

Morality: Towards A Rational Basis for Law

Should Moral Principles be a Consideration in Law or Court Decisions?

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I. INTRODUCTION

The recent United States Supreme Court decision in *Lawrence v. Texas*¹ purports to draw legal implications of equal protection of the law down to its ultimate consequences in a highly controversial matter — the private sexual behavior of homosexuals. While it openly promoted the homosexual agenda, it also let out a resounding message — moral principles are no longer valid considerations in legal matters. The Court, in an effort to decriminalize sodomy, declared that moral standards should not be considered in adjudicating controversies when the public arena is not involved. In its own words, the Court decreed that its obligation was to “define the liberty of all, not to mandate its own moral code.”² The irony behind this stance is that

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1. 000 U.S. 02-102 (2003), 41 S. W. 3d 349, certiorari to the Court of Appeals of Texas, Fourteenth District, No. 02-102. Argued March 26, 2003 – Decided June 26, 2003.
2. *Id.*

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while the Court pretended not to moralize in its decision, it did make a moral stand in an important issue because the very nature of law called for such. It shall be explained shortly why this is so.

Defence of the rightful liberty of individuals and equal protection of the laws was the main argument of the Court when it decided to overturn the decision of *Bowers v. Hardwick*,³ which had decided that homosexuals did not have the right to engage in sodomy. It can be drawn from *Lawrence* that liberty is equated with doing whatever a person chooses to do, even if this act is deemed immoral. In other words, society has no right to intrude upon the private behavior of its citizens when such behavior is consensual and does not harm parties other than those directly involved. Of course, such a behavior could go against moral sensibilities of certain sectors of society, but law should not be based on moral considerations, rather, it should be based on rational ones. This event raised a general alarm all over the United States, resulting in a current move to push for a constitutional amendment to strengthen the institution of marriage and define it as a union between heterosexuals.⁴ As far as marriage and family-related legislation is concerned, the United States seems to contemplate a fate similar to Canada.

While this current situation may seem implausible in the Philippines at present, such a status gives us a ground for considering the seeming disregard for morality in legislation and jurisprudence. The current situation sadly points to the weak hold that Christian moral principles seem to have over Western society in general. While the public perception of most Western countries is hostile to religious-grounded reasons, a close examination of the nature of law may show that moral principles do have a bearing over questions of significance in society, particularly those pertaining to its laws. There is an urgent necessity, therefore, to present jurisprudential and social reasons why morality should be considered in law making and judicial pronouncements.

It bears stressing that moral principles are intrinsic to the bonds which tie society together and, therefore, cannot be disregarded without inflicting considerable harm to society based on the following reasons: a) Moral

3. 478 U.S. 186 (1986).

4. The Alliance For Marriage (AFM) proposes the following amendments to the United States Constitution: "Marriage in the United States shall consist only of the union of a man and a woman;" and "[n]either this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Alliance For Marriage, Multicultural Coalition Reintroduces Federal Marriage Amendment in Congress *available at* <http://www.allianceformarriage.org/reports/fina/amendment.htm> (last accessed on Feb. 21, 2003).

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principles are necessary presuppositions of legal reasoning and legal systems, without which these legal systems will make no sense at all; and b) Law performs a function of morally forming society's citizens, and every time lawmakers promulgate and enforce a law, persons are effectively drawn towards or deflected from morally significant actions. In view of this second reason, lawmakers and judges thus have the duty and obligation to enact, enforce, and apply, at least morally neutral, if not morally good, laws.

II. MORAL BONDS HOLD SOCIETY TOGETHER

A. Main Considerations

The main considerations for legal enactments may be protection of rights, imposition of order, efficiency, or other pragmatic concerns that are based on general public feeling or some common goal. In Lawrence, there is much emphasis on the notion that in a pluralistic society, it is of utmost importance that the civil liberties of persons be protected by the due process clause of law. This is not surprising since the legal panorama in many Western countries has been positivistic, which means that laws are taken simply as enactments of lawful authority with or without considerations for morality.

Furthermore, an important characteristic in modern legal reasoning is that the question of morality has been taken out of the public sphere and shelved under some obscure drawer, thus some stigma is attached to bringing discussions of morality to the public sphere. In other words, morality may not be legislated. In spite of this reluctance, or even sometimes abhorrence, to bring considerations of morality to the legal sphere, laws are pregnant with moral notions which cannot be easily disregarded. In fact, a close examination of what the law is really all about will show that law may not be divorced from moral principles without rendering basic laws insensible or unjust or even absurd. Take the case of any country's fundamental law—the constitution, whether written or unwritten. Any constitution is a set of laws that a country establishes and lays down as a basis for building a society based on a common ground with a view to a common aim or good. Our own Constitution incorporated the following words in the Preamble:

We, the sovereign Filipino people, imploring the aid of Almighty God; in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good; conserve and develop our patrimony, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of

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law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.⁵

As stated clearly in our own Philippine constitution, the aim of this body of laws is to build a just society based on the rule of law in order to promote the common good. These very words imply that every society which aims to achieve this does so based on some idea of what good is. It also bases its laws on some foundation of justice, truth, and the like. Now good, truth, rights, and justice are decidedly moral notions which are linked to other moral principles as well. The American Declaration of Independence and Constitution are fraught as well with parallel notions evoking moral principles. Concepts such as liberty and freedom are intimately linked with ideas and moral principles such as the dignity of human persons. These notions bring along with them moral presuppositions. It is apt to cite the following words written by Lord Devlin in his essay *Morals and the Criminal Law*:

Society means a community of ideas; without shared ideas on politics morals and ethics, no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate.

For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.⁶

Ultimately, the aim of the promulgation of a body of laws, like the constitution, is to establish a society based on a common ground which in turn is based on some moral principles. These moral principles are not created, rather are necessarily presupposed by law. Justice, for example, is presupposed by law in the sense that it is what the imposition of law intends to protect so it may not be taken away, or reinstated after it has been taken away. Law does not make sense without the presupposition of justice. Justice does not make sense unless you have the presupposed notions of human dignity, rights, truth, freedom and so on.

Aristotle not only classified justice as a personal virtue which leads a person to render constantly what is due, but he also characterized it as a

5. PHIL. CONST. PMBL.

6. LORD DEVLIN, MORALS AND THE CRIMINAL LAW, IN PHILOSOPHY OF LAW 223-29 (Joel Feinberg & Hyman Gross eds. 5th ed. 1995) (quoted in Ronald M. Dworkin, *The Philosophy of a Law* (1977)).

system which is an integral foundation of society. For justice to be in society, it necessarily has to be fostered in every citizen who forms part of that society. Applied to modern situations, justice leads the employer to give the due salary of his workers, and a government to render service to its people by establishing a legal system which protects their rights and liberties. To the extent that this habitual rendering of what is due is observed, then there is a just ordering in any given society. The aim of the society as a whole is for its members to attain happiness through a life of virtue. For this reason, laws are enacted to ensure that a system which promotes this behavior is in place. Laws are established to enforce justice.

B. Justice

Is justice then dependent on how society articulates it and lives it? Montesquieu makes this observation:

Particular intelligent beings may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.

We must therefore acknowledge relations of justice antecedent to the positive law by which they are established.⁷

Justice then is something which is first discovered as a certain ordering of reality before it is applied in particularities. His observation points to the fact that justice must have some objective basis which transcends its positivization through civil laws. This points to the existence of the natural law, understood as an ordering of reality based on some pre-made plan by the Creator. This natural law encompasses not only the physical laws of nature but includes the moral laws by which human persons ought to live in society. Aquinas says that this law is written in the heart of every human person wherefore everyone knows that he must do good and avoid evil.⁸ This is the

7. Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, (Thomas Nugent trans.) available at <http://www.constitution.org/cm/sol.htm> (last accessed on Feb. 21, 2004).

8. Aquinas further explains that since not everyone has the inclination or the capacity to discover this law individually (mainly due to the darkening of reason caused by original sin), God revealed this law in the promulgation of the Ten Commandments. According to this view, the Ten Commandments are not only negative prohibitions, but also prescriptions for certain behavior, e.g., *Thou shall not steal* not only a prohibition against unlawful usurpation of another's property, but is also a prescription to observe justice in property relations; *Thou*

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most basic prescription of the natural law. This natural law is founded on certain inclinations of the human person which are a demand of his nature. For example, it is a natural inclination of persons to communicate their thoughts to each other. Reason demands, however, that persons should always speak the truth because otherwise, communication will not only be rendered meaningless but useless as well. For this reason, telling the truth is part of natural law. Our natural inclinations then become part of our obligations because reason commands it so.

However, even if natural laws are inscribed in the nature of the human person, human positive law are still quite necessary to determine the specifications which the natural law has to assume under the varying conditions of time and age. In other words, while the natural law remains immutable and universal, its application to specific societies of different times may be different. Hence, there is a need to enforce positive laws. To the extent that these laws follow the natural law, then these laws are said to be just and will, therefore, have the force of law. For example, a positive law which disregards life will not be just according to natural law which acknowledges the sacredness of life in all its stages.⁹

C. Truth

Another notion reverberating with moral undertones is truth. This requires of society the establishment of certain objectivity. Objectivity, in turn, points to an element that is not invented, rather discovered. In this sense, truth is not something made by man but is discovered by him through the use of reason. This shows that reality has its own ordering that needs to be discovered. This is why science can in fact discover laws in nature which are constant and uniform given certain conditions. The same can be said in the sphere of human laws and not just physical laws. When applied to human behavior, therefore, truth demands that our action should follow the rational demands of our nature. Truth demands that the objective moral ordering of our nature is followed. Truth demands the absence of arbitrariness and acknowledges the demands of moral absolutes.

D. Liberty

Liberty, as understood in democracies, is not license. It is liberty regulated by law. Malcolm, borrowing from Mabini, referred to liberty as “freedom to do

shall not kill is not only a prohibition against murderous acts, but is also a prescription to preserve life.

9. Hence, laws which promote abortion or euthanasia may be enforced in some societies as positive laws but they are not just laws and, therefore, ought not to be obeyed.

right and never wrong...ever guided by reason and the upright and honourable conscience of the individual.”¹⁰ Neither does the person have the liberty to abuse himself. The reasonable thing to do with liberty is to exercise it with a view to promoting some good, whether it is on the personal or communal level. The right to be free may not be equated to mean the right to do evil or do actions which may be harmful to one’s self or to others.

Furthermore, the free exercise of rights is reasonably geared towards human perfection and the perfection of society. Wherefore, to exercise one’s freedom to do what is evil or harmful not only is insensible but is also unreasonable. Linked to this is the notion that the exercise of freedom is not absolute and individualistic. Every human person who wishes to exercise his or her rights within society is also expected to contribute to the common good. This is what the principle of solidarity is all about. All of one’s actions have a bearing on the welfare of others, whether these actions are exercised in the private or public sphere. In the sphere of moral actions, then, our personal choices have a bearing on the general moral tone of society in general.

Justice, truth and liberty then, understood as moral notions, are seen as basic presuppositions of civil laws which ultimately should be founded on natural laws, and are part of the common bond that society wants to not only presuppose, but also establish. If such notions are ignored or disregard, only but weak links will be forged within society, thus making it unstable. If moral principles do not form the backbone of society, soon enough, these moral principles will easily be replaced by political ideology or some other agenda. To illustrate how the lack of basic moral considerations can reach the absurd in legal proceedings, applications in cases in the United States where a proclivity for resorting to legal solutions has sometimes reached the extremes are ready examples.¹¹

10. *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919).

11. If you have come across absurd accounts in the Stella Awards (<http://www.stellaawards.com>), then one would realize to what extent the law may be used not to redress justifiable grievances but for mercenary schemes. One account tells of how a certain Mr. Merv Grazinski of Oklahoma City, Oklahoma, won a suit against the company on the basis of what one may call moronic misinformation. He purportedly purchased a brand new Winnebago Motor Home. On his trip home from a football game, having driven onto the freeway, he set the cruise control at 70 mph and calmly left the driver’s seat to go into the back and make himself a cup of coffee. Not surprisingly the RV left the freeway, crashed and overturned. Mr. Grazinski sued Winnebago for not advising him in the owner’s manual that he could not actually do this. The jury awarded him \$1,750,000 plus a new Winnebago Motor Home. The company

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As regards equal protection of the law, equal protection does not signify a kind of classless equality. Equal protection “is not a disembodied equality. It does not deny to the State the power to recognize and act upon factual differences between individuals and classes. It recognizes that inherent in the right to legislate is the right to classify.”¹² Thus, since marriage is a union between a man and a woman, it would be repugnant to reason that a man should insist on being allowed to marry another man. In this regard, it is worth noting that in the Philippines, pursuant to the provisions of the 1987 Constitution, a law cannot be passed, as the other Scandinavian countries have done, allowing a marriage between individuals of the same sex.

The Constitution provides: “The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution.”¹³ The family, as contemplated by such provision, is understood as a stable heterosexual relationship and never as a union between the same sexes. Lawrence has certainly closed its eyes to the fact that equal protection does admit of a valid classification not only provided by law, but by nature itself. To discard the natural and basic distinction between man and woman is to deny reason itself

III. THE RELEVANCE OF MORAL LAW TO MAN-MADE LAWS

What is a law? St. Thomas Aquinas defines law as a decree of reason made by him who has care of the community. In this definition are encapsulated the essential traits of law. However, this definition alone does not give us the function of law. Shortly, it will be shown how the intrinsic link between law and morality has been elucidated by Aristotle’s *Nichomeachean Ethics*.

Law’s primary function is to establish order in society and serve it as an instrument. Law also has a normative function in creating and enforcing obligations and rights or it may prohibit certain actions. Due to this function, law creates a system where it becomes more favorable to do what is just. If law does not create this kind of climate, then the law ceases to be an effective tool of society for forming its citizenry. When a just law exists, justice is favored in society. This is the reason why the law has to be just, and not only effective at protecting or sanctioning individual rights and liberties.

actually changed their manuals on the basis of this suit to prevent others, like Mr. Grazinski, from getting away with the same or similar lawsuits.

12. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 137 (2003).

13. PHIL. CONST. ART II, § 17.

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Because of the consequent climate created by law, law recognizably performs a secondary but equally important function—the moral formation of society's citizens. This has long been recognized by Aristotle, as seen in his *Nichomachean Ethics*. The main argument of Aristotle was that laws are formulated in such a way as to habituate the citizens to virtue. After extensively discussing the moral virtues in various chapters of his *Ethics*. He argues in the last chapter the dependence of morality on law. He says that in order to instill and habituate the citizens of any state towards moral virtue, the ruler has to fashion laws which direct the actions of the general public.

Law has the function of either habituating the actions of citizens towards moral virtue, or it inhibits other actions which lead toward vice. Law has the important function then of not only establishing law and order, but also has the function of training the citizens toward morally good acts. Often enough, the law specifies how justice may be applied in situations or how it may be specified in various circumstances. This idea runs contrary to many modern theories about law, and in fact runs contrary to the reasons why certain laws are promulgated in modern times.

Whether the law pertains directly to moral matters or not (e.g., whether they pertain directly to matters of order or administration like traffic rules; or whether they pertain to matters with direct moral implication like decriminalizing homosexuality or prostitution), law always fulfills the secondary function of forming citizens in moral character. This is so because law directly controls behavior and this certainly has a bearing on character. It has an important function in the habituation of its citizens. For example, at the root of all the seemingly prohibitive rules being meted out by the MMDA is an attempt at conditioning people to be more orderly in their comings and goings to promote better traffic flow. At present for example, traffic laws are implemented not only to instill order but indirectly, these laws are supposed to instill a sense of order in citizens. A noted political scientist observes:

Although intellectuals of liberal democratic sympathies may not believe that morality depends on law, it is almost impossible for any regime that takes itself, and is to be taken, seriously not to shape its citizens with respect to morality. To deny that legislation of morality can or should take place does not eliminate such legislation; it merely conceals it, perhaps distorts it, and otherwise confuses and misleads rulers and ruled alike.¹⁴

This leads us to conclude that laws have a great part to play in the forging of a moral climate within a given society. This is not to deny that there are other factors which shape morality, such as religion, familial

14. George Anastaplo, *Aristotle on Law and Morality*, in 3 WINDSOR [ONTARIO] YEARBOOK OF ACCESS TO JUSTICE 458-64 (1983), available at <http://www.cygneis.com/ethics/gamoralist.htm> (last accessed on Feb. 21, 2004).

instruction, and custom. But note that even these factors depend on the law to some extent. Religious freedom is protected by the law. Mores and customs are safeguarded by law as well. The family, as an institution of society, is also shaped by the law. Society knows that the institution of the family has a lot of impact on the common good and its promotion or breakdown is within the interest of the general public. Laws which affect the family will affect the progress or demise of society. To the extent that society's laws promote the role of the family, then that society is protecting itself. But above this primary concern of promoting society's interest that the family fulfills its institutional role, society's laws which touch on the family do a lot to spell the moral tone that society may imbibe. For example, to the extent that a society may indirectly sanction promiscuous behavior by providing lax divorce rules, it sets the moral tone for that society through its marriage legislation.

Aside from setting the moral tone of a society, law also charts the sociological path a society is likely to take, whether for good or bad. Take the case of divorce. There is a wealth of sociological and psychological studies showing the adverse impact of divorce in America.¹⁵ One study after another have shown the far-ranging effects of divorce such that many American states now are trying to promote through public policy and legislation the strengthening of families and the imposition of stricter divorce laws.

If the law then has this powerful capacity of setting the moral tone of a society, then there is an obligation on the part of legislators to keep this in mind whenever laws are formulated. In the case of the recent U.S. Supreme Court decision on the decriminalization of sodomy, we can only imagine and project the impact that such a ruling will take. Contrary to its claim that it is not stating the Court's moral code but is simply protecting civil liberties, it has indeed stated its moral position. The decision was, in effect, a stamp of approval on the homosexual lifestyle. Yet, several psychological and sociological studies have come up underlining the risks of a homosexual lifestyle.¹⁶ Does this mean that the U.S. Supreme Court is protecting civil

15. JUDITH WALLERSTEIN, *THE UNEXPECTED LEGACY OF DIVORCE: THE 25-YEAR LANDMARK STUDY* (2000), presents significant findings on the long-term effects of divorce on children. One marked characteristic of children of divorce is the tendency to cohabit before getting committed.

16. The National Association for Research and Therapy of Homosexuality (NARTH) presents a study suggesting higher rates of self-harm and suicidal behavior for same-sex attracted individuals. Other studies as well indicate that same sex unions likely lead to substance abuse, violent behavior, *etc.* NARTH, *New Zealand Study Suggests Higher Rates Of Self-Harm And Suicidal Behavior For Same-Sex Attracted Individuals*, available at <http://www.narth.com/docs/newzealand.html> (last accessed on Feb. 21, 2003).

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liberties at the cost of some societal risk in the future? Only history can judge the impact that this decision (and other such similar decisions) will have on societies where they have been implemented.

IV. CONCLUSION

Our exploration of the implications of the U.S. Supreme Court's decision in *Lawrence v. Texas* may have generated more questions than answers. While there is no doubt that each citizen has to be accorded his fundamental rights, we do know that not all private actions may be licit or legal. Where is the line then drawn between protecting the basic rights of individuals and ensuring that justice really reigns in the community? If certain intimate and private choices may be protected from state interference, then to what extent should the law sanction these choices especially when they have societal and moral implications? Related questions are: On what ground then should a law be enforced? On the pleasure of the majority? On pragmatic and utilitarian grounds? On a political agenda?

In spite of all these questions and others which may be asked, we have tried to see some rational ground for the inclusion of moral principles in the formulation of law. The reasoning has been geared to showing jurisprudential and social reasons which point towards the connections between moral principles and legal systems and situations. Thus, moral principles are intrinsic to the bonds which tie society together and, therefore, cannot be disregarded without inflicting considerable harm to the whole of society based on the following reasons: a) Moral principles are necessary presuppositions of legal reasoning and legal systems, without which these legal systems will make no sense at all; and b) Law performs a function of morally forming society's citizens, and therefore every time lawmakers promulgate and enforce a law, persons are effectively habituated towards or deflected away from morally significant actions because of the law. This

Other studies also show that children raised by non-heterosexual parents are at risk. They are more apt to experience gender and sexual confusion; they are more apt to become promiscuous; they are at greater risk of losing a parent to AIDS, substance abuse or suicide. They suffer more depression and other emotional difficulties. They are also more likely to engage in same-sex behavior. NARTH, *Pediatrics Group Endorses Homosexual Adoption ...But New Policy Places Children at Risk*, available at <http://www.narth.com/docs/endorse.html> (last accessed on Feb. 21, 2003).

Furthermore, statistics tell us that gay sex is often tied to substance abuse, promiscuity and unsafe sex practices. NARTH, *Why Reveal the Dark Side of the Gay Movement?*, available at <http://www.narth.com/docs/whyreveal.html> (last accessed on Feb. 21, 2003).

second reason then imposes a certain obligation on lawmakers and jurists when they enforce a law.

A brief examination of the concepts of law and its function and impact in society has shown us that law does have something to do with morality. In turn, the moral tone of any society very much depends on the laws which are presently promulgated and/or applied. We see here a reciprocal relation between law and morality. Society's laws are founded on something beyond the law itself. Often enough, modern judicial systems have invoked the phrase "rational basis of law" to found legal decisions. Yet ultimately, unless societal laws or judicial decisions for that matter are founded on some basis other than the will of the lawgiver or interpreter, they will simply be subjected to either propaganda or the ideology of the ruling faction.

A law or a court decision, as we have tried to show, has an indirect function in the moral formation of its citizens and, therefore, a disregard for moral considerations will lead to the loosening of important societal bonds and ultimately will lead to the ruin of society. Finally, any lawgiver or jurist who intends to fulfill his function in a just manner has to be cognizant of the impact of the law or a judicial decision on the moral tone of society. To disregard this role would be to disregard the very good of society.