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Sex and the law

Recurrent public fusses about various aspects of Britain's sex laws, and their operation, confirm the contention of the Sexual Law Reform Society that these laws are in a thoroughly messy state and should be drastically recast (1). They are now being reviewed by the Criminal Law Revision Committee (a standing committee of the Home Office), whose final report is expected sometime this year. So 1982 is a good time to pose some questions about the sex laws for Libertarians to think about, and hopefully to pass on to their MPs and others in positions of influence.

WHAT SHOULD BE THE LAW'S FUNCTION?

Historically, the law's task was seen as the enforcement of a moral code which was derived from religious belief and imposed with the backing of severe criminal sanctions. In a modern, pluralist society this is no longer appropriate. As the Wolfenden Committee said in 1957 (2): "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." In their interim reports (3) the CLRC have emphasised the primarily protective function of the law. So the next question is:

WHO IS BEING PROTECTED?

The Wolfenden Committee saw the law's role as being "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence." This implies that adult citizens have the right and the responsibility to make their own decisions about their sexual behaviour so long as they don't harm others. It is going beyond the generally acceptable framework of the criminal law to use it to protect people *from themselves*. As J.S. Mill put in his essay *On Liberty*:(4) "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise. or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him.... Over himself, over his own body and mind, the individual is sovereign."

WHO 1S HARMED?

Obviously anyone who is physically sexually assaulted, or coerced into sexual activities against their will, is harmed and their assailants should be punished. But is someone who inadvertently stumbles upon people have sexual intercourse in what the latter believed to be private circumstances, and who is shocked and offended by what they see, sufficiently harmed to justify criminal penalties? Different people have different views as to what is sexually harmful, and to whom. At what age should young people be considered by the law as being old enough to make responsible sexual choices for themselves about their behaviour and its likely harmfulness? And does a prohibitive law itself do tangible harm to a young person who, out of positive desire or mere curiosity, engages in experimental sexual behaviour classified as unlawful? Should there be 'victimless crime' where sexual activity is concerned?

WHOSE CONSENT?

At present, the law forbids - because of the participants' ages and/or the circumstances in which the activities take place - much sexual behaviour which is in fact consented to, but which in law is punishable as 'indecent

assault', gross indecency', etc. Leaving aside the loaded terminology used by the law in this area (which the Sexual Law Reform Society would like to see altered so that NO consensual activities are any longer designated 'assaults', and 'indecency' is only applied in a precisely defined and restricted sense), the question of principle here is whether *any* sexual act, in fact, consented to by the participants should ever be punishable (unless others are unwillingly involved or affronted). If the CLRC's view that 'the mere fact that sexual conduct is consensual should (not) always be decisive against its criminality (5) is to be upheld, the Sexual Law Reform Society believes that the burden of proof that prosecutions are in the public interest in such cases should always rest upon the prosecution, and should be strict and narrowly defined. Libertarians will, I hope, agree that in general people who have attained puberty should be free to decide for themselves what they want to do sexually with their own bodies. The SLRS has put forward a scheme whereby a legal age of consent of 14 for both sexes, designed to protect those below puberty, would be combined with a system of civil law sanctions and social work care to provide effective protection for those aged under 18 who are deemed by their parents, guardians or the courts to be sexually at risk. And it is interesting that the CLRC, while rejecting this scheme as impracticable for protecting adolescents, has nonetheless proposed a remarkably similar system to replace the current penalties against sexual intercourse with mentally subnormal people.

WHOSE PRIVACY?

The law has traditionally taken the view that some behaviour which is legal in private should be punishable if done in public because it is offensive to others. Usually the law achieves this result by defining what is a 'public place' (there are different definitions for different purposes) and laying down national and local regulations about conduct in such places. Thus many sexual activities which are acceptable in private - which is a narrower concept than 'indoors', because many indoor premises are public places - are designated by the law as 'indecent' and punishable if done in public. This is so *whether uninvolved third parties are actually present and offended or not*. The result is that people are frequently brought to court on indecency charges when the only witnesses of their 'indecent' behaviour have been the police. Such a system lends itself to abuse, and lawyers working in this area are all too familiar with allegations of *agent-provocateur* tactics and perjury which, though difficult to verify, indicate that those laws could advantageously be re-framed.

Unfortunately, the CLRC has not so far grasped the opportunity to do so. In its Working Paper proposals, while recognising that those who wish to engage in sexual activities in the open air (e.g. in a secluded private garden) are entitled to their privacy provided that they take reasonable precautions not to be overlooked, the Committee suggests that the law should properly continue to punish the sexual behaviour of consenting adults on premises which are 'places of common resort', such as clubs, even if all those present and consenting are members, on the ground that such behaviour is intrinsically 'grossly indecent' and that therefore the mere knowledge that it may be taking place is seriously offensive to members of the public who aren't present. Such an attitude regresses from the Wolfenden principle, is largely unenforceable without police infiltration and haphazard raids upon suspected premises, and is an unwarranted interference with personal liberty. The moralistic attitudes enshrined in the sex laws die hard, and this proposals reflects the distaste many British people feel at the idea of places which are in effect brothels. But such places have always existed, and they will continue to exist whatever the law may say because (however deplorable the fact may be) they meet a demand.

Where the protection of privacy is concerned, a balance has to be struck between the privacy of those who wish to indulge freely in consenting sexual behaviour (whether heterosexual or homosexual, 'moral' or 'immoral') in a secluded place, even though technically not 'in private', and the privacy of those who are offended by such behaviour. The SLRS believes that a fair and practical solution would be to make the commission of actual nuisance, rather than quibbles about what is

technically 'in private' or a 'public place', the guideline for the law in this respect. If 'nuisance' became the test, it would be necessary, in order to secure a conviction, to produce witnesses other than the police who were prepared to say in court that they had been offended by something which they had unintentionally witnessed. The issue would become one of factual offence - not hypothetical disgust. Suitable provision could be made to prohibit sexual behaviour in specified places primarily used or habitually frequented by children. Such a law would also be a much fairer way of regulating street offences such as soliciting by prostitutes, instead of the harshly unjust laws we now have which allow them to be sent to prison after sufficient previous police 'cautions' and convictions.

WHOSE PERMISSION?

"And if my ways are not as theirs Let them mind their own affairs.
Their deeds I judge and much condemn,
Yet when did I make laws for them?
Please yourselves, say I, and they
Need only look the other way.
But no, they will not; they must still
Wrest their neighbour to their will,
And make me dance as they desire
With jail and gallows and hell-fire."

- A E HOUSMAN

The sex laws raise deep philosophical issues about the nature of society and the claims of personal freedom. It is fashionable these days to attack 'permissiveness' as the source of social and moral ills, and to clamour for stricter laws regulating personal morals, sexual behaviour and freedom of speech. It seems bizarre that such calls mostly come from those who, in other respects, advocate greater economic laissez-faire and a robust individualism as the antidote to Britain's material troubles.

The notion of 'permissiveness' begs the all-important question of who has the right to 'permit' or to withhold 'permission' from others to behave as they wish sexually in the first place. Those who speak in this way seem to assume that there are, and should be, authoritative social controls, appropriately enforced by law, over everyone's personal and private choices; and that these controls have laxly been allowed to slip. (The speakers, of course, always see themselves as the eager controllers, and never as the unwillingly controlled.) This model of society is surely totally unacceptable to Libertarians. The only effective control over personal - and especially sexual - behaviour is the inner one which the more old-fashioned amongst us call conscience. Externally imposed laws can never be a satisfactory substitute for the internal claims of self-respect and concern for others. Of course, too many people may lack a sufficient degree of these qualities, and so the law has a rightful place to function in protecting everyone - and especially the weaker members of society - from physical abuse or psychological coercion. But laws which set out to protect people from themselves, and to impose externally defined 'permissions' upon freely made mutually consenting sexual choices, are self-defeating and ultimately anti-social. By vainly seeking to impose compulsion in spheres of personal behaviour where truly ethical choices can only be made in freedom, the law becomes the enemy of those very values of personal responsibility which it should promote'. And it creates "victimless crime".

WHO IS VICTMISED?

If the purpose of the law is to prevent people from being sexually victimised, it must ensure that nobody is victimised by the law for making what are essentially personal and private choices about their own sexual behaviour. By all means let the law punish - and, where necessary, punish severely - those who violate others' sexual freedom by rape, actual assault or mental coercion. In doing so, it is rightfully protecting the sexually victimised. But let the law cease to punish - as it is now doing by the hundreds if not thousands every year - those who, merely because their sexual references and choices are unorthodox, or regarded by some as being 'immoral', fall foul of a code which is no longer appropriate in today's modern, pluralist society. For these people are cruelly victimised by the law. And let society be clear-minded and unhypocritical about who the real victims of the existing situation are.

WHOSE LIFE? WHOSE RIGHTS? WHOSE RESPONSIBILITY?

Libertarians will, I hope, agree that the questions raised by the application of law to sexual behaviour concern the very roots of social justice. The basic question is: what sort of a society do we wish to live in? One where each individual is seen as uniquely important in his or her own right, and in which positive regard and compassion for others are valued as much as our own wants; or one in which flesh-and-blood people are sacrificed to abstract principles. Who owns my life? Who owns my mind? Who owns my body? To believe that MY life is the most important business in the universe to me is not anti-social selfishness: it is, on the contrary, the necessary prerequisite and the surest foundation for me becoming socially involved, concerned and useful to others.

Such a mutually involved, yet liberty-loving, society can only exist in an atmosphere of social, political and legal freedom. This is more than a mere matter of balance - it is a question of belief. If you believe profoundly, as I do, that the first and foremost possession to which each one of us is rightfully entitled is ourselves - our minds and our bodies - with all the moral and practical consequences of responsible ownership which flow from that, you must be aware that sexual politics - the business of securing proper recognition within society of individual sexual freedoms - is an essential component of a Libertarian attitude to life.

ANTHONY GREY

1. *Sexual Law Reform Society:*
(a) Report of Working Party on the Law in Relation to Sexual Behaviour, 1974
(b) Response to CLRC Working Paper on Sexual Offences. 1981.
(c) Response to CLRC Questionnaire on Prostitution and Street Offences. 1981. Report of the (Home Office)
2. Committee on Homosexual Offences and prostitution. (CND. 247) 1957 .
3. *Criminal Law Revision Committee*:
(a) (Policy Advisory Committee): Working Paper on the Age of Consent in relation to Sexual Offences. 1979.
(b) Working Paper on Sexual Offences. 1980.
(c) (Policy Advisory Committee): Report on the Age of Sexual Consent in relation to Sexual Offences. 1981.

4. *J. S. Mill* On Liberty. 1859 (Various editions)

5. See 3(b) above, para. 10.