

Law and Morality: The Evolution of Notions in Relation to LGBT Issues

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Abstract:

This paper delves into the dynamic interplay between law and morality concerning LGBT issues, examining how societal attitudes and legal frameworks have evolved over time. It explores the historical context of laws governing LGBT rights, highlighting pivotal moments and landmark cases that have shaped the trajectory of legal and moral discourse. Through a comprehensive analysis, this study elucidates the complexities of navigating the intersection of law and morality in the context of LGBT rights, shedding light on the ongoing evolution of societal norms and legal principles.

Key words: Law, Morality, Homosexuality, Public Morality, LGBT

Introduction:

Since the resurgence of jurisprudence, perhaps no other topic has engendered as much discussion and debate as the relationship between law and morality. Despite the ongoing and seemingly perpetual nature of this discourse, a definitive resolution remains elusive. Various contrasting viewpoints have been entertained, spanning from the positivist legal theory propounded by Austin, which posits law as entirely divorced from morality, to opposing perspectives advocating for the unity of morality and law.

From the vantage point of the natural law school, which perceives law and morality as inherently intertwined, to the positivist law school, which contends that law is solely a decree of a sovereign detached from morality, and even to Mills' 'No Harm Principle', few discussions in jurisprudence have commanded such widespread attention. This intellectual discourse assumed social significance and contentiousness particularly when issues surrounding homosexuality gained traction in various communities.

At times, an academic discipline attains significant scholarly and practical relevance, transcending the confines of academia to capture widespread attention. Morality sets the standards for legislation, and legislation ideally conforms to these standards. However, the perennial question persists: whose morality shall ultimately prevail?

Most jurists commonly acknowledge a connection between morality and law, contending that the purpose of law is to advance morality and, in doing so, safeguard the principles conducive to the realization of a moral existence. The average person perceives law as a means to achieve justice, albeit justice itself is often viewed as a nebulous amalgamation of moral ideals.

Many individuals tend to conflate law and morality, erroneously equating legal standards with abstract notions of fairness. Moral principles govern both internal motivations and their resulting outcomes, encompassing the entirety of one's existence. However, the scope of legal regulations

is narrower compared to that of morality, strictly regulating outward behaviors without encroaching upon internal mental processes or emotions.

Harboring malevolent or malicious intentions against an individual or in general is morally condemnable, yet legal consequences only ensue when these intentions manifest into actions violating established legal principles. Morality is subjective, contingent upon individual perspectives, communal norms, and temporal contexts, each individual possessing their own set of moral and ethical principles.

Moral laws lack the precision and definitiveness of legal standards due to the absence of a singular authority responsible for their creation and enforcement. These rules are not formulated nor implemented by any legal jurisdiction, lacking the coercive power of the state to enforce them. Consequently, transgressions of moral principles are typically met with social criticism or personal conscience rather than physical punishment.

While laws are enforced through coercion, moral behaviors are guided by individual conscience and free will. Ethics, as a distinct field of study, examines morality. Laws can be defined as regulations governing human behavior supported by supreme political power, inherently interwoven with morality.

Laws often emerge as a manifestation of collective moral ideals held by a specific society, governing external behaviors, while morality primarily regulates internal processes. While laws possess a universal scope, morality exhibits variability across different locales. Law enforcement is carried out by state authority, while moral enforcement relies on public opinion or individual conscience.

Although intellectual distinctions between law and morals exist, in practice they often intersect. Legal norms such as 'justice', 'equity', 'good faith', and 'conscience' are frequently influenced by moral precepts permeating the legal realm. Moral values play a crucial role in judicial legislation, interpretation of legal principles, and exercise of judicial discretion, imposing limitations on legislative authority as lawmakers, acting as societal representatives, cannot enact laws blatantly contradicting collective moral values.

Historical Back Ground:

The historical background of the relationship between law and morality in relation to LGBT (Lesbian, Gay, Bisexual, and Transgender) issues is multifaceted and spans centuries.

In many cultures and societies throughout history, non-heterosexual behaviors were often stigmatized and subjected to legal and moral condemnation. Ancient civilizations such as Greece and Rome had varying degrees of acceptance and condemnation of same-sex relationships, reflecting the diversity of attitudes towards homosexuality throughout history.

In more recent centuries, particularly during the era of colonialism and the spread of European influence, laws criminalizing homosexuality were established in many parts of the world. These laws were often rooted in religious teachings and moral beliefs prevalent in the societies of the colonizing powers.

During the 19th and early 20th centuries, the legal and moral frameworks surrounding LGBT issues were largely characterized by repression and discrimination. Same-sex relationships were often considered taboo, and laws criminalizing homosexual conduct were widespread in many countries.

However, the mid-to-late 20th century witnessed significant social and legal changes regarding LGBT rights. The Stonewall riots in 1969, which occurred in response to a police raid on a gay bar in New York City, marked a pivotal moment in the modern LGBT rights movement in the United States. This event galvanized the LGBT community and sparked a wave of activism demanding equal rights and an end to discrimination.

In subsequent decades, the legal landscape surrounding LGBT issues began to shift, with several countries repealing laws criminalizing homosexual conduct and enacting anti-discrimination laws to protect the rights of LGBT individuals. Landmark legal cases, such as *Lawrence v. Texas* in the United States, played a crucial role in challenging discriminatory laws and advancing LGBT rights. Furthermore, the evolving understanding of human rights and principles of equality and non-discrimination have contributed to the changing legal and moral attitudes towards LGBT issues on a global scale. International organizations such as the United Nations have advocated for the protection of LGBT rights and condemned discrimination based on sexual orientation and gender identity.

Despite these advancements, challenges persist, and the relationship between law and morality regarding LGBT issues continues to evolve. Debates surrounding marriage equality, adoption rights, transgender rights, and other LGBT-related issues remain contentious in many parts of the world, reflecting ongoing tensions between legal frameworks, moral beliefs, and societal attitudes. However, the trajectory of progress suggests a growing recognition of the rights and dignity of LGBT individuals and a gradual shift towards greater acceptance and inclusion.

Morality:

The concept of "morality" finds its roots in the French notion of "bonnes moeurs", which is defined as "the extent to which one adheres to moral principles, particularly those considered good." Morality encompasses specific normative patterns aimed at fostering good and mitigating evil in individuals and society.

Law, on the other hand, represents a broad directive imposed on individuals by the unrestricted governing power of the State, enforced through penalties. Within the legal realm, four distinct components exist: the uniformity of law, its coercive nature, absolute obligation, and the necessity of legal sanction for its existence. The divergence between law and morality lies in their exterior characteristics; law is formally articulated and enforced by state authority.

However, relying solely on laws to govern human behavior and social interactions is not feasible, as a significant proportion of them are governed by ethical principles. Many activities and interactions within society operate seamlessly without requiring legal intervention, upheld by ethical principles. Thus, moral principles serve to refine and enhance the law.

The discourse surrounding the relationship between law and morality dates back to the origins of jurisprudence. The natural law school, represented by eminent figures such as Socrates, Plato,

Aristotle, and Thomas Aquinas, posits a strong correlation, if not complete equivalence, between law and morality. According to this school, human rules derive their definition from morality rather than from ruling individuals or governing bodies.

Conversely, positive law theory, exemplified by John Austin's command theory, emphasizes the distinction between human law and moral rules. Laws, under this theory, are directives given by a ruler and are not based on moral laws.

In the modern era, the sociological perspective has significantly influenced legal development, emphasizing the ultimate objectives that legislation must strive to achieve, often influenced by prevailing moral principles in contemporary society.

The clash between criminal law and evolving societal values is particularly evident in relation to issues such as homosexuality. Historically criminalized due to moral condemnation, attitudes towards homosexuality have evolved, prompting renewed debates on the relationship between law and morality.

Public morality, essential for the overall welfare of the community, is periodically upheld by law and can evolve over time. Legal moralism, on the other hand, justifies the prohibition of certain behaviors based on intrinsic immorality, regardless of harm caused.

The moral acceptability of gay relationships in recent times has reignited debate on the extent to which public morality should be enforced by the state, particularly in regulating private and consenting actions of individuals.

The 1954 Wolfenden Report in England marked a significant milestone in evaluating laws criminalizing homosexual conduct, proposing prospective changes to penal law and concluding that criminal law should not enforce moral standards.

Jurisprudential Aspect on Morality & Homosexuality

Aristotle and Saint Thomas Aquinas both endorsed the idea that law could foster a social environment conducive to human virtue. However, the fundamental principle of natural law theory in ethics asserts that humans are governed by inherent or fundamental laws rather than legislation. These laws form the foundational basis of ethical thought, applying universally and originating from nature rather than human creation. They operate autonomously, independent of individuals' beliefs, desires, wants, needs, or emotions.

Aquinas' natural law theory of morality emphasizes that each type of being or category possesses its own distinct manner of existence and conduct, integral to its innate essence. Therefore, the inherent nature of an organism establishes norms or standards for what is beneficial for entities of that type. Human beings, guided by reason, align their actions with the laws of nature. Anything contrary to reason is deemed unnatural and morally wrong. Aquinas, for instance, condemned homosexual practices as aberrant sins deviating from the natural order, considering male homosexual union as an unnatural perversion.

Classical and Thomistic formulations have embraced the natural law theory of morality. Classical moral laws are seen to vary among nations and are regarded as positive laws, products of societal norms and traditions lacking true binding power. In contrast, the Thomistic perspective sees natural

law theory as the connection between morality and human nature. It posits that our actions should align with our inherent characteristics, rooted in rationality and autonomy.

According to the Thomistic perspective, human nature, characterized by rationality and autonomy, entails the obligation to fulfill our inherent purpose. While inanimate objects and non-human creatures act according to their predetermined nature, individuals with free will decide whether to fulfill their role in God's plan. Adhering to the classical perspective suggests that moral principles hold validity relative to individuals or societies, implying that same-sex marriage may be ethically permissible within the context of those involved.

Moreover, from the Thomistic viewpoint, if human nature is indeed characterized by rationality and autonomy, then gay behaviors are choices made by rational individuals aligning with their perception of human nature. They may argue that reason guides their choice and that embracing homosexuality aligns with their rational judgment, asserting that it is inherent in their nature, individually or collectively, to feel drawn to one another.

CONFLICT BETWEEN MORALITY AND LAW:

The resurgence of the issue of legal moralism occurred approximately one hundred years later, following the publication of a report by the Committee on Homosexual Offences and Prostitution in 1954. This report evaluated existing laws criminalizing homosexual behavior and prostitution in the United Kingdom, marking the inception of contemporary discourse, particularly with the establishment of the Wolfenden Committee as a subsidiary of the British Parliament. Tasked with examining potential modifications to criminal statutes governing sexual offenses, the Committee produced a report in 1957, proposing revisions to the penal law.

A contentious suggestion made by the Committee was to decriminalize consensual homosexual activity among adults, sparking substantial controversy. Emphasizing the need to maintain societal harmony while upholding moral standards, the Committee argued against criminal law's involvement in implementing moral standards. They proposed refraining from interfering in personal affairs except to achieve specific objectives.

The Committee's recommendations were grounded in a restatement of John Stuart Mill's harm principle, asserting that criminal law's primary purpose is to maintain societal order and protect individuals from harm, exploitation, or corruption. They underscored the importance of preserving a sphere of private morality beyond the law's jurisdiction.

The Committee contended that consensual homosexual acts between adults in private do not align with criminal law's theoretical and practical framework, as they do not harm others or exploit vulnerable individuals. They emphasized individual freedom of choice and action in areas of private morality, arguing against criminalizing behavior that falls outside the law's legitimate objectives.

Despite the Committee's proposal, the home secretary declined to endorse the decriminalization of consensual homosexuality between adults in private. However, the ensuing discussions over the role of criminal law in addressing sexual morality issues and the resulting recommendations

garnered significant attention. Ultimately, the British Parliament implemented the Wolfenden Committee's suggestion by passing the Sexual Offences Act in 1967.

The Committee's proposal to decriminalize consensual adult homosexuality in private, along with its underlying principle that personal morals should be a private matter, sparked renewed debate between proponents of legal moralism and advocates of individual autonomy. This debate highlighted the functional paradigm of criminal law established by the Wolfenden Committee and provided a basis for arguments in favor of decriminalization, asserting the importance of respecting individuals' sexual autonomy and choices.

PERSONAL RIGHTS AND PUBLIC MORALITY IN INDIA:

In the case of *State of Bombay v. R.M.D. Chamarbaugwala*, an argument was presented to the Supreme Court claiming that the freedom to engage in gambling transactions is protected under article 19(1)(g) of the Constitution as a basic right. It was argued that the interpretation of these clauses should begin with complete freedom, allowing the State to impose limitations, including a complete ban, if deemed necessary.

However, the Supreme Court swiftly dismissed this argument, seemingly influenced by the prevailing public and legal consensus that categorizes gambling as a moral failing. The decision was based on ancient scriptures and prevailing public sentiment, both domestically and internationally, which considered gambling operations as falling outside the scope of 'trade or commerce'.

In the case of *K.A. Abbas v. Union of India*, the Supreme Court ruled on the constitutionality of pre-censorship of films and other media forms in relation to freedom of speech and expression outlined in articles 19(1)(a) and 19(2) of the Constitution. The Court highlighted the balance between public morality and individual freedom of speech, indicating a tilt towards public morality.

The censorship of films, including classification based on age groups and determining whether they can be shown without edits, was deemed a legitimate exercise of authority to uphold public morality and decency, without infringing upon the rights of speech and expression. This reflects the prioritization of collective welfare over personal liberty, acknowledging the necessity of limitations on freedom for the greater good.

In *Mr. 'X' v. Hospital 'Z'*, the concept of 'public morality' was pivotal in determining the priority of one basic right over another in a conflict situation. Similarly, in *Nashirwar v. State of M.P.*, the Court upheld the State's authority to control or prohibit the sale of alcohol based on "public expediency and public morality".

The evolving concept of public morality has significantly influenced various individual rights, as seen in cases such as *Govind* and *K. A. Abbas*. However, the Courts have consistently endeavored to balance personal liberty with societal interests, ensuring that limitations on freedom are justified by compelling reasons.

Constitutional landscape

Constitutional morality and popular or public morality diverge fundamentally. While the former is grounded in constitutional principles, the latter relies on ever-changing and subjective notions of right and wrong.

Dr. Ambedkar was instrumental in conceptualizing constitutional morality, citing Grote, the Greek historian, who emphasized the importance of constitutional morality for the sustenance of a free and peaceful government. Constitutional morality entails a profound respect for established constitutional procedures, including obedience to authorities acting within these frameworks, while also allowing for lawful dissent and criticism. It fosters a belief in the enduring sanctity of the Constitution, even amidst intense political discord.

Ambedkar highlighted that constitutional morality must be cultivated and is not inherent. The governance type must align with the constitutional structure, ensuring consistency and adherence to constitutional values. Without a deep understanding and commitment to constitutional morality, there's a risk of subverting constitutional principles through administrative manipulation.

The judiciary, in cases like Naz and Johar, underscored the supremacy of constitutional morality over popular morality. They emphasized that moral indignation, even if widespread, cannot justify curtailing fundamental rights. Safeguarding LGBT rights became imperative, reflecting the evolution of societal values and constitutional interpretation.

Constitutional morality mandates treating LGBT individuals as equal citizens, prohibiting discrimination based on sexual orientation, and upholding their right to express intimate choices. It positions the court as a guardian of constitutionally protected rights, even against majority opinion.

Inclusiveness, a fundamental tenet of the Indian Constitution, underscores the importance of recognizing societal roles for every individual, irrespective of perceived differences. Constitutional morality, as articulated in Naz and Johar, extends beyond constitutionalism, promoting diversity and inclusion while upholding constitutional principles.

In the Hadiya case, the court emphasized personal autonomy and freedom of choice, particularly for LGBT individuals, affirming the importance of fostering a society conducive to the free expression of love and relationships.

Overall, constitutional morality serves to guide all stakeholders in constitutional governance to fulfill their duties in alignment with constitutional principles, reflecting the collective ethos of the Indian people. Any attempt to substitute this ethos with subjective viewpoints undermines the compassionate essence of the Constitution.

Conclusion:

The discourse surrounding the intersection of law and morality in the context of LGBT issues reveals a dynamic and evolving landscape shaped by historical, philosophical, and legal perspectives.

Throughout history, diverse philosophical schools of thought, from natural law theory to positivism, have grappled with the relationship between law and morality. Ancient philosophers like Plato and Aristotle, along with later thinkers such as Thomas Aquinas, laid the groundwork

for understanding moral principles as foundational to legal systems. However, modern legal theories, like positivism, have sought to differentiate law from morality, emphasizing the formal authority of the state in creating and enforcing laws.

The tension between legal and moral frameworks is particularly pronounced in issues related to LGBT rights. Historical criminalization of homosexual behavior reflects societal attitudes steeped in moral judgments. However, as societal values have evolved, so too has the legal landscape, with landmark cases like *Lawrence v. Texas* and *Obergefell v. Hodges* advancing LGBT rights within the framework of constitutional principles.

Moreover, the concept of constitutional morality emerges as a guiding principle in navigating conflicts between popular morality and fundamental rights. This notion, championed by figures like Dr. Ambedkar, emphasizes adherence to constitutional values over transient societal norms. Recent judicial decisions, such as the Naz and Johar cases, underscore the importance of constitutional morality in safeguarding the rights and dignity of LGBT individuals.

In essence, the evolution of notions surrounding law and morality in relation to LGBT issues reflects broader societal shifts towards inclusivity, equality, and respect for individual autonomy. As legal frameworks continue to adapt to changing social norms and values, the pursuit of justice and equality remains central to the ongoing struggle for LGBT rights.

Referecces:

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1. Zoya Hasan, Aziz Z. Huq, et. al. (eds.), *The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US* 164- 194 (Oxford University Press, New Delhi, 2018).
 2. Charles Wellborn, "Public v. Private Morality: Where and How Do We Draw the Line?" 20(3) *Journal of Church and State* 491–505(1978).
 3. VII Constitution Assembly Debates Nov., 1948 37
 4. Including 'Mahabhartha
 5. K.A. Abbas v. Union of India(1970) 2 SCC 780
 6. State of Bombay v. R.M.D. Chamarbaugwala AIR 1957 SC 699