

Homosexual Law Reform

MAX ATKINSON*

Introduction

The Tasmanian Legislative Council, after lengthy deliberation, has in the past year conclusively rejected the Government's proposal to decriminalise private, consensual adult homosexual acts; that is, sexual conduct which involves no element of public indecency, intimidation or assault, nor exploitation of minors. Tasmania presently stands alone in Australia in this respect, and contrary to the consensus of modern International opinion.

The public debate saw much of the strong emotional feeling and moralistic ideas this issue inevitably attracts. The Government might have expected a better reception given its health advisers saw the reform as essential to A.I.D.S. policy, and part of a broader legislative program to combat this disease. But opponents of reform cited a wide range of reasons, including the fact that we live in a Christian society, that 'the majority' would oppose reform, that youth would be corrupted, that disgusting sexual behaviour should not be tolerated, and that this 'thin end of the wedge' could lead to more permissive laws governing involuntary euthanasia, the sexual exploitation of children and many other evils. The Churches were clearly divided. Whilst the Catholic Archbishop of Hobart has supported Tasmanian congregations opposing reform, the Anglican Bishop, the Australian Council of Churches, and the College of Australia's Catholic Bishops are in favour. In recent months many politicians and other individuals, as well as representatives of a wide range of community groups, have voiced differing views on this troubling issue.

Homosexuality and A.I.D.S.

In the Tasmanian context there appear two major areas of controversy. The first concerns the technical issue whether decriminalisation will assist the fight against AIDS. Professional advice from public health authorities, legal and medical experts, and welfare and counselling support services, appears to concur that it is necessary. They stress the world trend towards a rapidly expanding heterosexual infection, indicating a general public health crisis, despite the high initial incidence among homosexuals, heroin addicts and haemophiliacs. Indeed, there appears little if any expert opinion, among those professionals working to contain the epidemic, for

* Senior Lecturer in Law, University of Tasmania.

retaining criminal liability. Given the existence of a range of sexual lifestyles, the public health focus has been on promoting safe practices, requiring communication and counselling, and depending a good deal on the trust of those most at risk. Against this, critics insist that practicing homosexuals, whether or not they are worthy of concern, should continue to be treated as criminals. They may believe either that the risk of some increased infection is justified by the need to protect 'public morals', or that it is at best speculative to suppose that risk is real.

Homosexuality and the Enforcement of Morals

The second issue in dispute is for some mainly one of moral/theological commitment, but for others involves a controversial judgment of fact. The purist critic defends punishment in principle for conduct which may harm no-one, but which offends or undermines a prevailing community 'morality'. Although superficially attractive to many, comparable theories have been invoked in various totalitarian societies to repress dissident political or religious views (e.g. Nazi laws of June, 1935, proscribing conduct deserving of punishment according to "the fundamental conceptions of penal law and sound popular feeling"). Its relevance to sexual morality has been widely discussed in British Jurisprudence for over a hundred years, notably in the Hart-Devlin debate in the mid-fifties, and in the earlier nineteenth century debates stirred by John Stuart Mill's famous defence of the right to be different. Mill, father of the liberal tradition in British political theory, insisted the State's power to coerce by force be limited to protecting its citizens against actual harm; It had no right to punish simply because it disapproved, however strongly, their conduct. His best-known critic, the formidable Victorian judge James Fitzjames Stephen, replied that punishment should be "a persecution of the grosser forms of vice". Perhaps few people would now defend this extreme idea that a society may punish what it finds morally intolerable ; instead, most modern critics tacitly adopt Mill's principle by seeking to show the society will be harmed in some way.

But this is typically where the argument falters, for there is simply no credible evidence that a failure to punish aberrant sexual conduct will endanger the society. Lord Devlin, seeking a general philosophical defence for this moral conservatism, argued in his acclaimed 1959 Maccabean Lecture to the British Academy that any society, be it Christian, Hindu or Fundamentalist Islam, had an intrinsic moral right to 'protect itself'. It thus had a right, and even a duty, to guard against inevitable 'disintegration' due to a 'weakening of the bonds' of common morality, especially in those areas, such as sexual morals, where deviation generated strong feelings of revulsion. Although offering no factual support for this disintegration claim, he appears to have felt that morality was a seamless web, such that tolerance of sexual diversity would lead to a general breakdown in law and order,

with resulting disregard for the lives and interests of citizens. But it is clear that people are not in fact 'corrupted' by their sexual identity, and that the community includes many homosexual persons leading selfless and dedicated lives, often with great eminence in its intellectual, artistic and professional life; no reputable criminologist has yet suggested any link between homosexual orientation and crime.

Lord Devlin's strong conviction that sexual tolerance threatened social integrity may have been due to some confusion between weakness of character and what is seen as immoral conduct. For although most people would agree that self indulgence becomes irresponsible when excessive, and remind us of the need for discipline in any personal or social enterprise, that describes a distinct dimension of morality, pertaining to virtue and character, and unrelated to the moral value of the conduct in question. However that may be, this underlying factual weakness has led some distinguished critics to detect a crucial ambivalence. For in seminal passages Devlin's argument appears merely definitional viz., that any major change in public morality would be tantamount to 'destruction'. Professor Hart has reminded us that such a proposition, because it rests on an artificial definition of society as a set of shared cultural values, must effectively deny any normal distinction between peaceful social reform and anarchy.

Other 'legal moralists' have suggested society may be 'harmed' simply because it is offensive to the public to know that a minority may legally do in private what it finds repugnant. But as Hart has also observed, the question must then arise whether punishment to protect against this kind of harm would be consistent with any meaningful concept of individual liberty; for freedom could mean nothing if it is only the freedom to do what others will not object to.

Democracy and 'Public Morality'

Some modern critics of reform (as well as politicians who have no developed views but sincerely think they have a duty to uphold public opinion) seek to avoid this awkward factual issue by reverting to an argument of principle which appeals more directly to democracy viz., to the 'rights of the majority', to advance Lord Devlin's thesis. Thus diffident as well as opposed legislators may simply proclaim their duty to express "the public will" (which sounds eminently responsible until we recall that they might as easily say their duty is to protect citizens' rights). Some of these may conclude that punishment is justified if the public believes homosexuality is immoral or evil, others may want to ensure that there is also a genuine public consensus that it be punished. In either case there is a danger that mere 'mob instinct' may end up being paraded as a kind of moral consensus.

For both versions suggest a belief that democracy means that in practice the majority can use the criminal law to preserve its popular values. But this belief is surely based on a grave misunderstanding of democratic theory, which says only that the representatives of the majority have a preferential right to make the rules, not that they can make whatever rules they like (in which case they could simply outlaw the minority). Little reflection is needed to see why our tradition of natural rights, and the very concept of individual rights, must exclude such a simplistic notion. Because a majority preference to punish can provide no **moral** reason for appeasing their demand we must, like Mill, look to some independent moral principle such as the prevention of harm to others.

This point also suggests why 'public morality' must be a more complex idea than a mere set of conventional moral rules; it must also include those critical principles we appeal to when the authenticity or meaning of such rules is itself in dispute. These include both the principles of rational argument (requiring logical consistency and factual integrity) as well as those more abstract moral values such as freedom, fairness, candour, the sanctity of the individual, the public welfare etc., which, with varying priority and interpretation, will shape the ideology and programs which distinguish competing political parties. Those politicians who look only to surface opinion will fail in their duty to respect the public morality in this deeper sense, thereby betraying an implicit trust to assist their community in its aspiration to live according to its own ideals. If such ideals and principles did not make up the fundamental ground rules for our social moral practice, this would seem mere elitism; because they do, their observance expresses a much more profound sense of respect.

Punishment and Education

More recently it has increasingly been urged that, even if this punishment was originally suspect, it should now be kept up to avoid a risk that legalisation be seen as social approval, because (it is said) most people will tend to identify morality with the law. This argument reflects a more general theory of 'maintenance of standards', which emphasises the 'educative' role of the criminal law, through inculcating and reinforcing community moral values. A sophisticated example of this latter argument appeared in print earlier this year when the Most Reverend Dr. Eric D'arcy, Catholic Archbishop of Hobart, added a scholarly voice to support several Tasmanian congregations objecting to the de-criminalisation of private, consensual homosexual conduct.

But this version also raises a more fundamental moral question whether the end can justify such means. For if we try to justify the punishment of someone primarily to educate others in morality, we ignore the requirement of individual desert, without which any punishment is unjust. Accordingly, we do not punish a person simply

for being drunk or adulterous, even if we think such punishment would have an 'educative' role in promoting public morals; rather, we punish for risking harm to others by driving under the influence, or for fraudulent deception in bigamy. That is, the relevant desert required is not found in the kind of moral weakness or indulgence any freedom loving society must tolerate, but in a specific anti-social attitude which endangers or injures others.

This is an important point, because it explains why it cannot suffice to agree certain conduct is wrong, we must also ask why it should be punished by the State. If we punished theft to keep up the idea that it is wrong (and not primarily to prevent harm by deterrence), then we would risk confusing these crucial moral judgments. For we do not want people to think that what is not punished (eg., lying, selfishness) is not morally wrong, nor to suppose that conduct (eg., vagrancy) is immoral simply because it is punished. This is the insidious danger of treating the educative effect of punishment as a **primary** justification, rather than a useful but strictly consequential social benefit.

We cannot, therefore, appeal to this 'maintenance of standards' argument as a reason to preserve punishment merely to keep up a shared belief that the conduct is wrong; we must go back to square one to see if the original justification for this crime makes sense. That means risking a change in ideas such that some may come to believe their abhorrence is in the end perhaps more a question of preference than of morals. But that is precisely the kind of risk Mill considered justified in the name of individual freedom. It is also the nerve of the moral argument dramatised by George Orwell and Aldous Huxley in their famed literary attacks on the totalitarian state and its reliance on 'education' and punishment' to condition 'morality'. In summary, we must punish murderers to protect potential victims, not to remind ourselves that it is wrong to kill. But having agreed that this protection from harm is necessary, it would be silly to deny that the same punishment will also help maintain respect for human life, and that this might also be a factor in determining the form of sentence.

Those who find this distinction puzzling should consider how effectively the most personal and basic moral values of the society are maintained, without the need for criminal sanctions. We do not punish for greed, dishonesty, laziness, selfishness, unkindness, or for vain, ignoble or dishonourable behaviour; nor in a wide range of sexual matters including fornication and adultery. Such values are in practice maintained by education and example, and especially by appreciation of their personal and social consequences. They are reinforced in our families, schools, churches, in public awards and official speeches, and in many other ways, including disapproval and sometimes ostracism of offenders. By contrast, we punish legally where conduct clearly harms others, and we protect against the

seduction of minors, and the offensive public display of indecent conduct (which may not be immoral in itself) on this same ground.

The danger of 'Legal Moralism'

This approach keeps alive Mill's civilising idea that the merit of particular views about morality (particularly those touching religious belief, and political and sexual preference) must meet strict tests of reason and principle before we try to make them compulsory. It applies whether or not these views are widely shared. By contrast, to use the criminal law primarily to maintain some particular rule of conduct as a public value risks an institutional taboo, with a public conditioned rather than educated, and a vicious circle may then result: We punish because it is wrong, but we may also come to believe it is wrong because it is punishable. This danger is acute where the conduct is widely disapproved, but cannot easily be shown to harm others, since we are all vulnerable to popular opinion, especially where it appears to be shared by those we like and respect. In brief, we need to protect ourselves against the same prejudices and social forces which led us in the recent past to punish as criminal subversives those who formed alliances to improve work conditions and, further back, to burn religious heretics at the stake.

Perhaps it is easy to overstate this danger in an open society (one wonders how many Soviet citizens came to believe that criticism of the State was morally wrong simply because their Constitution made it a serious criminal offence). Notwithstanding, the problem of individual justice remains paramount, and the risk of tyranny in guise of popular opinion is ever present. It can be minimised if we remind ourselves that prevailing attitudes to sexual conduct are often based more on strong feeling than morals. Indeed, the public comments of many people suggest they think homosexuality immoral because they find it disgusting, rather than vice versa. If so, they must also acknowledge that a good deal of disgusting behaviour, sexual and otherwise, has never been subject to the criminal law. Those who believe their strong feelings are based on clear moral grounds, must still ask why this kind of immorality, and not the many others referred to, should be punished by the State. The answer to this question clearly requires a different kind of moral argument from that which establishes the conduct as wrong.

Conclusion

This is a difficult debate, with deeply held convictions on both sides. But it is hard to avoid two conclusions. First, because the use of official punishment *prima facie* needs justification, the moral onus is very clearly on those who would wish to retain criminal liability, and this must apply whether or not reform is needed to advance the campaign against AIDS. Secondly, that any attempt to resolve it by simplistic appeals to 'public morals', majority views, personal

repugnance etc., cannot suffice. One must hope that our parliamentary representatives will in due course look beyond such appeals to the relevant arguments of principle, including the fair and respectful treatment of those whose sexual preferences they may strongly object to.

Finally, those who find homosexuality deeply repugnant have a special responsibility to consider just how rational is the urge for punishment. For psychologists who seek to understand the forces behind such social aberrations as 'poofter bashing', also remind us that these strong feelings will often reflect deep and unresolved conflicts of personal sexual identity ; this does not make them less genuine, but may help explain why such an issue typically engenders far more 'moral' condemnation, often surprisingly violent, than reasoned argument.