as delivered by the Hon’ble High Court of Delhi is nothing but a reiteration of the views of H L A Hart and Lord Devlin . This debate can be studied under different nomenclature :

(1) Public Morality vs Constitutional Morality .

(2) Liberalism vs Legal Moralism .

The starting point of this debate was the publication of Wolfenden Report in England which wanted to de criminalize homosexuality and prostitution in England . Both Lord Devlin and H L A Hart had divergent views on the issue . Lord Devlin was against the notion of de criminalizing homosexuality and Prostitution and based his argument on the basis of ‘*Public Morality*’ . H L A Hart opposed the views of Lord Devlin by making a recourse to John Stuart Mill’s ‘*Harm Principle*’ . Let us understand some key terms before understanding the actual debate and its spill over effect .

(A) Liberalism : It is the view that the prevention of harm or offense to non consenting parties other than the actor is the only morally legitimate reason for a criminal prohibition .

(B) Legal Moralism : It is sometimes legitimate to use the criminal law to prevent actions simply because those actions are ‘*inherently immoral*’ even if those actions cause no harm or offense to non consenting third parties .

(C) Harm principle : Legal coercion is justified only to prevent one citizen from violating the rights of another . Any other basis for state coercion – particularly the attempt to promote personal virtue – would itself violate a fundamental moral right of persons .

(D) Retributivism : Punishment should be inflicted , at least in part , on the basis of desert – on the basis of the blameworthiness of the individual criminal .

(E) Fundamental Rights Constitutionalism : All liberty is important , of course , but only some liberties are important enough to be protected as fundamental rights at the constitutional level .

The debate is triggered by Lord Patrick Devlin in his article '*Morals and The Criminal Law*' where Lord Patrick Devlin uses Public Morality to warn the legal culture of England against the misgivings of Homosexuality and Prostitution . In his article , Devlin makes religion (Christianity) the moral base of Criminal Law . He states , “ Crimes of violence are morally wrong and they are also offences against good order; therefore they offend both laws. ...” This is what is called '*Public Morality*' . Devlin's views on Public Morality are based on three inter related questions .

- (a) Has society the right to pass judgment at all on matters of morals ? Ought there , in other words , to be a public morality , or are morals always a matter for private judgments ?
- (b) If society has the right to pass judgment , has it also the right to use the weapon of the law to enforce it ?
- (c) If so , ought it to , use that weapon in all cases or only in some ; and if only in some , on what principles should it distinguish ?

According to Lord Devlin Public morality has two constituents ; politics and morals . Political Structure and Moral system are interdependent . If a person 'x' tends to live in a nation state where monogamy is a norm then this norm is accepted not because of the religious point of view of a nation state but because society , according to Devlin is built like a house and it should be accepted the way in which it is . Society according to Devlin cannot tolerate rebellion and the rightness or wrongness of a society's judgment cannot be left to individual judgment . Society decides the 'sense' of good and evil and if there is no common agreement on this then society will disintegrate . (It is to be remembered that Rawls' used an individualist approach to arrive at a Just society when uses the *thought experiment* of Original Position). Society is held together by an invisible , common bond . Devlin obsession with Public morality can best be stated in his own words , “ A common morality is part of the bondage . The bondage is part of the price of the society ; and mankind , which needs society , must pay its price.” Since sexual immorality involves the exploitation of human weaknesses , there shall be no theoretical limit on the State to legislate against immorality . Lord

Devlin equates Immorality with Treason and Seditious . Devlin is of the view that the Public Morality is correct because it is from the point of view of a 'common man' or the Clapham omnibus man . This is called 'practical morality' . It is based on 'common sense' and not on sophisticated philosophical basis .

Hart counters it by resorting to Harm principle . He endorses Liberalism while Devlin supports Legal moralism . Hart supports Mill's principles . It is interesting to mention here that what is missing from Hart – Fuller debate are the different theories of sexuality . Sexuality like any other freedom or morality deserves a Constitutional protection in the form of fundamental rights . This is exactly what Delhi High Court did in the *Naaz Foundation case* . This case marks the triumph of ' *Constitutional Morality*' over ' *Public Morality*' hence giving a 'honourable burial' to Devlin's Public Morality . Court applied the doctrine of *reading down* and circumscribed Sec 377 of IPC that dealt with unnatural sexual offences . It is to be noted that Sec 377 of IPC contains three distinct offences : Sodomy , Bestiality and sexual relations against the order of nature . Sodomy and Bestiality were not challenged . A part of Section 377 IPC which dealt with non penal vaginal intercourse and made it an offence was challenged to be discriminatory against the LGBT community . It was argued that it violated Art 14,15,19 and Art 21 of the Constitution of India . According to the Court , *Public Morality* as practiced by the State through Sec 377 of IPC was unconstitutional . Sec 377 of IPC violated the *intelligible differentia* test as suggested by American Scholars Joseph Tussman and Jacobus tenBroek and the Supreme Court of India . In the twenty first century the Supreme Court had been following the 'Right based jurisprudence' in M Nagendra Rao and I R Coelho case where even Art 14 , 19 , 21 were given a possibility of being included in the Basic Structure . The addition of *Impact Test* has further strengthened the Fundamental Rights regime . Following the judgment in *Anuj Garg* case the Supreme Court has constantly evoked the 'deeper judicial scrutiny' test where the laws that perpetuate 'oppressive , cultural norms' and target minorities and vulnerable groups . This test was invoked by the Delhi High Court . The Court held that prosecution U/S 377 made LGBT a sub altern group and drove them under ground . LGBT

community being afraid of being penalized , victimized became susceptible to HIV . Criminal Prosecution was almost nil under Section 377 of IPC and High Court asked as to why the device of *desuetude* should not be used to render Sec 377 obsolete as the non use of the section had made it irrelevant in recent times . In Navtej Johar vs Union of India the Supreme Court of India 'read down' Sec 377 of IPC .