COMMERCIAL LAW AND MORALITY

BY THE HONOURABLE SIR GERARD BRENNAN*

When Professor Crommelin did me the honour of inviting me to attend this dinner at the end of a seminar on Commercial Law and Morality, I accepted with alacrity. I thought that it would be a comforting experience to be among those professional colleagues whose presence testified to their commitment to morality. In the event, the experience has been far more rewarding. It has furnished a stimulating review of the proper role of law and of lawyers in commercial transactions. For me, Professor Finn's paper was an additional bonus. He illuminated what has been going on around me for eight years past! It is the role of the academic profession to be, in a sense, a final court of appeal — to examine the principles which judges state or imply, to identify other relevant principles and to evaluate critically the solutions adopted by the court. That is a demanding role which calls for familiarity with the literature in foreign as well as domestic jurisdictions, incisive and dispassionate analysis and an ability to place the law in its social context. We are indebted to Professor Finn for the stimulus of a paper of great intellectual sweep and vigour which, standing back from the workface of individual cases, essayed a description of the paths of legal development. If I do not agree with all that Professor Finn has said, I respectfully acknowledge the force of the argument he presents.

I have come to repent my joyful acceptance of Professor Crommelin's invitation. At the time, the juxtaposition of the topics 'commercial law' and 'morality' had the charm of novelty but as the need to say something about their connection approached, the complexity of the problems inherent in the joint topics has become more manifest and the prospect of propounding a solution has become more elusive. At the outset, let me confess my remoteness from the topic. I last practised at the Bar in commercial law matters in 1976, and the intervening decade has seen not only a growth in commercial law but a transformation in the way in which it is practised. In the intervening years, the glimpses of the real world to be had from a judicial Arcady have been fleeting and fragmentary. As to morality, no doubt each of us treasures his or her own visions of the moral imperatives binding on everyone else whilst, for ourselves, we earnestly pray the prayer which St Augustine prayed in resisting conversion from the profligate life: 'Not yet, O Lord, not yet!' Without propounding a precise theory of morality for application to commercial law, I do not doubt that there is a moral standard to be observed. It would be too cynical to accept the truth of George Essex Evans' 'Ode to the Philistines':

> Six days shalt thou swindle and lie!
> On the seventh — tho' it soundeth odd —
> In the odour of sanctity

* High Court of Australia. Address to Seminar Dinner, Melbourne, 10 November 1988.

> Thou shalt offer the Lord, thy God,
> A threepenny bit, a doze, a start, and an unctuous smile,
> And a hurried prayer to prosper another six days of guile.

I must undertake the task assigned, attributing to commercial law and to morality such content as my imperfect understanding will permit.

In many areas, law and morality work in a symbiotic relationship. This is especially true of the general criminal law, which would hardly be enforceable if the common moral values of the community were at odds with the law's proscriptions. In tort also, a close relationship of law and morality can be perceived. As Professor Finn observed, 'Moral values . . . can and manifestly do inform the law'. I respectfully agree, though it is desirable that the dichotomy between law and morals be borne steadily in mind in determining the content of each. Law which is the subject of our professional concern does not mirror all the tenets of morality. Nor should it try to do so. The coercive power of the State must be reserved to the enforcement of those moral principles which, by a broad community consensus, enjoy recognition and acceptance and which need to be expressed as universal binding rules in order to facilitate a peaceful, ordered, just but free society.

The stimulus which moral values provide in the development of legal principle is hard to overstate, though the importance of the moral matrix to the development of judge-made law is seldom acknowledged. Sometimes the impact of the moral matrix is obvious, as when notions of unconscionability determine a case. More often the influence of common moral values goes unremarked. But whence does the law derive its concepts of reasonable care, of a duty to speak, of the scope of constructive trusts — to name but a few examples — save from moral values translated into legal precepts? How often do we see the construction of a statute turn on an intention of the legislature imputed by reference to a moral value?

There is room for debate about the method of legal development at the hands of the judges. The role of precedent, the need for certainty, the desirability of judicial reform by piecemeal development in cases arising almost adventitiously, candid recognition of the role of policy in legal development, simplification of legal principle — these are the heady topics about which the tide of debate rises and eddies under the influence of moral values pressing for legal recognition. The call for judge-made law increases as Parliamentary inclination to keep the law in good condition diminishes. There are some areas of the law which will never be swept by the statutory broom, and judicial refurbishment offers the only prospect for keeping these areas in a satisfactory condition.

As legal transactions become more complex, the input of morality — or policy, for in this context the terms are interchangeable — will increase inevitably, for morality furnishes the reference points for legal development. There are manifest dangers, of course, and I would mention two:

1. the danger that a judge might mistake his or her own moral predilections for the moral imperatives which, by broad consensus, enjoy recognition and acceptance; and
2. the danger that orderly legal development will be imperilled by the

piecemeal dismantling of old principles without substitution of a new coherent body of doctrine.

Acknowledging the dangers, the development of legal rules is nevertheless a necessity. There are but three possible sources of any proposition which is employed to determine a case once the facts are found: legal rules, morality or idiosyncracy. If legal principle is not sufficiently precise to determine the result, morality or idiosyncracy will make up the deficit. Better that new and precise legal rules be informed by morality than that morality and idiosyncracy vie for supremacy in a succession of *ad hoc* contests. Whether the development of the law is in the direction of new legal rules or of broadening and loosening existing rules, morality has a part to play.

Before morality can be employed by judges to inform legal principle, the particular moral imperative must exhibit certain characteristics. I have already mentioned one characteristic: a broad consensus for recognition and acceptance. Such an imperative is easily translated into a legal precept for it represents a common community value. Law, the binding cement of society, simply adds the coercive powers of the State to the value which the community has accepted. And thus the crimes which stir the community to moral outrage become the more heinous crimes in the calendar. At the discretionary level, we may note that the heaviest penalties are imposed when the moral sense of the community is most deeply offended.

The second characteristic of moral imperatives which inform the law is that they relate — for the most part — to personal morality. By that I mean the kind of ethical standards by which people live in their personal, as distinct from their public, lives. These are familiar standards. We do not deliberately set out to inflict physical harm on our neighbour or to damage his land or his possessions; when we foresee that harm or damage might happen, we take care to avoid causing it; we do not try to deceive or defraud people with whom we deal; we do not engage in calumny or detraction of another. These ethical standards are the stuff of the law of torts. Equally with the criminal law: murder, rape, offences against the person, larceny. There are few crimes which have what might be called a public element in them. The chief exceptions, I suppose, would be treason, sedition, perversion of the course of justice and conspiracy to corrupt public morals (if *Shaw v. Director of Public Prosecutions*[1] is good law in this country). By referring to standards of personal morality, I do not mean to imply that personal morality is, or ought to be seen as, private morality in which the public can have no interest. Perhaps there is no area of morality more personal than that which affects consensual sexual relations, yet the public interest in the health consequences of sexual activity is manifest. In one sense, I suppose all morality is a matter of profound public interest for the strength of a nation cannot survive the moral decadence of its people. But the point of present relevance is that public interest is seldom an element in the immediate circumstances which give rise to the moral standards which are translated into law.

[1] [1962] A.C. 220.

The moral standards of personal life apply, generally speaking, to situations where the consequences of their non-observance are immediate or are clearly foreseeable by the person who engages in the forbidden conduct. This is reflected in judge-made law. Liability will be imposed on a landholder who allows water to escape onto and damage his neighbour's land, but the law is much slower in devising a remedy for farmers at the mouth of a river whose irrigation supply is contaminated by the use by upstream farmers of agricultural chemicals.

In the general law which is informed by moral imperatives those imperatives can be identified: general recognition and acceptance, applicability of the standard to one's own conduct in personal living and immediacy or foreseeability of the consequences of non-observance. These three characteristics facilitate the translation of a moral imperative into legal precept. Absent any of these characteristics and the difficulties of translation are increased. Commercial law, particularly the law relating to corporations, is not able to draw to the same extent as some other branches of law upon the support of moral imperatives which exhibit these characteristics. This is not a defect of commercial law; rather it is a lacuna in the development of moral imperatives. Why is this? Many problems of commercial law relate to the exercise of intangible legal rights. There is not, and perhaps there cannot be, a broad consensus on the morality of acquiring or exercising intangible legal rights. Their variety and the differing circumstances in which they arise and in which they operate preclude reliance on any generally accepted standard to govern their creation or their exercise. Similarly, there is no relevant moral imperative relating to the use of financial power. Since the mediaeval abhorrence of usury has been replaced by a search for maximal return on investment, there is no general moral objection to a person laying out his own money in whatever way he chooses. Yet much of the law of commerce has to do with the acquisition and exercise of abstract legal rights and of financial strength.

Next, the morality of many commercial activities depends on considerations much more complex than those which govern personal morality. The rules about a company giving assistance in the purchase of its own shares which in my day used to be found in s. 67 but which I now find in s. 129 of the Companies Code in a more complex and qualified form, do not reflect a canon of personal morality. Indeed, for those who never lift, pierce or rend the corporate veil, the rules may appear to run counter to the company's moral freedom to spend its money on whatever it chooses. Perhaps sub-s. (10) reflects the appropriate limits of moral freedom. Of course, if *laissez faire* or deregulation were the overwhelming philosophy of commercial law, it would not be necessary to retain the mass of positive laws which have become familiar to commercial lawyers of modern times. That is a consummation which, I understand, Mr Morgan holds to be desirable. Yet, as Mr Walsh reminded us, some laws have been found to be necessary in order to protect interests which might be overreached by those for whom the call of morality is but distantly heard. Presumably the reason why statutory commercial law has become so voluminous and complex is because commercial relationships are so complex that proper regulation is impossible if it be left to simple drafting expanded by judicial invocation of recognized and

accepted moral standards. Section 52 of the Trade Practices Act 1974 (Cth) is an obvious exception.

In company law, the interests of company, company officers and employees, directors, shareholders, creditors, suppliers and customers are often interdependent and there may be little or no connection between the person whose conduct is regulated or prohibited and the class of persons whose interests are to be protected. It is difficult in such a situation for those who are not familiar with the consequences of the conduct to perceive the moral value which underlies the statute. Generally accepted moral values cannot hope to equal in sophistication, much less to inform, the complex of modern commercial laws. There is a great shortfall between the furthest point to which generally accepted personal morality goes and the ultimate reach of commercial law, and that shortfall raises problems of unique difficulty for the practitioner of commercial law. The law abhors a moral vacuum, not only because society treats with indifference the enforcement of laws which have no recognizable moral purpose but also because the reference points for statutory construction are missing. The natural inclination of mind is to find a moral purpose for the law to fulfil — a moral end or policy of the law — and to predicate of Parliament an intention to achieve that purpose.

In a mass of regulatory provisions, the obstacles in a search for the law's moral purpose resemble those encountered in a maze. Contradictory signposts are seen on the way, theories which lead promisingly in one direction will be blocked by the intransigence of an unsuspected subsection. Yet the search must yield a solution and the moral purpose must be revealed for acceptance by those who practise in that field. In other words, although the complexity of much commercial law hides the underlying moral purpose so that that purpose is not immediately revealed by reference to the community's general set of personal moral values, the commercial lawyer must search for the moral purpose by ascertaining the operation of the law he or she practises.

It is not a light burden. Study is required to gain an insight of the purpose which the law is intended to serve. Let me remind those of you to whom the provisions of the Companies (Acquisition of Shares) Code have become thoroughly familiar that, on first reading, the purpose of the several provisions of the Code were — and to me still are — far from self-evident. Once the operation of a law is ascertained, the discovery of its moral purpose depends ultimately on perceiving the moral value which the operation is apt to serve. Candour, equitable treatment of a class, the securing to a class of the benefit of assets which in justice belong to them may be seen to be the moral purpose of the law — values which are not found in the words of the statute but which, to the professional eye, explain and inform the statutory text.

The hidden morality of much of the commercial law and the traditional role of the lawyer as the adviser on law alone raises peculiar difficulties for the commercial lawyer.

Because the moral purpose of much commercial law is known to or ascertainable by commercial lawyers alone, the commercial lawyer becomes by default the moral as well as the legal adviser of the client. There is nobody else to be the

moral adviser. The role sits somewhat uneasily on a lawyer's shoulders. Yet it must be accepted if professional advice is to avoid the reproach of being the solvent of the client's moral responsibility. How often does one hear the financial journalist who, seeking to embarrass a captain of commerce, is met with the disarming response: 'We took the best advice and what we did is entirely lawful'. Yet legality and morality are not interchangeable terms and both are appropriate fields for advice by the well furnished commercial lawyer. Take as an example the debt defeasance transactions to which Mr Justice Marks referred. If the client is advised merely that such a transaction is legally valid, he may fail to consider whether it is morally objectionable.

In a case where the underlying moral purpose of the law on which advice is sought is not and perhaps cannot be perceived by the client unless the lawyer tells him, the commercial lawyer's duty cannot be restricted to legal advice, for then the moral decision — what ought to be done as distinct from what can lawfully be done — will not be addressed. If the lawyer alone knows the moral dimension of the decision to be made, it is morally unacceptable for him to be silent. If he perceives that it is within the client's legal power to impair the rights of a third party whom the legislature has ineffectually tried to protect or to exercise that legal power in a way which is unjust, surely the moral dimension must be pointed out. But the moral decision is not for the lawyer to make: that decision is for the client. But what if the client chooses to disregard the moral dimension? Is the lawyer under an obligation to carry the decision into execution? This is a question which must be left to the ethics committees of the professional associations to answer but it is a fundamental ethical problem: should a lawyer do for a client what he would not do as a person? It seems to me that the problem does not admit of a simple solution and that much depends on the nature of the transaction, the extent of the lawyer's participation and the moral issue involved. But there are some relevant propositions about which there can be little doubt.

There is a temptation for a lawyer advising in a commercial transaction, as there is for lawyers in other fields, to identify closely with the interests of the client. This temptation is enhanced, of course, by the offer of services additional to the strictly legal services of advice, documentation and representation in legal proceedings. If the lawyer offers commercial or accounting advice or undertakes the negotiation of the transaction he not only steps outside the bounds of strictly legal professional duty; he also tends to identify himself with the interests his client is pursuing. This has two consequences. One, the lawyer bridges that remoteness from the client which is the safeguard of independence. It is difficult enough to advise a client about the legal and moral implications of a transaction in order that the client may make an informed decision. It is more difficult to assure the client of independence when additional services are offered and where the acceptance of the offer redounds to the financial advantage of the lawyer.

Next, if the transaction may disadvantage third parties and its morality (as distinct from its legality) is open to question, can it be right for the lawyer to participate beyond the giving of legal and moral advice and the rendering of strictly professional services? A good case can be made for the duty of a lawyer to render strictly professional services to a client who seeks to take full advantage

of the law. It is strongly arguable — I need not conclude — that a lawyer should not discharge himself from his retainer merely because his client refuses to take his moral advice. But if the client insists on extra-professional services, perhaps because they have usually been provided, what justification can the lawyer offer to himself for rendering those services in a cause of questionable morality?

If there be one thing more important than another in the conduct of any branch of the legal profession it is preservation by the lawyer of his self-esteem. A lawyer who leaves the moral decisions to the client but then seeks to justify extra-professional activity as though he were simply performing his legal professional obligation will lose his self-esteem. Losing that, he loses not only his capacity to render a professional service of the quality to which his clients are entitled; he forfeits his own entitlement to membership of an honourable profession.

The practice of commercial law offers a great challenge to lawyers of ability and integrity. An understanding of commercial law requires technical skills of a high order and a sensitivity to the subtle influence of morality on the interpretation and development of that law. A duty of moral advice is often added to the duty of providing legal services, and ethical questions of nicety must be addressed. So long as the commercial branch of the profession sees itself as independent, competent and acting with a moral integrity that will not be compromised, it will continue to contribute greatly to the commercial life of this country. This Seminar is splendid evidence of a profession — academic, practising and judicial — which is alive to its responsibilities and which has resolved to discharge them. We are all indebted to the Melbourne University Law School Foundation for assembling us to consider the purpose of morality and the purpose of law in commercial transactions. The purpose of one is justice; the purpose of the other is justice according to law. The purposes are not coincident, but they are not opposed.