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**AN OVERVIEW OF MALA IN SE CRIME AND MALA PROHIBITA
CRIME IN NEPAL**- Bishal Bajgain¹**ABSTRACT**

Crime dies with the criminal but the existentiality of a crime is laid down through preordained laws, whether backed by sanctions or not. Explicit division of crime into two hues” Mala in se, and Mala Prohibita” has made it apparent considering the nature of a crime committed and the penalizing procedures. In terms of its applicability in criminal law and universal acceptance, the idea of mala in se crime has secured its existence and acceptance in ever moving society. Upon its acceptance, this paper examines why mala prohibita crimes faces reproval vis a vis mala in se crime and to what extent its notion finds applicability in contemporary practices. Impunity protects criminals undermining the core principle of criminal law and to this regard politics and bad governance render full assistance to the criminals. So this paper so far depicts the roadblock to the shrewd enforcement of mala in se crime in Nepal and argues why morality and divinity should not be the prime reason while interpreting mala in se crime.

INTRODUCTION

The usefulness and the distinction between mala in se and mala prohibita is still debatable in many forums. Mala Prohibita are those offences that are wrong simply for its association with the codified rules prohibiting them, or punishable by states.² On other hand, Black law dictionary defines Mala in se crimes as an act that is inherently and essentially evil considering it immoral in nature.³ Mala in se crime is wrong in itself. But the notion of mala in se crime has faced many criticisms over the years. One of the critiques to mala in se crime stem linking the idea with the moral deeds and the law of god. Despite this, it has growing

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2. Bishop, New Criminal Law, (8th.ed. 1892) ¶¶ 94-96.

3. Black Law Dictionary

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acceptance in contemporary practices. The reason behind the growing acceptance of this crime is that all the crimes under it are kindred with human dignity, liberty and life of the person. It has the nature of universality since no country offers non conformity to the rights and human dignity of a person. *Mala prohibita* constantly acts upon fringes owing to the fact that the reaction of a society to crimes categorized under this facet is less, and unconcerned at times. Above portion discusses two subsequent issues, (a) reproof of mala prohibita crimes vis-à-vis mala in se crime, (b) barriers to mala in se crime in Nepal.

CRITICISM OF MALA PROHIBITA VIS-À-VIS MALA IN SE CRIME

Upon the universal acceptance of *mala in se* crime, it is necessary to examine the drawbacks of *mala prohibita* so as to extract the ongoing debate on this category. Criminalization, one of the core aspects of criminal law, must be reasonable and fair complementary to the established rules and regulations under it. Crimes depending upon the country's laws and regulations can escalate punishment to such offences, on the other hand, sometimes bestow the way out without having faced adequate punishment. Over criminalization and under criminalization are those loops ever challenging to the subject of criminal law. Over criminalization can be defined as the overuse and abuse of criminal law to address every societal problem and punish every mistake, while under criminalization is the exact opposite.⁴ The former pose more tendency to distort the principle of criminal law than the later due to its wide area of expansion. To cover up such change, the *mala prohibita* might incorporate many laws restraining basic liberty and enjoyment of the people. Above all, the criminalization under *mala prohibita* is disguised in itself. The act considered immoral in one society can be considered moral or acceptable in another society. If the laws are made to regulate and govern the conduct of the society then such laws should penalize offences according to the degree of the crime whereby over criminalization is just the over exercise of the given power that does no good to society. In Nepal anti-corruption laws, forest laws are being over criminalized⁵. In India, the Muslim Women (Protection of Rights in Marriage) Act

⁴.Overcriminalization, NAT'L ASS'N OF CRIM. DEF. LAWS., <https://www.nacdl.org/Landing/Overcriminalization> [<https://perma.cc/PQD5-LH2A>] (noting that overcriminalization is a legislative issue); see also Alex Berger, Congress Takes Much Needed Step Forward on Over-Criminalization, AM.C.L. UNION. (May 15, 2013, 4:59 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/congress-takes-much-needed-step-forward-over-criminalization>

⁵.Prof. Dr. Rajit Bhakta Pradhanga&Balram Prasad Raut, Concept of Criminalization, Penalization and Principle of Legality in Nepali Judicial Discourse, 103(2013).

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2019 prescribes three years of imprisonment to any husbands who execute Talaq Three Times.⁶ Though this provision has been declared void, it intriguingly resonates with the three years imprisonment term for attempting to commit culpable homicide. The degree and gravity of these two offences are unparalleled and reproduce distinct results in the society. Nonetheless, when these two are put in the same basket lowers the seriousness of criminal penalty. On that account, it is the ever faced criticism to the concept of *mala prohibita* upon the question of actual limit and scope of criminalization.

Mala prohibita on action derives the idea of '*Ignorantiajuris non excusat*'⁷, though which being one of the general principles of criminal law is shrouded with critics and shortcomings. But, for particular crimes, a defendant cannot be convicted unless he knew that his conduct was illegal⁸. Simply knowing the dictates of a statute is not enough to hold someone liable for the act. For that one must also understand the nuances of its judicial interpretation to know precisely where the boundary between criminal and noncriminal behavior lies⁹. This has weakened the traditional rule of 'Ignorance of law is no excuse' and to this the concept of *mala prohibita* falls back on its applicability. In the *Cheek v. United States* case¹⁰, the court made a note that legislators should write statutes in a way that requires "willful violation of law" rather than emphasizing more on the maxim 'Ignorance of Law is no Excuse'. Thus, interpretation and execution of this concept should be in accordance with statute itself. The justification of crime under *mala prohibita* considerably failed to distinguish it between the act of 'Wrongfulness' and 'Harmfulness'. When an act considered wrong may not necessarily harm another counterpart. Herbert L Parker categorizes the criteria for criminalization into two ways, the first is the human conduct must be wrongful and the second is, it must be necessary to employ criminal law to condemn or prevent such conduct.¹¹ By contrast, there are no accustomed criteria for the establishment of wrongfulness. Given the idea of the crime considered inherently wrong with respect to *mala in se*, it must be

6. Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, India Code

7. *Ignorantiajuris non excusat*, \Oxford Reference, available at <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095957244>. See *Jermain v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08- 1200.

8. *Liparota v United States*, 471 US, 419 (1985).

9. Michael L. Travesty, Mistake of Law in Mala Prohibita Crime, *The University of Chicago Law review*, 1301 (1995).

10. *Cheek v. United States*, 498 U.S., 192 (1991)

11. *Supra* note 4, at 93.

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specified what kind of wrong amount to criminalization acknowledging that not all the wrong amounts to criminalization. For instance, when we look at the Arms and Ammunition Act¹² of Nepal, 2019, it states that ‘no person shall carry arms without a license or contrary to the terms and conditions as specified in the license’. Here, if a farmer in a village area owns a rifle, without having license, for the protection of crops, and from wild animals, then the law deems the person liable for illegally holding a gun though no harm is done. Eyeing the principle or axiom of ‘Utilitarianism¹³’, Jeremy Bentham writes, actions are right insofar it promote happiness, and wrong insofar it produce unhappiness. The need to justify wrong but for the private good without causing harm is still vacant. There should be a precise explanation for the establishment of what counts as harm. Therefore, law must be able to pin the criteria for the legitimate criminalization.

BARRIERS TO *MALA IN SE* CRIMES IN NEPAL

Mala prohibita is widely accepted as a soft core crime while *mala in se* is taken as a hard core crime and can have adverse effects in a society. The latter one in terms of harm and consequences can jeopardize the society, ergo legal sanction to it is stringent compared to punishment under the *mala prohibita* crimes. Efficacy on the execution of the provisioned punishment for the *mala in se* crime depends upon the political structure of the country. In a country like Nepal, criminalization for any offence is a cumbersome task. The great wall to the execution of *mala in se* crime is not the competent judicial authority rather be blamed the government itself. Pragmatically failed governance and rampant impunity adding fuel to it creates hollowness in proceeding legitimate criminalization . One such example can be referred to the case concerning rape of thirteen years old girl NirmalaPanta¹⁴ in Nepal. It has been years since the incident took place but the investigation is timely delayed and derailed whereby the actual culprit roaming around like a free bird is intolerable for rape being morally wrong, inherently evil and in addition the delayed justice to the victim subverts the

12.Arms and Ammunition Act, N.L.C § 5(1) (2019), available at <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/arms-and-ammunition-act-2019-1962.pdf>

13.Bentham, Jeremy, 1789. An Introduction to the Principles of Morals and Legislation, Oxford: Clarendon Press, 1907.

14.Everything you should know about the Nirmala Pant rape and murder case, The Kathmandu Post, July 15, 2019,<https://kathmandupost.com/national/2019/07/25/everything-you-should-know-about-the-rape-and-murder-of-nirmala-pant>

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principle of Justice. Similarly, murder is another *mala in se* crime that goes against the standards of the society. No alternative available for the murderer other than nailing prescribed punishment by the law. Death of AjitMijar¹⁵, where Dalit Civil Society concluded it as a murder, in 2016, on the ground of discrimination upon attempt of marrying higher caste girl is unsettled and the government paying less attention to it. When an impunity holds sway everywhere such grievous crimes never undergo to put the culprit behind the bars. Impunity exists for two main reasons, first the poor governing of a government having zero accountability and transparency, the second is the government safeguarding such offenders, in most of the cases, for political interest and gratification.

The other thing holding back the enforcement of *mala in se* crime is due to the controversy at the time of interpretation of law. Courts do not have any power to create new laws, in many jurisdictions. Law making by judges would violate the principle of parliamentary supremacy¹⁶. Chapter 1 of rape in MulukiAin, which now replaced by Muluki Criminal Code of Nepal 2017, does not explicitly mention about marital rape as a rape in the chapter. However, the court in the case of MeeraDhungana¹⁷ declared that ‘marital rape’ is included in the chapter of rape. Such action is considered against the criminal jurisprudence as in common practice courts only interpret law. Albeit, as a preponderant view, a court can make law to fill the statutory gap referring to the case of D.Velusamy vs.D.Patchaiammal¹⁸. Since this practice has not been embraced in many jurisdictions and contentious in legal literature it always poses a question during the interpretation of law. Likewise, the common notion of determining *mala in se* crime with a rationale of it being morally wrong is often criticized. The interpretation and explanation of such crimes should not merely be on the premise of morality and divinity. It has to come out with the purpose of defining *mala in se* crime with pragmatism and logic that best suit the existing structure of the society. To simplify it within the context of Nepal, reference should be taken from the Criminal code of Nepal 2017. Incest is considered crime in Nepal¹⁹ with it being codified in the penal code of the country. Standing to the main idea of the *mala in se* crime, incest is crime because it is wrong in itself

15.Asian Human Rights Commission, Nepal: Intercaste marriage allegedly ends in murder, July 21 2016, available at <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-093-2016/>

16.Magor and St Mellons Rural District Council v Newport Corporation, [1951] 2 All ER 839.

17.MeeraDhungana v. HMG, Decisions of the Supreme Court 147-63, (2003).

18.D. Velusamy v. D. Patchaiammal, 10 SCC 469, (2010).

19.Muluki Criminal Code of Nepal, §172 (2017).

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as such relations among blood goes against the morality and is evil. In contrast, incest is common in Magar community of Nepal where they are eligible to marry within their blood²⁰. Here, law do not restrict them engaging in incest marriage as a custom but the problem here is with the contradiction it has created with the main idea of *mala in se* crime. If incest is wrong in itself in one part of the country and legit in another part of the country or community, the question is pointed to the interpretation of *mala in se* crime based on morality and the law of god. Morality cannot come out with reservations, so the statement ‘mala in se crime is wrong in itself’ is highly challenged and eventually falls on grey area. The solution to it can come only from judiciary rethinking on purpose, applicability and relevance of *mala in se* crime.

CONCLUSION

The roadmap is accompanied to rethink and redefine the applicable concept diminishing the margin of controversy ignited by the multiple hues and interpretation concerning *mala in se* and *mala Prohibitam* must contend every crest and trough of criminal law. If crime is a deceiving concept then to it the optimum certainty through logical interpretation, to take down such discrepancies, must be sparked by the court of law. Morality and divineness in apropos *mala in se* crime, and the exact scope and extent of *malaprohibita* crime is a very need to well define to fulfil the gap in the criminal law.

²⁰.*Id*, §171(1)

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