

## MESSAGE FOR DEC 08

In my message for this month and the next, I propose to examine some basic thoughts on the purpose of our laws on crime and punishment, commencing with crime.

There are many statements of the purpose of the criminal law, but my favourite short and simple statement is from the Wolfenden Committee in England set up to review the law on Homosexual Offences and Prostitution. The function of the criminal law, as they saw it in their 1957 Report, was:

... to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable ...

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, further than is necessary to carry out the purposes we have outlined ... there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

If we accept this as a working statement of the guide to criminalization of conduct, then the following principles flow from this:

1. It is not the function of the criminal law to shape personal conduct in the way that lawmakers would like Singaporeans to behave.
2. Acts (or omissions) should only be made criminal if they cause positive harm to:
  - a. other persons or beings capable of sentient feelings;
  - b. the actor himself;
  - c. the state;
  - d. public order; or
  - e. the community as a whole.
3. Harm has to be tangible and provable rather than speculative or subjective.
4. Harm to others (2a above) needs little explanation except for the second part which is meant to justify laws against cruelty to animals.
5. Harm to the actor (2b above) can be justified either by the principle of paternalism (sometimes the state knows better than the individual what is harmful to him, defining harm in terms of (3) above) or the welfare principle (it is against public policy to utilise the resources of the state to

expend time and money on attending to the injuries of those who could protect themselves against such injuries with little inconvenience).

6. Harm to the state (2c above) will justify offences set out under Chapters VI and VII of the Penal Code and offences such as failure to pay taxes.
7. Harm to public order (2d above) will justify:
  - (in principle) the laws against public assembly and racially insensitive speeches, although the degree to which it is necessary to control the activities of public assembly and freedom of speech is debatable; and
  - laws which prohibit behaviour which many not cause tangible harm to the object of the act concerned but, if not prohibited, will cause people who are so outraged by that act that they will take redress into their own hands (eg necrophilia).

This will also distinguish public decency and private morality, so that (for example) there should be:

- criminalization of sexual acts committed in public (which would be justified in the preservation of public order); but
  - non-criminalization of sexual acts performed in private (other than those which cause physical harm even to consenting adults).
8. Harm to the community (2e above) distinguishes the interests of the state from the community at large and provides justification for offences such as:
    - those which protect the integrity of the financial markets; and
    - those which save the community from the trouble and cost of having to take action to rectify the consequences of acts which cause harm to the actor (e.g. taking drugs or attempted suicide), which is also justifiable under the welfare principle described under (5) above)

If we follow these principles to their logical conclusion this should lead us to re-examine why certain offences remain on the statute books and whether they should be repealed or modified.

The point of this analysis is that we should not criminalize conduct which we simply consider to be immoral unless harm also results from the conduct. We can argue about what 'harm' means for this purpose, but the essential principle should be: no harm, no criminal offence.

That is not to say that morality has no place in the criminal law. All criminal laws must be rooted in morality in the sense that it must have the moral support of the majority of the community, otherwise it becomes the rule of the oligarchy, who think they know what is best for us all. We cannot criminalize conduct if the majority of the people think that the conduct is not wrong enough to require state enforcement (eg adultery). But the converse argument does not follow as a matter of logic: to enforce morality for its own sake cannot be justified by legal arguments. Hence, the arguments about prohibiting the consumption of alcohol or the practice of homosexuality need to focus on the actual or potential harm caused to the persons involved, especially if they are vulnerable (by reason of age or mental incapacity) and not capable of making a fully informed decision as to whether they understand what harm they might suffer from the conduct in question.

All the above is not original thought; it is largely reproduced in the standard criminal textbooks, and I am simply reminding people who have a say in the revision of our criminal laws to take the above into account.

We need to apply intellectual rigour to our attitude to criminalization of human conduct, and should not simply argue for criminalization of conduct which offends us personally for reasons which do not fall within the objective criteria set out above.

So let us clear our minds of cant, and think logically and progress towards a more rational theory of criminal law.

In next month's message I will deal with what I consider to be the relevant principles determining the imposition of penalties for criminal behavior.

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