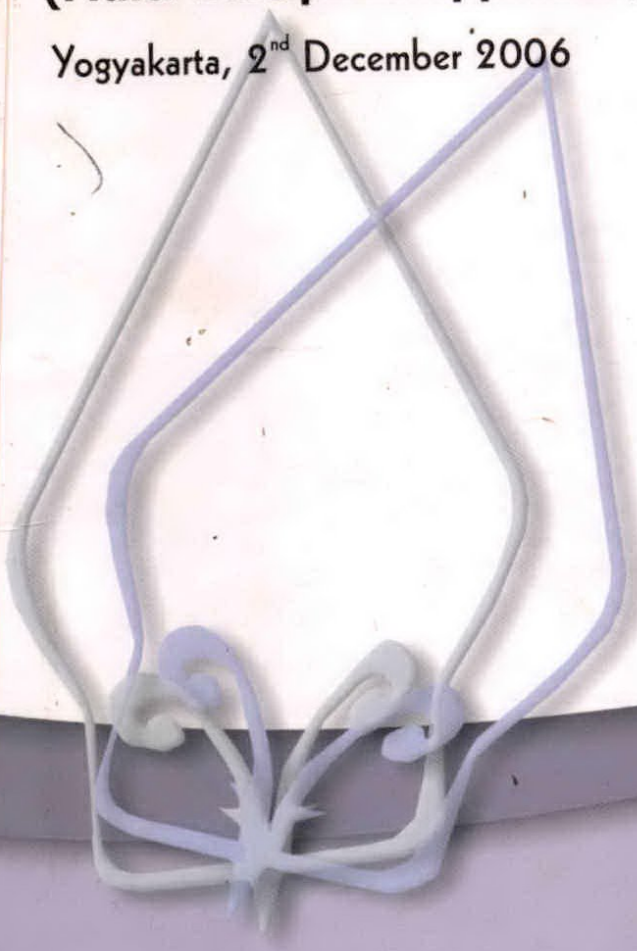


Proceeding

International Joint Seminar

**Muslim Countries and Development :
Achievements, Constraints and Alternative Solutions
(Multi-Discipline Approach)**

Yogyakarta, 2nd December 2006



Organized by:



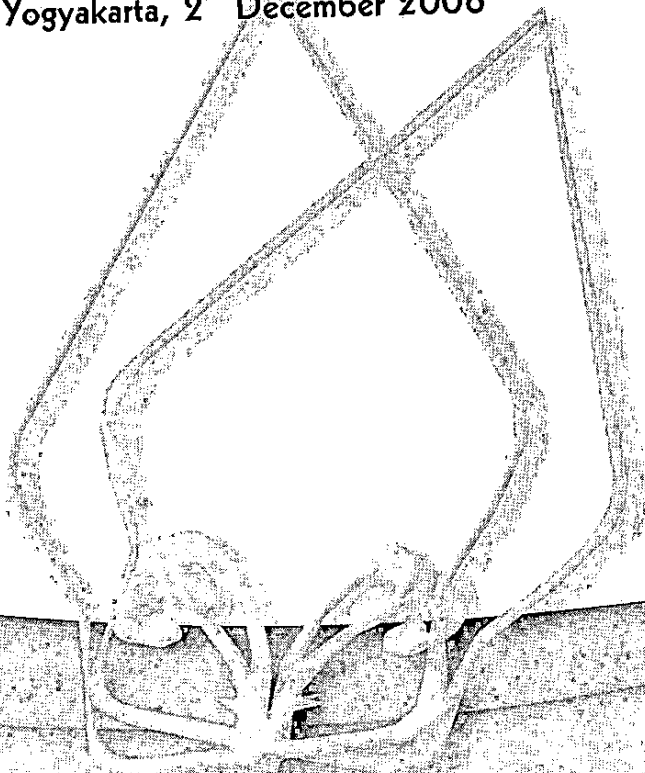
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Organized by:



Universitas
Muhammadiyah
Yogyakarta



International
Islamic
University
Malaysia



Education and
Cultural Attache
Embassy of The Republic
Indonesia in Malaysia

**MESSAGE FROM THE RECTOR OF
UNIVERSITAS MUHAMMADIYAH YOGYAKARTA (UMY)**

Assalamu'alaikum warahmatullahi wabarakatuh

All praise be to Allah SWT, Lord of the world. Peace and blessings on Muhammad SAW, His Servants and Messenger.

First of all, as the rector of Universitas Muhammadiyah Yogyakarta (UMY), I would like to welcome to the honourable guests, Rector, Dean of Postgraduate Studies (CPS), Dean of ISTAC, Dean of IRKHS, Deputy Deans and Head Departments from various Kulliyah, lecturers, postgraduate students of International Islamic University Malaysia (IIUM), and all participants in this joint seminar.

Academic cooperation between UMY and IIUM started several years ago. The cooperation between us is based on a solid foundation; both us are Islamic universities having same missions to develop Islamic society, to prepare future generations of Islamic intellectuals, and to cultivate Islamic civilization. In fact, improving academic quality and strengthening our position as the producers of knowledge and wisdom will offer a meaningful contribution to the development of Islamic civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this joint program will be a giant step for both of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities.

I sincerely wish you good luck and success in joining this program

Wassalamu'alaikum Wr, Wb.

Dr. Khoiruddin Bashori

Rector, UMY

**MESSAGE FROM THE RECTOR OF
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA (IIUM)**

Assalamu'alaikum warahmatullahi wabarakatuh

In the name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmer bilateral tie between the International Islamic University Malaysia (IIUM) and Universitas Muhammadiyah Yogyakarta (UMY) after the MoU Phase.

I would also like to express my heartfelt thanks to Centre for Postgraduate Studies (CPS), Postgraduate Students Society (PGSS), contributors, paper presenters, participants and our Indonesian counterpart for making this program a prestigious event of the year.

This educational and cultural visit is not only an avenue to foster good relationship between organizations and individuals and to learn as much from one another but a step forward in promoting quality graduates who practices their ability outdoor and master his or her studies through first hand experience. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to our graduates. This comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

My utmost support is with you always. Looking forward to a fruitful meeting.

Ma'assalamah

Wassalamu'alaikum Wr, Wb.

Prof. Dato' Dr. Syed Arabi Iddid

Rector, IIUM

**MESSAGE FROM EDUCATION AND CULTURAL ATTACHE
EMBASSY OF THE REPUBLIC OF INDONESIA
KUALA LUMPUR**

Assalamu 'alaikum warahmatullahi wabarakatuh

All praise be to Allah SWT. This is the moment where implementation of MoU between Universitas Muhammadiyah Yogyakarta (UMY) and International Islamic University Malaysia (IIUM) comes in the form of action by organizing this Joint Seminar. The efforts of both sides to implement the MoU are highly appreciated, especially, in the context of which both universities effort to enhance the quality of education.

Substantially, I believe that this Joint Seminar will bring many benefits. In term of the development of knowledge, it is a means for developing academic quality, for exchanging of information on academic development, as well as for constructing intellectual atmosphere at both universities. In term of international relations, both universities have taken part in increasing close relationship between Malaysia and Indonesia. RUM and UNY as well are using 'soft power' to increase bilateral relations among citizens which brings a lot of benefits for both nations.

Therefore, I hope that both RUM and UMY can make use of this program as a 'kick-off' for other programs in the future, especially in using UMY's vast networks with other Muhammadiyah Universities in various cities in Indonesia as well as IIUM's network. The support of IIUM for UMY also means a progress for IIUM and UMY. I hope such joint program will continue in future for betterment of both Indonesia and Malaysia. Embassy of the Republic of Indonesia in Kuala Lumpur will always support these efforts.

To our honorable guests, Rector, Dean of Postgraduate Studies (CPS), Dean of ISTAC, Dean of IRKHS, Deputy Deans and Head Departments from various Kulliyah, lecturers and students of IIUM, I warmly welcome you to Yogyakarta. I hope you enjoy your stay in the cultural city of Yogyakarta.

Finally, as the Attache of Education and Cultural, Embassy of the Republic of Indonesia, Kuala Lumpur, I sincerely wish you good luck *and a successful program with unforgettable memories.*

*Wabillahit Taufiq Wal Hidayah
Wassalamu 'alaikum warahmatullahi wabarakatuh.*

M.Imran Hanafi

Education and Cultural Attache, Embassy of the Republic of Indonesia

MESSAGE FROM DEAN CENTRE FOR POSTGRADUATE STUDIES

Assalamu'alaikum warahmatullahi wabarakatuh

Praise be to Allah. May the peace and blessings of Allah be on the last prophet and messenger, our master Muhammad and on his household and companions. It is a great privilege for me to foreword this message to this wonderful event that is jointly organized by the Universitas Muhammadiyah Yogyakarta (UMY) and International Islamic University (IIUM).

First and foremost I would like to record my special gratitude to management of Universitas Muhammadiyah Yogyakarta for their co-operation.

In order to obtain comprehensive excellence, the Centre for Postgraduate studies has always facilitates postgraduate students of the university to achieve the highest quality in their academic work. This seminar is one of the many programs that Centre for postgraduate studies has to ensure quality graduates.

I would therefore like to thank all the participants and programme coordinators who have worked hard to realize this event.

May Allah SWT shower His blessing upon us.

Wassalamu'alaikum Wr, Wb.

Prof. Dato' Dr. Wan Rafei Abdul Rahman
Dean, Centre For Postgraduate Studies

**MESSAGE FROM THE ACTIVE
PRESIDENT OF POSTGRADUATE STUDENTS'**

Assalamu'alaikum warahmatullahi wabarakatuh

On behalf of Postgraduate Students' Society (PGSS), my gratitude and appreciation to our beloved Dean of Studies, the Embassy of Indonesia in Kuala Lumpur, Muhammadiyah Yogyakarta and the organizing committee of IIUM and the Universitas Muhammadiyah Yogyakarta for their huge success. Postgraduate Students' Society (PGSS) under the supervision of the Center for Postgraduate Studies (CPG) is pleased to host this event.

As I strongly believe that the initial stages of unity are the key to building the new generation, who will represent the future more, such programs, not only achieve the mission of our universities but to achieve the global mission and vision. Therefore, I believe today, we have to have understanding and then only we can appreciate our diverse cultures. We should acknowledge the different strengths and weaknesses through knowledge in this age of information. I am sure this joint seminar will initiate unity among the future generations along with integrating them.

Thank you,

Mohd Nabi Habibi

Active President Postgraduate Students' Society (PGSS)

MESSAGE FROM PROGRAM DIRECTOR

Assalamu'alaikum warahmatullahi wabarakatuh.

Praise be to Allah. May the peace and blessings of Allah be on the last Prophet and Messenger, our master Muhammad and on his household and companions.

Honestly speaking, we are pleased to be trusted by Postgraduate Students' Society (PGSS) and Centre for Postgraduate Studies (CPS) to organize the programme named Educational and Cultural Visit to Yogyakarta, Indonesia. For this, We express our gratitude to the management of both PGSS and CPS. This programme is of immense value. It has the potentials to promote intellectual endeavor, develop leadership capabilities and enrich cross-cultural understandings. We sincerely believe and hope that program of this kind will be organized in a regular fashion in future.

It is a great privilege for us to play twofold role in organizing this event: *as a host* and *as guest*. In fact, this is a fascinating experience to manage this event. Since our inception here, we have found meaningful interaction of students in an interweaving of cultures into complicated, yet beautiful, embroidery of social fabric. We are proud to say that this dearly loved university has produced graduates of high quality, who are distinct from those of the local universities.

Finally, we wish to express our special thanks to Bapak M.Imran Hanafi, Education and Cultural Attache of Indonesian Embassy, Bapak Herdaus, S.H., Assistant of Immigration Attache of Indonesian Embassy, Bapak Tharian Taharuddin for their immensely valuable assistance and co-operation in making this program a success. I sincerely appreciate all local committees at Yogyakarta, the colleagues and program coordinators and committee members who worked diligently to materialize this event. We wish to pass on good wishes to the PGSS for their valuable efforts it expended for this event.

May Allah s.w.t shower His blessing upon us.

Wassalam,

Nasrullah

Programme Director

Todi Kurniawan

Co-Programme Director

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The Perplexed Issues Of Morality And Law: The Case Of Ooi Kean Thong

Mohd Iqbal Bin Abdul Wahab*
Ahmad Ibrahim Kulliyah of Law
International Islamic University Malaysia

Abstract

The issues of law, morality and justice have always been inter-related to one another. Morality involved the questions of origin of law and the reasons for the existence of law. Justice, on the other hand, reflects the outcome of the process of implementation of laws. This work is focusing on the relationship between law and morality. History tells us that basically scholars are divided into two groups. First, those who strongly committed on the importance of morality in the formulation and functioning of law. Second, those whose primary concern is the process of the making of law itself. A set of law is a good law when the promulgation and enactment of which is in concert with the process acceptable by the system prevalent in a given period of time. This is so despite the fact that the law itself may be repugnant to the concept of morality as believed by many or the authority responsible in the making of law is, from the perspective of the majority, invalid. The famous Hart-Fuller debate is taken as an example. Fuller, being a natural lawyer, believed that law and morality are one and can never be separated. A law which is totally divorced from morality ceases to be law. Hart on the other hand believed that the law is the law; it remains good even though it might not meet the demand of eternal moral criteria. The point of concern between the two was on the validity of Nazi Laws passed in Germany under the dictatorship of Adolph Hitler. Very briefly, the rigorous application of the law resulted in the severe punishment introduced to one who was found to have been 'insulting' the system. (He was sentenced to death but later was sent to the frontline in Russia). As mentioned earlier, this case later becomes popular in the discussion of law and morality. A question of substance here is whether morality should be the basis and will always be the test of the validity of law. Secondly, how morality is defined? Perhaps on this point, the basis and origin of morality is worth a subject of investigation. This paper is focusing on issues stated above. Particular reference is made on the recent case of Ooi Kean Thong v P.P. as decided in the Federal Court of Malaysia. The appellants in this case were vehemently protesting their conviction for, as it appeared, 'behaving disorderly' in public place. The issue before the learned Chief Justice varies. However, my primary concern is on the aspect of moral and its definition as discussed and explained in this case. It is hoped that this paper would be able to investigate on the main reasons for the passing of laws, especially when it touches or claimed to have touched the personal rights of a citizen. In the end, what is clear is the fact that, law and morality are integrated very closely to the effect that law is at the same time understood as the direct product of morality. Any attempt at disputing it will not be popular as it is seen as a challenge to a sound conscience and good practice of the decent people as a whole.

Keywords: law; morality; justice; Ooi Kean Thong.

Table 4-C PUBLIC SPENDING PRIORITIES OF SELECTED ISLAMIC NATIONS

HDI Rank	LOW HUMAN DEVELOPMENT	Public Expenditure On Education (As % of GNP)	Public Expenditure On Health (As % of GDP)	Total Debt Service (As % of GDP)	Military Expenditure (As % of GDP)
127	Pakistan	2.7	0.9	5.2	4.4
128	Togo	4.5	1.3	2.8	-
132	Bangladesh	2.2	1.7	1.7	1.6
133	Yemen	7.0	-	2.3	5.6
136	Nigeria	0.7	0.8	2.6	1.4
137	Djibouti	-	-	1.0	4.4
138	Sudan	1.4	-	0.6	2.6
139	Mauritania	5.1	1.4	11.0	2.3
141	Uganda	2.6	1.9	2.9	2.1
144	Cote d'Ivoire	5.0	1.2	12.9	0.9
145	Senegal	3.7	2.6	5.0	1.5
147	Benin	3.2	1.6	3.0	-
149	Gambia	4.9	1.9	5.4	0.8
150	Guinea	1.9	2.2	3.8	1.4
153	Mali	2.2	2.1	4.1	2.2
155	Chad	2.2	2.3	2.1	1.2
156	Guinea Bissau	-	-	4.4	1.3
157	Mozambique	-	2.8	3.1	2.4
159	Burkina Faso	3.6	1.2	2.4	1.6
161	Niger	2.3	1.2	2.5	-
162	Sierra Leone	-	0.9	3.2	1.6
	Afghanistan	-	-	-	-
	Iraq	-	-	-	-
	Palestine	-	-	-	-
	Somalia	-	-	-	-

The report above is of course far from a complete comprehensive study of human development in the Islamic world, but at least could be considered as a brief introduction and a summary of its recent position. Most Islamic nation fall in the low and medium human development category, a clear sign that much work must be done. Key indicators of the progress should be tracked in order to assess the progress of development in education, health, life expectancy, gender, literacy, and overall poverty. Many of the countries have a long way to go, but there many examples of successful Muslim nations for them to follow.

Introduction

The Justice and Development party or more popularly known as AK Parti, has, in a major surprise, won a landslide victory in the Turkish general election on the 3rd of November 2002. It was a surprise first, at the time they went into the election, they have just reached their first year of establishment.¹ Second, as it was suspiciously claimed, to be a party motivated and to a large extent maneuvered by the Islamists: something that is a serious challenge to the secular principle of the Turkish post Ottoman constitution.

Erdogan,² after two years in power, proposed a bill to make adultery a crime. The issue of adultery law, together with few other amendments, was introduced for debate in his bid to ensure that the new Turkish Penal Code will bring Turkish laws closer to those of EU members.³

This attempt at criminalizing adultery is of a particular interest. The intended amendment was explained by the Justice Minister, Cemil Cicek, as in harmony with the feeling of the Turkish people. This, however, was heavily protested by women's group and liberal commentators. The strongest protest came from the main opposition, the Republican People's Party (CHP). Quite a number of reasons were given for their opposition but the main is on the issue of Islam based moral values.⁴ Some will look at this development as something peculiarly Turkish. However, a deeper investigation will suggest that this was by no means a phenomenon for a modern Turkish state alone.

It has to be said that the proposed changes in respect to the adultery law was in the end dropped.⁵ The reason was not essentially on the issue of imposing morality into the legal system, but was closely related to the Turkish bid to be a member of European Union,⁶ or at least, looking at it from the literal perspective of the incident. A sizable number of Turkish populations would welcome the move but again, there are those who opposed, and opposed it vehemently.

The reason for this is nothing new. It is the issue of defining and understanding morality and its basis. For those who supported the move, looked into it as a measure taken to minimize cruelty against women by making their husband loyal and faithful only to herself. This line of reasoning is clearly based morally motivated. Those who greeted it with dismay forwarded the argument, ironically, also on the issue of sanctity of marriage.⁷ This only proves the complexity of the issue of morality and law.

¹ The party was formed on the 14th of August 2001.

² Recep Tayyip Erdogan, Turkish Prime Minister from the Justice and Development Party.

³ Among other legal reforms proposed include outlawing torture and imposing stiffer penalties on human traffickers. <http://www.turkishnews.com>.

⁴ European Union enlargement commissioner, Guenter Verheugen was quoted to have said: "If Turkey tries to include crimes that are not in other countries' laws in its Penal Code, European Union countries could interpret this as Islamic law entering Turkish law". EU Irked by Turkish Adultery Law, <http://news.bbc.co.uk>

⁵ Turkey Signals U-turn on Adultery, <http://news.bbc.co.uk>

⁶ Guenter Verheugen, EU enlargement commissioner was quoted to have said:

"I cannot understand how a measure like this could be considered at such a time – it can only be a joke". Turkey Signals U-Turn on Adultery, *ibid*.

⁷ Senal Saruhan, woman's rights advocate expressed herself in an interview with AP reporter:

Morality and Law: An Early Discussion.

Can people be made moral by law? Is paying total obedience to law will make a person a better moral citizen? Is the law that gives birth to a well-balanced and orderly society; or it is the people who translate their formula into a system that later appeared as laws, the disobedience of which is subject to sanction and punishment? Must law be devoid of moral characters? Are we looking at the process of the law making or the content of the law? Those are among the questions continuously discussed and elaborated from generation to generation.

The views amongst the scholars, legal commentators and experts are broadly divided into two categories. First, the positivists⁸; those whose understanding and conception of laws are essentially focusing on the process of the creation of the law. The evaluation of morality is peripheral issues and will not be affecting the validity of the law. Jeremy Bentham⁹ is perhaps the most staunchly positivist. He is widely popular with his principle of utility i.e. the greatest happiness of the greatest number. J.W Harris in his 'Legal Philosophies'¹⁰ wrote:

"Bentham was a philosopher and a reformer dedicated to the principle of utility: that every act of law should be judged, as to its goodness or badness, solely by reference to its consequences in terms of human happiness. He was anti-traditionalist from an early age and was shocked to the core when in his teens he attended lectures by Sir William Blackstone and heard all the complexities and anomalous accretions of contemporary common law defended in the name of reason. The root cause of all such unmerited praise seemed to him to be the confusion of law as it is with law as it ought to be, and for that the theory of natural was largely to blame. It was necessary to define law in terms of facts, the political facts of powers, human prescriptions, punishments and rewards. That done one could devise a scientific theory of legislation based on the principle of utility."

In short, he was known to promote the idea of laws devoid of metaphysics. Laws are to be analysed systematically and must also be scientifically approved. What is considered to be harmful by the majority is to be rejected. In the same vein, the best amongst the majority is the best for all. Laws are to be implemented and obeyed even if there are still many who are not particularly favourable with its introduction. This, in simple terms, is what he means by the greatest happiness of the greatest number.

Turkey signals U-turn on adultery, *ibid*.

⁸ The popular terms used to describe the essence of the positivist's idea is, 'to look at the law as it is, and not as it ought to be'. It emanates from this that, as long as the processes are valid and recognisable, the law produced must therefore be valid and enforceable. This must be so despite the fact that it may not be in harmony with the demand of morality.

⁹ J. Bentham, 1748-1832.

His most celebrated work among others are 'The limits of Jurisprudence Defined' (1945) and 'Of Laws in General' (1970).

¹⁰ J.W Harris, 'Legal Philosophies,' Second Edition, Butterworths, London, 1997, p.28.

John Austin,¹¹ is rather a robust positivist who is popular with his command and sanction theory of law. The command of the sovereign is the essence of a system and sovereign in his explanation exist only if a determinate political superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, and the society (including the superior) is a society political and independent.¹² To complete his theory, sanction played an important role on which he described as an essential element in the definition of law. The sovereign, who enjoyed obedience by the people, has also the power to inflict an evil in the form of sanction to those who disobey his command. Hence, obedience to the sovereign becomes a duty to others. This is how a system works and the sovereign seems to have an extensive power to make and alter laws as he thinks fit. The three elements, combined together, constitute a complete set of rules that make a governance system works. This is a no surprise as him, quite emphatically, aims at distinguishing law from other phenomenon, particularly from rules of morality.¹³ And as it appears, very little emphasis is made on the issue of morality at all.

Second, the naturalists who, as the term itself suggests, look into life; for that matter, laws, according to the nature of human being itself. It is, as argued, natural that recourse is to be made at any given times in human daily activities to something unseen but predominant. There is a strong feeling that in the end there is a superior being that guides or at least to be referred to at times of difficulties.

This belief is overwhelmingly influential within the legal theorists belong to this school. Only that they differ as to who or what that superior being is. It follows from there that any laws, if to be credited and qualified, must be in conformity with this inner feelings naturally born together with the creation of human beings. And this is morality by itself.

The classical Greek philosophers; Socrates, Plato and Aristotle elaborated this discussion fascinatingly, laying down the fundamentals which overwhelmed the later generation of scholars. St. Thomas Aquinas,¹⁴ in the medieval period propounded his four classifications of laws which are very churchly and of course divinely. His, *Lex Aeterna*, *Lex Naturale*, *Lex Divina* and *Lex Humana* are the manifested the dominance of papal authority in every aspects of the society at that particular time.¹⁵ Henceforth a very morally guided system; the morality or otherwise of the laws are interpreted by the churchman or the wise man on whom the people traditionally and without question relied upon.

¹¹ John Austin, 1790-1859. His most celebrated work is 'The Province of Jurisprudence Determined', 1832.

¹² R. Wacks, 'Understanding Jurisprudence,' Oxford University Press, 2005, p.61.

¹³ H. Davies and D. Holdcroft, 'Jurisprudence: Text and Commentary', Butterworth, 1991, p. 16.

¹⁴ St. Thomas Aquinas, 1225-1274. The most influential work of him is his 'Summa Theologica'.

¹⁵ Thomas Aquinas defined law as: "an ordinance of reason for the common good promulgated by him who has the care of the community". T. C. Shiell, *Legal Philosophy*, University of Wisconsin at Stout, Harcourt Brace Jovanovich Publishers, 1993. It derived from this that the 'him who has care of the community' is referred to the saints or the blessed man.

Ultimately, the main concern among the readers of law, especially those interested in the jurisprudence and philosophy of it, is on the quality of laws and its impact on the society. The positivist approach is tantamount to saying that any law passed is deemed to be good law, although unjust in character. The problem with the natural lawyers on the other hand is, who then, to determine the morality of law?

Morality and Law: the 'Hart-Fuller debate'

The focus is on the case of what is known as 'lady informer'. The essence of the debate is whether a law is to be regarded as valid if it contravened certain basic principles of morality. In 1949, a woman was prosecuted in a West German court for an offence under the German Criminal Code of 1871. She was found to have denounced her husband to the war time Nazi authorities as having made insulting remarks about Hitler, while on leave from the army. In her defence, she contended that she was not committing any offence for what she was doing was in accordance with the law prevalence and sound at that particular point of time- that her husband was making statements detrimental to the valid government in place. It was completely within the boundaries of the authentic law, no matter how despicable it may be, and to have her been incriminated for the past act was wholly unacceptable and injurious to the rule of justice.

The court found that the Nazi statute, being 'contrary to the sound conscience and sense of justice of all decent human beings,' did not have a legality that could support the woman's defence, and she was found guilty.¹⁶ The decision of this case brought hope to those who believe in the natural law principle; there is no strange that the positivists had furiously contesting the decision.

Professor Fuller, in his evaluation of law developed the concept of 'inner morality of law'.¹⁷ These are the qualities that every law must fulfill and without which a system cannot be properly regarded as a legal system.¹⁸ According to his evaluation, the law in which the husband was tried and convicted lacks such important quality. Thus, the decision to convict her in the post war trial was right. Another way of putting it, Fuller was explaining that the Nazi law was immoral and that the trial of the lady and her conviction was thus, moral.

Professor Hart believed that law is to be understood from its straightforward terms. The law which was passed according to a recognizable system is a good law; at least at the time when it was made in operation. The law is the law, and that it remains law even though it might not meet the demands of eternal moral criteria.¹⁹ Hart's conviction on the process of the law making,

¹⁶ J.G Riddall, 'Jurisprudence,' Butterworths, Second Edition, 1999, p. 80.

¹⁷ L Fuller, *Morality of Law*, Revised Edition, New Haven and London, Yale University Press, p 33-94.

¹⁸ J.G Riddal summarised Fuller's inner morality as follow:
1.general (not made ad hoc);2. published;3.prospective, not retroactive; 4.intelligible;
5.consistent; 6.capable of being complied with; 7. endure without undue changes; 8.
applied in the administration of the society. J.G. Riddall, 'Jurisprudence,' Butterworths,
Second Edition, p. 83.

¹⁹ L.B. Curzon, 'Jurisprudence,' Cavendish Publishing Limited, 1995, p.90.

however, must not be misunderstood as being sympathetic with the Nazi law of the 30's. It was the decision of the post war German court that strikes his indulgence and not on the content of the law.

The debate between the two legal theorists has certainly been valuable in any jurisprudential discussions of law. It would not be fair to just simplifying the discussion by a short comment such as this. And that reference to the work itself is highly necessary to really feel the excitement of the polemics. For the purpose of this study though, the case proves to us the tremendous influence of morality argument in both, law making as well as decision making processes. And that, at least, from the lady informer case, the morality arguments emerged victorious.

The 'Wolfenden Report'

The report of the committees on Homosexual Offences and Prostitution (known as 'Wolfenden Report') recommended a drastic change on matters related to sexual offences in England. The pivotal part of it was the suggestion to decriminalize homosexual practices. The debate revolved, as expected, around the arguments of the relationship between law and morality. Ought the law to concern itself with morality? Homosexual practices, which have long been despised, are now the subject of individual choices and will become acceptable norms within the community.

Because of its important, the philosophy of the report is laid down as the following:

The function of the criminal law (according to the subject area of the enquiry) was '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....'

*'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.'*²⁰

²⁰ L. B. Curzon, 'Jurisprudence,' Cavendish Publishing Limited, Second Edition 1995, p. 226.

Quite clearly, morality and law are said to have been two subjects the connection of which is of no importance. It is exactly this point that was strongly criticized most notably by Sir Patrick Devlin, known as Lord Devlin.²¹ His point was chiefly on the moral aspect of homosexual activities. Criminal activities, according to him, involved not only the doer of the act and the injured person, but also the whole members of the society. It, therefore, a matter of concern for everyone in the state and the basic principle of morality and good behaviour that have been respected need not be altered.²²

The arguments and discussion developed from there touching upon many pertinent questions related to the morality of law. The issue of public and private morality, the definition and conception of crime and the enforcement of law in correcting those whose criminal activities are mainly private. It is to be noted that despite fierce arguments against, the recommendation was taken and the law altered in favour of homosexual practitioners.²³

The case of Ooi Kean Thong²⁴

This is a case where a young couple was caught in a park by members of the DBKL (Dewan Bandaraya Kuala Lumpur) for behaving indecently in public. The allegation states:

"That you on 2.8.2003 at 5.20 p.m. under the trees at Kuala Lumpur City Centre Park, Wilayah Persekutuan was found behaving in a disorderly manner, to wit, hugging and kissing with a man women Siow Ah Wei (KP No: 830323-05-5392) and thereby committed an offence under section 8(1) of the parks (Federal Territory) By-Laws 1981 and punishable under section 10 of the same Act."²⁵

Section 8 (1) of the by-laws states:

"Any person found behaving in a disorderly manner in any parks commits an offence."

This law was challenged to be ultra virus section 102 of the local government Act 1976.²⁶ The effect of the law as claimed by the couple was that their constitutional right of freedom was deprived and curtailed.

²¹ 1905-1992, a former Lord Justice of Appeal and Lord of Appeal in Ordinary, England.

²² Curzon in his explanation states:

"Devlin states that, hitherto, the criminal law has been based upon certain standards of behaviour or moral principles which society requires to be observed, and that their breach is an offence not merely against the person who is injured, but against society as a whole".
L.B. Curzon, 'Jurisprudence,' p. 227.

²³ The law develops further to recognise gay marriage in England on December 2005. See 'Gay Marriage Around the Globe,' www.news.bbc.co.uk.

²⁴ Ooi Kean Thong & Anor v Public Prosecutor, [2006] 3 MLJ 389.

²⁵ *Ibid.* p.394.

²⁶ Section 102 of the Local Government Act 1976 states:

"In addition to the powers of making by-laws expressly or impliedly conferred upon it by any other provisions of this Act every local authority may from time to time, make, amend and revoke by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well being of the inhabitants or for the good order

There are quite a number of issues raised from this case. The constitutionality of the by-laws, or specifically, the power given to Local Authorities which include DBKL under section 102 of the Local Government Act 1976 and in particular paragraph (a) to (u) therein do not include the power to make by-law relating to indecent behaviour. According to the argument, there is no specific reference to offences which could be categorised within the definition of indecent behaviour as claimed by the authority.

It is also argued that, as a result of the absent of such direct reference, the authority was behaving unfairly and discriminative against them. To have both of them sentenced and punished for the alleged intimate relationship in public places is not but a deprivation of their right as a citizen.

It was also contended that DBKL in legislating the by-law had blatantly infringed Article 5(1) of the constitution guaranteeing the basic freedom of right to life and to live according to the way one wants.²⁷ The fact that Malaysia is a multi-racial country with different ethnicity and culture was not respected. Therefore, kissing and hugging in public places should not be deemed wrong and can not be regarded as indecent behaviour. As reported, the learned council has suggested that such expression of love should instead be encouraged.²⁸

The main focus in this work is on the issue of morality in the formulation and regulation of the by-laws. Whether the DBKL in compounding the two young man and woman, compounded them because of their behaviour which is repugnant to the accepted norms and way of life of the citizens? If the answer for this is in the affirmative, it can safely presume that the by-laws were in fact designed in accordance with the interpretation of morality as defined and practiced by the people of Malaysia.

In actuality, the case has become the concern of many NGOs and individuals in the country. It is not intended to detail down each and every opinion of those relevant commentators. Suffice it to say that the bottom line of the problem-if it is at all a problem-is on the question of morality. The terms 'indecent behaviour', 'behaving in disorderly manner' and 'disrespectful of the feeling of the majority' are all revolved in one spectrum i.e. morality. The question is, morality according to whose perspective? Who have the final decision in making such interpretations? This become clearer when the council for

and government of the local authority area and in particular in respect of all or any of the following purposes- (a) - (u)." For the purpose of this case, specific reference was made to clause (f) and (t). Section 10 (f): 'to provide for the establishment, regulation and management of any public park, walk, recreation and pleasure ground, garden, swimming pool, lake, stadium, historical building or site, public library, art gallery, museum, public theatre, restaurant, hall, assembly room, botanical or zoological garden, or aquarium;' Section 10 (t): 'to provide for the offences under this act and any by-laws which may be compounded by the local authority, the persons who may compound, the limit of the sum of money to be collected by such local authority for compounding such offences and the procedure and forms to be complied with in compounding.'

²⁷ On this specific issue, the learned DPP reiterated that the applicants (the couple) were never arrested or detained. They were compounded and asked to pay the fine. Thus, the allegation in the summons for behaving in disorderly manner in public park should not be interpreted as an infringement of the couple's liberty under the constitution. This line argument seems to have been accepted with approval by the Federal court.

²⁸ Ooi Kean Thong @ Anor v Public Prosecutor, *ibid.* p. 395.

the applicants himself, in quite categorical terms, suggested that, expressing one's love by intimately connecting each other, even if it is in public places is plainly natural and should be encouraged.

The council here seems to have his own understanding of morality. His own assessment of good and bad, and for that matter vice and virtues. Hugging and kissing, to him and to those who follow his line of arguments, are plausibly positive act. The question now is, upon what basis is this interpretation of morality lies and finds its substance?

On the other hand, what is the basis for people who regard such an act as revolting and contrary to the accepted norms within the community? There have already been allegations that the element of Islam has been unfairly imposed upon every citizen irrespective of their religion and way of life. It has got to be stressed however, that this has not been the formal argument put forward by the counsel in court, though, nonetheless, the reaction by certain quarters in the country suggests it affirmatively. But is that really an imposition of Islam upon one's life or a process of creeping Islamisation of Malaysia? The final question then would be whether section 8(1) of the DBKL enactment, modulated and found its source of authority from divine textual authorities?

It would be beneficent if the remarks of the Chief Justice are referred to.²⁹ In respond to the issue of 'behaving disorderly,' the learned chief justice related it to the issue of culture and good practice of the people. Quite interestingly, he compared the definition and understanding of morality as believed and practiced by the Asian and Western communities. Hugging and kissing perhaps are quite commonplace and acceptable in Western culture but the Asian society still finds it hard to accept especially when the activities are conducted in public places. There may be some who will be happy to prolong this issue from various brackets, but the majority will acknowledge the essence of the judgment with content.

Conclusion

Any attempt at ignoring the discussion of morality in discerning the validity of law will inevitably end up with spectacular failure. Every man whose mind is of room temperature will know that we need others to live and live longer. And life, therefore, is all about right and wrong, good and evil and ultimately deepening into vice and virtues. Anything right is good and anything good will lead to virtuous act commendable within the society. The same calculation tells us then that anything wrong is bad and from there vices creep in and cultivated. This is simply our life and that necessitates no abstruse formula and scientific finding to prove otherwise.

One may want to differ in his understanding of morality and its origin, but can never deny the fact that religious belief and commitments are part of the process of defining morality. Western conception of morality is overwhelmingly

²⁹ Tun Ahmad Fairus Sheikh Abdul Halim was quoted to have asked the questions: "In England, those acts are acceptable to the people of that country but is kissing and hugging acceptable to Malaysian citizens?" and "Is the act according to the morality of Asian People?" "Mayor Can Enact Morality Laws," <http://www.suaram.net>.

Christian in its nuances and contours.³⁰ It is plainly logical that in a majority Muslim country, guidance from the textual authorities has special place in their definition of law.

In a situation where one is not in the position of giving recognition on the importance of religion, then the whole story of right and wrong has to be redeveloped and explained. Perhaps the alternative is to say that certain act, take kissing in public as an example, is not right not because of it being morally unacceptable but because of the harm that it may cause to the public at large. The ultimate aim of law is now not to cause injury to the members of the public. And that since majority of the people in big cities, be it in Europe or Asia, have become more tolerant towards such activities, such act cannot be deemed injurious and thus, no sound reason to criminalize it.

Just take that argument on the degree of religiosity as true; still, there is something that makes the act deplorably unacceptable; the cultural values of a society. If religion plays no part in our system, can one really rely his daily measurement of right and wrong merely on the basis of it being injurious or otherwise to others? And if one's cultural practices that have been inherited for generations are now also irrelevant, than Hobbe's theory of man's origin is after all, not wrong. For that reason, the learned Chief Justice's remarks are not wrong either.

³⁰ Lord Devlin, *Morals and the Criminal Law*, from R.M. Dworkin, (Edit.), 'The philosophy of Law', Oxford University Press, 1977, p. 69:
"Morals and religion are inextricably joined-the moral standards generally accepted in Western civilization being those belonging to Christianity. Outside Christianity other standards derive from other religions. None of these moral codes can claim any validity except by virtue of the religion on which it is based." Pope Benedict XVI was quoted to have said: "In Europe, while remaining open to other religions and their cultural contributions, we must unite our efforts to preserve Christian roots, tradition and values. . . In the face of this reality, we are called, together with all other christian communities, to renew Europe's awareness of its Christian roots, traditions and values, giving them new vitality." <http://www.turkishdailynews.com>.