

CRIME AND MORALITY REVISITED

By John Croft

In 2003 I published an article on the subject of the relationship of crime and morality. Although it was advertised as my belief that “Judaean – Christian traditions are threatened by the rise in global and domestic crime” the core of the argument focused on the rights, duties and responsibilities of living in civil society and the dichotomy posed by free will and determinism in addressing the problem and cause of crime. Below I explore from a somewhat different standpoint the same issue of the moral basis of criminal law.

Law regulates human behaviour in both civil and criminal matters but law, while it may be universally applied in one form or another, is not a universal code. As Kant remarked in the eighteenth century “Jurists are still trying to find their definition of law”. Comparatively and historically legal and moral codes overlap, and in theory at least the consensus of opinion concerning moral rights and wrongs leads to the plausibility, and hence the legitimacy, of punishment. I am not concerned in this article so much with the justification of penal practice or with the process of the application of laws but more with the interface between morality and ethics and the rules of behaviour that have been enshrined in criminal law. I should emphasise that I write, neither as a lawyer nor as a moral philosopher, but as a social scientist who has specialised in the study of crime.

Empirical evidence about how human beings came to regulate behaviour through customary or written rules can be approached from historical and archaeological record, religious text and ritual, comparison of legal systems and anthropological study. Some of this evidence is sketchy. It is only with the emergence of imperial and state systems, some of which were established centuries ago together with their bureaucratic infrastructure, that the origins and practice of modern criminal law can be discerned – and what emerges is neither universal nor necessarily compatible between cultures and civilisations. As regards the present day, crime as recorded by official agencies and as recorded by victims can be measured but it is not always as accurate a measurement as is claimed and consequently there is controversy

and misgiving about interpretation of the statistics. How does one measure morality? People can be questioned about their attitude to specific situations, and what they would do if confronted by such dilemmas in real life – but this method reflects all the shortcomings of opinion polls. None of the evidence gathered from such research is likely to be watertight and this makes direct comparison between crime, as defined by law, and moral behaviour at best rather uncertain.

At the risk of being simplistic, and setting aside what is implicit in the pronouncements of Aristotle and Plato, it appears that western legal systems are derived mainly from religious sources whereas those of Asia are largely derived from philosophical sources such as Confucianism. In parenthesis, it should be noted that the philosophers of ancient Greece had little or no influence on the thinking of Western Europe before the Italian Renaissance in the second half of the fifteenth century and before their works were translated into Latin. It was the Abrahamic religions – Judaism, Christianity and Islam – that established a code of law which incorporated moral beliefs; in its origins this code of law antedates the classical period and is to be distinguished from secular law which, as in Roman law, was more concerned with the practical resolution of conflict of interest. Of course the common feature of major legal systems could be described as being founded on common beliefs concerning the nature and function of law and, if these hold, a common faith in law as a process of just and orderly resolution of conflict. With the development of the nation-state law became recognised as a body of rules – primarily for the preservation of order – laid down by political authorities. This in turn led to questions about whether the sovereign power was above or subject to the rule of law and a whole host of issues which occupy national and international lawyers to this day. And thus over the centuries law became more specialised – canon law which regulated ecclesiastical affairs; the common law tradition established in the English speaking world; Romano-Dutch law; the Code Napoleon and subsequent codifications, particularly of criminal law in the last century in Europe; constitutional law; the hesitant recognition as a consequence of immigration of Sharia law in the west; mercantile law; international law and so on.

But to return to the overlap of moral and legal codes, and more particularly to God as the ultimate source of law as set out in the Ten Commandments. Mosaic law, as recorded in Exodus 20 : 1-17, is a mixture of do's and don'ts, of which two – 'Thou shall not kill' and 'Thou shall not steal' – clearly fall

into the category of what we would now call criminal prohibitions while three about adultery, bearing false witness and coveting property, though bearing a moral imperative, could be said to fall into a sub-category the force of which has been slightly modified over the centuries. The Koran is equally specific about murder: ... “whoever killed a human being ... shall be looked upon as though he had killed all mankind”, though some exceptions are made – for instance, “You shall not kill any man whom God has forbidden you to kill, except for a just cause”. In war or any conflict, it should be noted, the injunction not to kill is suspended though this appears not to be recognised in the texts. These two examples, drawn from two religious texts, do – if anything – underline the difficulty of establishing absolute moral values acceptable to all man and womankind and thus confirming absolute or natural laws, a problem that so preoccupied philosophers and lawyers particularly in the eighteenth century as a concomitant of the Enlightenment and the Age of Reason.

Although crime may be defined by law, there is no easy or absolute definition of moral and ethical standards even if there be cultural conventions on what constitutes such. The criminal law is an instrument of the State, defined by Sir William Blackstone in the eighteenth century as “the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood and good manners”: I assume that these three virtues were considered in eighteenth century England to enshrine the moral values of civil society. As Alan Duce put it “Traditional thinking argues that the law should have a fundamental connection with morality, reinforcing moral judgements and providing training in the rudiments of moral behaviour”. And he went on to say that “if the law gets out of step with morality, people lose respect for it”. One of the problems is that moral behaviour is not a constant; values seemingly vary historically and culturally over time and space throughout the world. And whereas moral values may be enshrined in religious doctrine, such doctrine is subject to interpretation much in the same way as law in its multitudinous forms and special applications is interpreted by courts, the State and for that matter academics and the media. While one may expect those in authority to uphold moral values (whatever they may be) one does not look to them to impose moral values on society. Moral values in civil society should be established ‘naturally’, by example – particularly from

parents, teachers and religious leaders. Moral values should not be created by political *diktat* and where this has happened in international relations it has added fuel to flames. Moral values, whether divinely inspired or otherwise, if incorporated in law should enhance respect for the rule of law by consent. One might suggest, accordingly, that traditional values and norms, if observed, provide a measure of social cohesion and that as a consequence erosion of these values and norms encourage crime. But can this be convincingly – scientifically, evidentially – demonstrated and validated?

Can criminology, the study of crime in the context of social science, throw any light on the overlap of legal and moral codes? Criminology is a descriptive rather than a prescriptive science: it describes behaviour but cannot predict behaviour with any certainty. At one time, it was thought that the application of the lessons of criminology would not only prevent crime but also reform criminals. It has not worked out like this and the science of criminology (perhaps with a few exceptions such as forensic science) cannot parallel, for example, the achievements of medical science let alone those of ‘hard’ science. As a consequence politicians do not take much notice of criminology, even though as an academic subject it is much more widely studied today in universities than half a century ago; by contrast rather more heed is taken of economists and some other branches of the social sciences and, in the instance of smoking if after some delay, the evidence of medical science. And although there have been many theories about the causes and treatment of crime and criminals there has been a lack of interest in the interface between morality and crime partly, I believe, because (as I have already indicated) whereas crime and the behaviour of criminals is to a degree measurable, as an abstract concept morality is less amenable to scientific observation and analysis.

By way of illustration, take the controversial issue of drugs. Many drugs, if prescribed by doctors, are legal and can cure disease and moderate behaviour. The legality of other drugs which change or enhance behaviour in other ways, such as alcohol, is culturally determined subject to certain caveats, for example driving a vehicle while intoxicated. The teaching of Islam, however, proscribes the consumption of alcohol entirely. Opiates, on the other hand, are proscribed internationally and nationally by law; but not so far as I am aware, by religious doctrine. Where substances are banned an illicit market tends to be created; in the case of drugs this is very extensive and requires a lot of resources to control. There is a point of view that

legalisation of drugs would destroy the illicit market and divert the problem from criminal sanction to health treatment. Another expression of view would hold that any artificially induced changes in mood and behaviour are intrinsically wrong and dangerous, and therefore should be actively discouraged by state and society. This is an example of where morality and crime overlap.

There appears to be no absolute moral value. Even those set out in religious texts may be suspended for it is legitimate to kill in war. So what is the role of morality? Is it to promote general happiness (the greatest happiness of the greatest number, according to Aristotle), and if so by what means, given that the function of morality is to set limits to actions? What dictates moral judgements and does 'do as you would be done by' fit the bill? Is moral law to be equated with the law of freedom and, if so, how do the concepts of probability and the assessment of risk bear on freedom of self-determination? Whatever the answers to these questions may be one can suggest that, empirically, they impinge on the values inherent in secular law, as the example of drug control indicates. As I have pointed out before, when considering crime and criminal justice several elements come into play – morality, social cohesion, tolerance; this article constitutes a plea for further investigation of these factors.

BIBLIOGRAPHICAL NOTE

In drafting this article I have drawn on several sources, including Hermann Mannheim: *Comparative Criminology*, Routledge and Kegan Paul, London 1965, Vol. I, Chapter 2; Roger Scruton: *Modern Philosophy*, Sinclair-Stevenson, London 1994, Chapter 20; and Mathias Reimann and Richard Zimmerman (editors): *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2006.

As regards *The Koran* I have consulted the translation by N. J. Dawood published by Penguin Books, fifth revised edition, London 1990. While I am fully aware of the problems of translation and interpretation of the text there are some puzzling passages on alcohol. Whereas it is banned on earth (verse 2 : 219 "There is great harm in both" [i.e. drinking and gambling] "although they have some benefit for men; but their harm is greater than their benefit". In verse 5 : 90 abstinence from wine and gambling is emphasised; there is also a reference to the "fruits of the palm and the vine"

in verse 16 : 67) in paradise there is the promise of wine, verses 37 : 47, 56 : 6 and 83 : 22. There appears to be some inconsistency here unless it could be explained by the cultivation of the vine in Persia, and in the Maghreb and Spain when conquered by the Arabs or perhaps a mistranslation of the word for sherbet.

For the Ten Commandments I have used the Authorized Version of 1611 of *The Old Testament*, Exodus, Chapter 20.

The quotation from Alan Duce is taken from his contribution (Chapter 1) to Sean McConville (editor): *The Use of Punishment*, Willan Publishing, Cullompton, 2003.

The references to my own publications are “Crime and Morality”, *Justice Reflections*, Issue 2, JR12, 2003 and “A Note on Tolerance”, *Justice Reflections*, Issue 7, JR51, 2004.

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