The Relationships between Law and Morality: A Comparison between English Law and Islamic Law

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ABSTRACT
Although criminal law has never been completely distinct from morality, considerable controversy has always existed, among lawyers and philosophers about the nature and extent of their co-relationship. In other words, there exist opposing views on whether or not a forbidden conduct committed against commands of morality should necessarily be a criminal offence, punishable in the eyes of the law. This issue and the answers given to this question by English law and Islamic law have been discussed in this article from a comparative perspective.

KEY WORDS: Morality, Law, English law, Islamic law.

INTRODUCTION
There has always existed a considerable controversy among lawyers and philosophers about the nature of the relationship which must exist between law and morality. In other words, two opposite answers have been given to the question of whether or not the mere fact that conduct is prohibited by a rule of social morality can justify its punishment by the criminal law. In this article, we will have a comparative analysis of the answers given to this important question by English law and Islamic law.

1. The relationship between English Law and morality
Regarding the question whether mere prohibition by social morality can justify punishment by criminal law, a negative answer was given in the nineteenth century by John Stuart Mill.

According to him, interfering with the liberty of action of any society member by another

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member is only justifiable when it is necessary for self protection.

In his essay, on Liberty, he says:

“The maxims are, first, that the individual is not accountable to society for his action, in so far as these concern the interests of no person but himself...Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection”. [Mill: 1977; P. 292]

The same view was adopted by the Report of the Committee on Homosexual Offences and Prostitution (generally Known as the Wolfenden Report). (cmd. 247). This Report, which was published in 1957, states in paragraph 62:

Unless a deliberate attempt is to be made by society acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

An affirmative answer to the question was given in the nineteenth century by Stephen. In his book, Liberty, Equality and Fraternity, while criticizing Mill's theory, he says:

There are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity. [Stephen: 1873; P.163]

The same view was adopted in the twentieth century by Lord Denning and Lord Devlin, who criticized the Wolfenden Committee’s view that there is a realm of private morality.

Lord Denning, in his address to the 1957 Conference of Law Society, said:

“As far as morals in the sense of right standards of behavior are concerned, I would say most emphatically that standards and morals are the concern of the law, and that whether done in private or in public.”

Then he added: “It is impossible to draw a hard and fast line between crime and sin... I would say that without religion there can be no morality and without morality there can be no law” [The Times: 27.09.1957].

This opinion of Lord Denning was stronger than what he had mentioned previously in his book, The Changing Law [1953; P.112], in which he asserts that since the time of Henry I, it has been the rule of English law that “in order that an act should be punishable, it must be morally blameworthy. It must be a sin”. In his address to the 1957 conference of Law Society, however, he goes even further and says that not only is every crime a sin, every sin is also the concern of the law.

According to Lord Devlin, in his maccabeean lecture to the British Academy in 1959, on the Enforcement of Morals, “The suppression of vice is as much the law’s business as the suppression of subversive activities”. [Devlin: 1959; p.15]

This second opinion was supported by the majority of the House of Lords in Shaw v. Director of public Prosecutions [1962, A.C. 220] When the House resurrected the ancient offence of “conspiracy to corrupt public morals”. In that case, the defendant had published a magazine called Ladies’ Directory which contained the names, addresses, and other particulars of prostitutes, and was designed to assist
them to get custom. Lord Simonds, upholding the offender’s conviction, said:

“In the sphere of the criminal law I entertain no doubts that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for”. [P.267]

In spite of this apparent victory for the view which believes in a stronger relationship between law and morals, it was in fact the opposite view which ultimately triumphed when the Sexual Offences Act. 1967, legalizing private homosexuality between consenting males of 21 of over, was passed.

This is a fact that the law has favored a different opinion on different occasions. This fact can be used to prove what the main problem with both the above mentioned opinions about the relationship between law and morals is.

Each opinion supporters have mainly concerned themselves by what they think the law and morality relationship "ought to be" in a good society, rather than what it "is" in actual situation.

But if the question is changed to what the relationship between law and morality is, then it must be admitted that neither of the two diametrically opposed opinions can be accepted because, on the one hand, the law has never concerned itself merely with public order at the exclusion of morality. The reason for punishing euthanasia (the killing of another at his own request) or incest between brother and sister, and not punishing drinking or gambling, can only be the fact that the moral code of society rejects the former but approves the latter. If law was only concerned with public order, it should not have punished euthanasia or incest, which may be committed without offence to others and need not involve the corruption of others. Conversely, it should have punished drinking or gambling which might be against the public order if a considerable number of people continuously get involved in them. However, on the other hand, it would similarly be wrong to assert either that every illegal conduct punished by criminal law is an immoral act, or that every immoral behavior is punishable by criminal law. There are many forms of illegal conduct, which because they are punishable by criminal proceedings, must be classed as criminal offences, although they do not involve the slightest moral blame, as, for example, "not carrying a light on a bicycle or … keeping a pig in a wrong place", [wifen &Bailey: 1915; 614] or being involved in a job without having an official license. Conversely, acts which may be regarded as immoral are not necessarily criminal offences as, for example, adultery, or abstaining from helping a needy person in cases where a special duty is not imposed by the law.

2. The relationship between Islamic law and morality

The Quran is very clear in mentioning the fact that the sole purpose of creation is to enable human beings to worship God. Verse 56/LI says: "And I have not created the invisible things (jinn) and man to any ends other than they may worship me". The interpreters of the Quran are unanimous in saying that worship is not supposed to benefit God, but to help the human being in his evolution. The Quran itself stresses this fact in many of its verses. In verse 7/XXXIX, for example, it says: "If you become infidels, behold, God has no
need of you, none the less, He does not approve of infidelity in his creatures". Verse 6/XXXIX has a similar provision: "Whoever strives hard (in God's cause) does so only for his own good; for verily; God is altogether independent of (His) creatures."

To make this possible, God has given some orders to man which must be obeyed by him to show his submission to his Creator. Although the failure to obey some of these orders constitutes a crime, punishable by prescribed punishments, non-obedience of other orders is equally blameworthy and subject to discretionary punishments (which are enforced at the initiative of the judge or sovereign authority). To put the above-mentioned in modern legal language, there is no clear distinction between a crime and a sin (and in more general terms, between law and morality) in Islam. The reason why in Islam, conduct has criminal sanction, whether committed against law or against morality, is that both Islamic law and Islamic morality are derived from the same origin, that is, Almighty God. In western systems, on the other hand, law is derived from the will of the legislator, who has legal power, but morality has its origin in different factors (such as religion, culture, historical background of society, etc.) as judged by the "reasonable man", who has no legal power. Conduct committed against law in these systems is, therefore, blameworthy in the eyes of the law, resulting in criminal sanctions, but conduct committed against morality is blameworthy in the eyes of the reasonable man, with no legal sanction.

This difference between the two systems affects also the degree of flexibility of morality in each system, in the sense that while in Islam, morality, which is derived from the wills of an unchangeable Creator, is inflexible, in secular systems, it varies from place to place and from time to time as public opinion changes. As a result of this strong relationship between law and morality in Islam, the lengthy discussions among western lawyers regarding the relationship between law and morals have not been given any significance in traditional text books of Islamic law, and it has always been taken for granted that both a sin and a crime may have criminal sanctions.

This must not, however, be taken too far to say that there is absolutely no difference between law and morality in Islam. Such an opinion would be wrong for two reasons.

Firstly, there are two concepts, known as mandub (recommended but not obligatory) and makkruh (discouraged but not forbidden), which are not subject to criminal punishments. These forms of conduct can, therefore, be described as pure moral or immoral acts or omissions with no legal sanction. So the relationship between Islamic law and morality can be best described by comparing them to two concentric circles, with morality the larger one. In other words, the sphere of criminality in this system is part of a more extensive field covered by morality.

The second reason for rejecting the view that there is no difference between Islamic law and morality is that although in theory both a crime committed against law and a sin committed against morality are punishable by the judge, his reaction is in fact more severer towards a crime than towards a sin. A crime is mainly punishable in this world, whereas the major punishment for a sin is left for the hereafter, with a discretionary power given to the judge to punish it (usually with a minor punishments of 't'azir) if he so wishes.
The question which arises here is why, in spite of the fact that both a crime and a sin are equally blameworthy for infringing upon an order of God, it is only some of the sins which are punishable by severe prescribed punishments. In other words, what justification, other than the general justification of disobeying God’s order, may shari’a possibly have in mind to treat some infringements of God’s orders more severely than others? The answer is simply public order. In other words, one cannot say that shari’a has no concern for public order in the field of criminal law. The fact that, according to Islamic law, the victim’s consent or his relatives’ forgiveness bars the enforcement of the prescribed punishment of homicide and bodily harm (i.e. retaliation or qisas) but is no defence to a charge of adultery (which is exactly the opposite way followed by English law) can be taken as an example. The difference in this respect is, partly at least, due to the fact that in committing adultery there is pleasure for the offender. This feature of the crime requires it to be made the concern of the whole society. By punishing an adulterer, society intends to protect its members, who can each be a potential victim of the crime. In murder and bodily harm, on the other hand, there is no pleasure, at least for normal people; these crimes often take place as a result of personal hostility between the criminal and his victim. The victim and his family have, therefore, priority over society in asking for either punishment or forgiveness of the criminal. It must be added, however that if murder does not take place as a result of personal enmity between two particular parties (for example, if it happens as a result of blind terrorist activities, or in the course of a highway robbery), it will be punishable by a had punishment, and the consent or forgiveness of the victims or their families will not abolish the prescribed punishment.

Another example which can show the concern of Islamic law for public order is the case of attempt. In spite of the fact that the moral blameworthiness of a person who attempts committing a crime but does not succeed, is equal to that of a criminal who succeeds, Islamic law does not determine a prescribed punishment for such a person, because his conduct has not yet violated the public order.

Before ending this section on the position of Islamic Law, a brief mention can be made of a related issue, i.e., the effect of supposed other-worldly punishments on the number of criminal punishments enforced at the criminal’s own initiative. At first sight, it may seem that the existence of other-worldly punishments in Islamic law is merely a matter of religious belief, and has nothing to do with Islamic legal system; however, the truth is that there is a belief among Muslims that a punishment tolerated by the offender in this world may bar the enforcement of other-worldly punishments. Imam Mahammad al-Baqir, the fifth Shi'i Imam, was once asked whether an offender punished in this world would also deserve another-worldly punishment. He replied: “God is more merciful than to do this” [Ameli, 2009; Vol.18- P.311].

This belief has caused, throughout Muslim history, the enforcement of many punishments which could not have been enforced if the offenders had not been willing to tolerate them as an alternative to other-worldly punishments. Muslim history is full of these cases, among them the following can be mentioned as an example:

A man once came to Ali ibn Abitalib, the fourth Caliph of Islamic and the first Shi’i Imam, confessing the commission of serious crime of adultery and asking the caliph to puri-
fy him. Ali asked him to sit down and then, without paying any attention to him, addressed those present and said:

-“why are you unable to conceal your sin in the same manner that God has concealed it for you?” The man did not pay attention and stood up again repeating his request.

The Caliph asked him:

-“what makes you so keen in confession?”

-“To be purified”, the man answered. The caliph said angrily:

-“What better way of purification do you know than repentance?” He then continued his discussion with the others present; but the man repeated his request for the third time. The caliph then asked him whether he had any illnesses or excuses, such as ignorance of the laws of God. He replied in the negative. Ali then ordered him to go home as he needed to carry out more investigations about the case.

A few days later when the man came back and repeated his request, the Caliph, whose investigations had not helped him in finding an excuse for the man’s conduct, told him that he would not have sent for him if he had not come back himself, “but”, he added, “now that you have confessed four times, you must be punished, as the laws of God cannot be suspended”, Ali then ordered that he be punished with the greater punishment of adultery prescribed for married offenders (haddullah al-akbar).[Sadug: 2010; P.20].

The enforcement of punishment as a sole result of the offender’s own willingness is not limited to voluntary confessions. George M. Baroody in his article mentions the case of an accused Saudi policeman who refuses to swear the oath of denial (of committing the crime), which is offered to him by the plaintiff, and is, as a result, taken to be guilty and sentenced to eighty lashes and six months imprisonment [Baroody: 1966; P. 31].

CONCLUSION

To summarize what was said above, it must be said that, in spite of the great effect of morality on Islamic law, one cannot say that there is no distinction whatsoever between Islamic law and morality. Such an opinion would be wrong because, on the one hand, there are two concepts of “recommended” and “discouraged” behaviour which are dealt with solely by morality. On the other hand, although violation of both law and morality is punishable, punishment is more severe in cases of violation of law than violation of morality. In this respect, the main criterion for Shari’a to decide whether a forbidden conduct committed against morality is also a crime committed against law (and, therefore, punishable by a prescribed punishment) seems to be the public order. So, the relationship between Islamic law and morality can be best described by comparing them to two concentric circles, with morality the larger one.

On the other hand, it seems that the relationship between English law and morality is best described by comparing law and morality to two orthogonal circles; because although the sphere of social morals and English law are co-extensive up to a point, many of the rules enforced by criminal law have nothing to do with social morality and many rules of social morality are not enforced by criminal law. This is the situation in which the law stands today, but discussions among lawyers as to whether this is a proper course of action followed by the law, or that it ought to accept any of the extreme views, will no doubt continue to exist.
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