

Law and Morality

There was a time when there was no distinction between law and morality. Society was governed by the morals that were law also. Later on distinction was made as obligatory rules and regulatory rules. Privy Council and our Supreme Court made a distinction between legal and moral injunctions. In Europe, Greeks and Romans recognized natural law as the basis of law. During Middle Ages Christian morals were considered as the basis of law. After Reformation distinction was made and state became basis or source of law. 17th and 18th century saw another change in reverse and theories of natural law became foundation. Nineteenth Century saw complete separation of law from moral when Austin said that law is command of the sovereign. Kelsen find only the legal norm as the subject matter of jurisprudence and exclude morals from the sphere of law. The approach of sociological jurists was different as they studied morals indirectly. They included morals while tracing the origin, development, function and ends of law.

The object of law is the submission of the individual to the will of organized society, while the tendency of morality is to subject the individual to the dictates of his conscience. Law is concerned with the social relationship of men rather than the individual where as ethics concentrates on the individual rather than society. Ethics considers motive and law emphasizes on conduct, but ethical duties of man cannot be considered without considering his obligation to his fellows or his place in society. .

Arndts finds following distinction between law and morals:

1. In law, man is considered as a person because he has a free will. In morals, we have to do with determining the will towards the good.
 2. Law considers man only in so far as he lives in community with others; morals give a guide to lead him even if he were alone
 3. Law has to do with external acts (Actus reas), morals look to the intention- the inner determination and direction of will. (only thinking good for others entails blessing of God but doing wrong is punishable under religious precepts and law)
 4. Law governs the will (external behavior) morals seeks a free determination towards the good.
 5. Law talks about strict liability i.e. even if there is no fault but morals excuse the person if there is no fault.
1. Four cardinal principles of H.L.A. Hart: Importance 2. Immunity from Deliberate Change. 3. Voluntary Character of offences 4. Forms of Moral Pressures.

THREE ANGLES OF RELATIONSHIP BETWEEN LAW AND MORALS

1. **Morals as the basis of law:-** There is no distinction between law and morals in the early stages of society. All the rules originated from the common source and sanctioned by supernatural fear. State picked up those rules important for the society and enforced those rules which were known as law. Thus law and morals have a common origin but diverge in their development. All laws should be moral but all morals cannot be law. There are number of legal rules which are not based on morals, some of them are opposed to morals. Morals do not make a person vicariously liable whereas law makes a person vicariously liable on the principle who can bear the liability.
2. **Morals as test of law:-** In human life morals occupy an important place. Greeks and Romans hold that law must confirm the morals. In Rome law was made to confirm to natural law which was based on certain moral principles. During middle ages, the Christian Fathers maintained that law must confirm to Christian morals. Same was the position in 17th and 18th centuries. In modern age a law is valid even if it is not in conformity with morals. Paton writes that if law lags behind popular standard, it falls in to disrepute; if the legal standards are too high, there are great difficulties of enforcement. (A Textbook of Jurisprudence)
3. **Moral as end of Law: -** Jurists defined law in terms of justice. The aim of law is to secure justice which is very much based on morals. In Sanskrit the word Dharma also implies justice. Analytical school holds that study of the end of law is beyond the domain of jurisprudence. Sociological jurists consider the study of end of law very important as law has some purpose i.e the welfare of the society. The conflicting interests of the society should be weighed and evaluated on the principle of minimum friction and waste. If people ask why they should obey law the answer is, it is in the welfare of the society.
Moral as Part of law: - Law and morals are distinguishable, but moral is an integral part of law. Morality is “secreted in the inter-stices” of the legal system and inseparable from it. Positivists insist that once the rule is laid down, it does not cease to be law. Prof. Hart says that some shared morality is essential if any society is to survive. Moral enters the arena of law in the name of justice, equity and good conscience. Morals act as restraint upon the power of the legislature. All human conduct and social relations cannot be regulated and governed by law alone. Many relations are left to be regulated and governed by morals and law does not interfere with them. Moral makes the law perfect. Paton gives an example of marriage. In

marriage, so long as love persists, there is little need of law to rule the relations of husband and wife but solicitor comes through the door as love flies out of the window. (A Textbook of Jurisprudence) Sociological approach insists on law to be persuaded by law. In international sphere brutalities committed forced the people to turn back to morals and standard and values are established to be followed by nations. If law is to remain closure to the life of the people, it cannot ignore morals. When law fails, society and nations surrender to the morals. Moral soothes the burning hearts and bring peace in the society- the very object of United Nations Organization.

Law, Morality and Justice

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The general acceptance of self imposed restraints to spontaneous behavior came to be recognized as laws. All laws had to be invented by necessity. There can perhaps be no better source of law anywhere else than in social consciousness present in every man. Laws are only the conditions of civil association, said Rousseau¹, although he very much doubted² the adequacy of laws to affect this purpose. It was well advised, according to him, to inquire whether the evils and crimes as the consequences of our passions did not spring up with the laws themselves.

To find out whether the evils came first or the laws, is only to argue in a circle. The passions are and shall always be as they have ever been. The recognition of some passions as evils is the only purpose of law. It is only after the evolution of a selective and standardized test that a passion could be given a good or bad name. Evils did spring up with the laws only in the sense that prior to the agency of laws, there was nothing to categorize human conduct.

¹ Social Contract, Book II, Chapter VI.

² Discourse on the Origin of Inequality.

It is not possible for law to create or abolish passions. Law or no law, passions have a seat in the human mind. The law disparages some passions and condemns an action arising there from. Stripped of bad and condemned passions, what is left in human conduct is the content of public morality on which the social order is founded. As regards interrelation of law and morality, political and social thought has gone much ahead from the days of Rousseau. T. H Green³ asserted that law can regulate man's outward behavior and actions but cannot touch his intentions; that law can ensure a moral action but cannot create morality. Lord Devlin⁴ has addressed himself to the questions whether the society has the right to pass judgment on matters of morals, and if such a right be conceded to society, whether it has also the right to use the weapon of the law to enforce it. The answer by Lord Devlin was in the affirmative. The field has further been expanded by Professor H. L. A. Hart⁵, and by Basil Mitchell.⁶ The problem of what the society may or may not do to enforce public morality is a pertinent question confronting the philosophers and legislators alike at all stages of social and political development. In the Vedic and Epic periods in India, the sages and saints had the right to enunciate principles of public morality and the king was to uphold righteousness in pronouncing upon an impugned conduct by reference to the settled tenets of society. In the Smiriti of Manu , the first law giver on earth , in the Mahabharata, and in the Arthshashtra of Kautilya, the institution of king was brought about to uphold public morality or the Dharma without the passions of the strong might oppress an event finished the weak.

However the whole of the life of man cannot be regulated by law alone. This is also true of ethics or morality. It is said that law is concerned with the external actions of individuals and morality with their inner conscience. The object of law generally is the submission of the individuals to the will of the organized society while the tendency of the morality is to subject the individual to the dictates of his own conscience. Law has its basis in social conduct; Morals lay down what is of intrinsic value for human conduct. Thus according to Bentham⁷ law has just the same center as morals but it has by no means the same circumference. On the issue of relationship between law and morality, the jurists, philosophers and authorities concern with the administration of law and justice are divided into two categories. Whereas one ideology believes in the separation of law and morality, other says that there is complete fusion between law and morality. The purpose of this paper is to highlight the relationship between these two concepts which are closely connected with each other and draw their relevance to the administration of justice.

LAW

Law can be understood in three senses. In its first sense of particular legal rules against murder, rape, negligence, speeding and so on. This is law as rules. Law in second sense is one amongst many standards of regulation and behavior. It includes standard of conduct alongside those of politics, business, morality

³ Principles of Political Obligations.

⁴ The Enforcement of Morals.

⁵ Law, Liberty and Morality.

⁶ Law Morality and Religion.

⁷ Jeremy Bentham, Theory of Legislation

and philosophy. Law also has a third sense of systemic and institutional features of the system of government; this is law as a system. In all three senses, law shapes and is shaped by value and socioeconomic factors.

Law is central to our lives. We encounter law without even thinking about it. One catches a bus, hire a taxi, sign a bank loan, buy or rent home. Every time we do one of these things, multiplicities of laws operate to regulate, protect and guide the people. Law as a medium through which changes in society, technology, thinking modify or translate in standards and norms of behavior. In that sense law is standard setting mechanisms such as morality, family rules, cultural norms and business practices.

It is a medium through which regulatory standards of conduct emerge. Thus law's rules mirror other regulatory standards like governmental policies, professional standards and regulatory rulings. Above all, it is the main medium concerned with standards of justice in both regulatory and non regulatory forms, as well as institutional law and justice mechanisms in our system of government. So try to put boundaries on law, to compartmentalize it and to keep it separate from politics, economics and other disciplinary ideas and values, when in reality there is an integral two way connection between law and society.⁸

Laws reflect different ideas grounded in ethics, politics, economics and what lawyers call jurisprudence or legal philosophy.

The main function of jurisprudence is to study the nature of law and its relationship with other social sciences. Jurists have dealt with this concept differently and adopted different approaches for ascertaining meaning of the jurisprudence and its concept. These approaches are popularly known as schools of jurisprudence. Natural law school makes the eternal principles as the basis of law. Analytical school says that law is made by human being for human being. Historical school says that law is child of history. Sociological school holds that law is a social fact. Realists maintained that law is what is declared by the judges. Sir John Austin, the first jurist who shattering all the barriers of ethics, politics, history and sociology gave a clear picture of form of law in a logical way. He took courage to call law as made by human being for human being. Thus superiority of state over church was proved. Salmond is of the opinion that Austin's concept contains an important element of truth. It recognizes the essential facts that civil is the product of the state and depends for its existence on the physical force of the state exercised through the agency of judicial tribunals. Where there is no state which governs a community by the use of physical force there can be no such things as civil law. Paton⁹ Partially accepting Austin's

⁸ Horrigan V, Adventures in Law and & Justice, Universal Law Publishing company, 2005,p,26

⁹ George White Cross Paton, A Text Book of Jurisprudence, Oxford University Press., 1964 .

view says that a mature system of law normally sets up that type of legal order known as the state, but we cannot say a priori that without the state no law can exist. Prof. Julius Stone¹⁰ also accepts that justice and social facts are immaterial to analytical school. In brief law is treated as isolated from society for the purposes of analysis, synthesis and classification.

Kelsen deals law as it is and not as it ought to be. The theory of law must be free from ethics, sociology, history and philosophy. Thus the positivists exclude the element of moral from the definition of law. Prof. Hart¹¹ rejects the command theory of law. He argues that the law is not a gun man situation, as the command can not be given by a man with a loaded gun.

Savigny, the pioneer of historical school of law emphasizes that law is not something which can be made or altered arbitrarily by law makers. It is not the product of reason or command or will of the Sovereign but it is a product of internal silently operating forces. Law is always found in popular faith, common convictions, customs, habits and traditions of the people. Law develops like language.

Prof. Dias comments that there is undoubtedly an element of truth in Volkgeist as there is stream of continuity and tradition but the difficulty lies in fixing it in precession. Savigny treated it as discoverable thing but even in a small group, people hold different issues and "The Spirit Does Not Exist."

However all the definitions given by different jurists are not complete. They have touched only one aspect. For example their test of lawness of law is different. Analytical jurists defined law in relation to its source i.e. command of the sovereign. Historical school defined it as continuity of law from custom. They say that law has been developing through custom. Law is found not made consciously. Legislation precedes law. Look before you leap.

Sociological jurists deal capacity of law to balance competing interests with the scale of minimum friction and waste by social engineering. Realists school emphasizes on authority of law reiterated by courts, meaning thereby legislation has nothing to do with law. Law is what judges say to which some jurists have defined as dog's law. Thus we see that all the jurists have touched different aspects of law.

However three types of questions can be asked regarding a legal system.

- (a) What is our legal system and what are its basic characteristics of definitions or propositions?(law and logic)

¹⁰ Stone Julius, The Province & Function of Law, Maitland Publication, 1961.

¹¹ Hart H.L.A, The Concept of Law, 1972, p.6.

- (b) What are the ideals to which we seek in a legal order i.e. what the law ought to do for men whose conduct it governs? (law and justice)
- (c) What are the actual effects of law upon men and what are the men's conducts upon law? (law and society)

However a definition which does not cover various aspects of law is bound to be imperfect.

Therefore law is norms of behaviour. It governs the behavior of the persons through its norms or different law. These norms are social in character. There is obligation to follow law. Disobedience of law will infer dire consequences. These norms are enforced by physical force of state. Thus implementing authority is institutionalized authority. However law cannot be defined, it can be described as coercive, effective and institutionalized order of social norms.

LAW & MORALITY

On the issue of relationship between law and morality, jurists, philosophers and the authorities concerned with the administration of law are divided into two categories. One ideology believes in the separation of law and morality, other says that there is a complete fusion between the two.

The concept of morality has been considered as universal and characteristic element of all human activity. The moral sense is that natural feeling which leads us to approve something and disapprove others. Moral appeals to our conscience, marks our ability to decide between right and wrong. Morality guides principles of ideal behavior in consonance with what is right and good. In essence morality is an integral force and appeals to the human conscience but its sanctions are also mainly internal.

There are external sanctions also in morality talked of by Bentham but the moral sanctions of Bentham are social sanctions because these are inflicted by society when its rules and morals are not complied with. These external sanctions are not sanctions of highest morality. The rules of highest moral law, like the rules of divine law are constant and internal and are not changeable with the change of time. However society does not by rules of divine or the highest moral laws. A majority of people in society go by the rules of general pleasure and displeasure and these may be termed as the rules of positive law. Positive morality is what a community at a particular time and place has thought it convenient, expedient or reasonable to enforce as binding on the conscience of the people. Positive morality varies from place to place and people. In positive morality, the rules of natural law, religious principles relating to good and right are existent. The method of enforcement of positive morality is through social sanctions. On the other hand, the principles of morality have sanctions in the inner conscience or natural conscience. The relationship between social morality and legal order can be found in any society. There can never be a complete separation of law and morality in a civilized society. In the

contemporary articulate and organized society law becomes a major factor in the formation of social morality. This inherent relationship can not be overlooked by any legal theory which maintains law as a self-contained order of enforceable prescriptions. The difference between certain positivist theories such as those of Kelson or Austin and others which in one way or other incorporate ethical postulates into the concept of law and the legal order lies mainly in the question whether the meta legal foundation of a legal order should be sought inside or outside it.¹² There is close relationship between law and morality though these two are not identical. If law is based on public policy, public policy itself should be based on some health principles which are valued by the community at a particular time and place. In modern democratic setup laws are based on public opinion or are supposed to be based on that opinion.

Public opinion is on the whole based on healthy moral principles, of which some are desirable from the point of view of universal moral laws in all civilized societies. The formulation of a legal system is not coercive power but certain fundamental and accepted rules specified in the essential law making procedure. These rules do not appear to be rules of law but are rules of morality, because they must necessarily be rules of what is accepted by society as just, fair and reasonable. In the words of Fuller law has its own intrinsic morality. It is indeed true that there is a great volume of laws that are not based on principles of natural law or highest morality and may not even be based on positive morality of the particular people. Such laws stand only by the force of sanction. Nevertheless it is true that there are many laws, legal principles and decisions based on definite and decisions based on definite and well recognized moral principles which are meant to serve, protect and upkeep morality and promote justice in real sense.

Paton¹³ is of the opinion that law, positive morality, and ethics are overlapping circles which can never entirely coincide. We do not find a close relationship between the rule of law and those of positive morality. If the law lags behind popular standards, it falls into dispute. If the legal standards are too high, there are great difficulties of enforcement. We may, therefore, say that between law and morals there may be distinction but not a separation. Dennis¹⁴ holds that the law and morality reinforce and supplement each other as part of the fabric of social life.

Distinguishing between order and good order Prof. Hart¹⁵ says that good order is that which represent the ideas of justice, morality or men's notions of what ought to be. Thus the order intended to be is

¹² Friedman W, Legal Theory, 5th Edition, p. 43.

¹³ Paton G. W. A., Text- Book of Jurisprudence, 3rd Edition .p.69.

¹⁴ Dennis, Lloyd, The Idea of Law, 5th Edition, p.57

¹⁵ Hart H.L.A, Positivism and The Separation of Law and Morals, 1965, p.12

certainly meant as functioning order in all forms of governments whether democratic, fascist or communist. In this sense, law is considered merely as an order containing its own implicit morality. This morality of order must be represented if we are to create anything that can be called law, even if it be a bad law. Law by itself is powerless to bring its morality into existence. There can be two fold prerequisites for claiming an order to be a good order.

Firstly, the authority which makes law must be guided by moral attitudes. Secondly we cannot establish good order unless our law makers are ready to accept the internal morality of law itself. In the life of a nation these external and internal moralities of law reciprocally influence one and other.

The eight principles of inner morality deduced by Prof. Fuller¹⁶ are not conceived as maxims of substantive natural law. They are rather the principles of procedural natural law.

However the legal system can create a healthy socio- political environment in any form of government, if eight principles of Prof.Fuller's inner morality are taken into consideration in the law making process and the authorities concerned are guided by sense of morality.

Now the question arises, what are the minimum moral conditions for the survival of a society? In England the Wolfenden Committee 1954, reported in 1957 that the function of law was not to intervene in the private lives of the citizens or to seek to enforce any particular pattern of behavior. The committee recommended that the homo-sexual behavior between consenting adults in private should no longer be a criminal offence as law ought to have no concern with the private lives of the citizens. It is not the business of law to see private morality or immorality unless the society equates the sphere of crime with that of sin.¹⁷ As regards prostitution, the committee referred that as the general proposition it will be universally accepted that law is not concerned with private morals or with ethical sanctions and therefore no act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation. Even then the committee recommended to suppress the offensive public manifestation of prostitution. Though prostitution was not made illegal but an Act was passed named as "The Street Offences Act 1957." Following the recommendations of the committee in 1955 the American Law Institute publish a draft model of Penal Code recommending that all consensual relationship between adults in private should be excluded from the scope of criminal law. The reason given for such recommendations was that such a typical sex practice in private between consenting adults partners do not affect the secular interest of the community. But the American Supreme court in the year 1974 condemned acts of naked dance in the night clubs and prohibited the

¹⁶ Fuller L.L, The Morality of Laws, p. 33.

¹⁷ Patrick Devlin, The Enforcement of Morals, 1965, p.2

use of wine on the plea that though there is no statutory prohibition for such acts, they affect public morals.

There is difference of opinion between Prof. Hart and Devlin regarding relationship between law and morality and regarding enforcement of morals in law. Prof. Hart bases himself on Mill's essay "On Liberty". John Stuart Mill says that the only purpose for which power can rightly be exercised over any citizen by the community against his will, is to prevent harm to others. Since private immorality does not affect society as a whole, there is no need to prevent homo-sexual behavior or declaring prostitution illegal. In contrast to this ideology, Lord Devlin maintained that law should continue to support a minimum morality. He says that each society has evolved certain moral institutions which form part of its way of living. For example institution of marriage is prevalent in all society but monogamy is not essential to every kind of society. Society is necessarily entitled to preserve, its moral notions through legal phenomena. The prostitutes exploit the lust of their customers and the customers, the moral weakness of the prostitutes. If the exploitation of human weakness is considered to create a special circumstance, there is virtually no field of morality which can be defined in such a way as to exclude the law.¹⁸ Society is entitled by means of its laws to protect itself from dangers. A well established government is necessary for the existence of society and therefore its safety against violent overthrow must be assured. But an established morality is as necessary as good government to the welfare of the society.¹⁹

Prof. Hart is of the opinion that in a particular legal system the rule of law needs no test of minimum morality. Like Stuart Mill he maintains that legal phenomena should be kept aside from private morality or immorality. Thus supporting the homosexual law passed by the British Parliament, he emphasized that judges have no power to declare it invalid on the plea of its reasonableness or unreasonableness. Prof. Fuller in contrast to Prof. Hart believes that there is a great moral principle upon which society is based. There are certain standard of behavior of moral principles which society requires to observe and the breach of them endanger the culture of the society. Thus Fuller pleads the inner morality of law and emphasizes the intersection between the law as it is and the law as ought to be.

However it may be said that law is necessary for the maintenance of morality at a decent level but law has its limitations and it is not meant to make people moral by its physical force. Though the relation between law and morality is very close and intimate and without such a close relationship we cannot have the solidarity of the state and safety of the people, yet it has to be born in mind that all that is morality cannot be enjoined by law, if the society is such that its people are not of a high moral character, moral laws becomes remote for the common people in that society. Law should not try to do

¹⁸ Patrick Devlin, *The Enforcement of Morals*, 1965, p.12.

¹⁹ Sharma G. S., "The Paradox of Law and Morality and Its Reflections in Contemporary India, *Jaipur Law Journal*, p. 15.

too much but should leave many things to other values i.e. culture of the society and art of living. It is the culture linked morality which binds the multicultural society in a single knot.

Justice

Now the question arises what is relevance of law and morality in administration of justice? Several questions may be asked. Is the relationship between law and justice permissive? Does law without justice retain its status as law? Does it justify disobedience at any point? Does morality play any role in the administration of justice?

So far as justice according to law is concerned; the courts simply administer the law of the land. They are not expected to ignore the law of the country. Hence what judge delivers is not justice in real sense but it is merely because judges are not expected to do what they consider to be just under the circumstances.

Justice is some time taken to be synonymous with the equivalent law, sometime to be distinct from law and superior to it. Justice in one of its aspect is held to consist in conformity with law, but it is also asserted that law must conform to justice. Justice Cardozo²⁰ made it clear by saying that what we are seeking is not merely the justice that one's receive when his right and duties are determined by the law as is it what we are seeking is the justice to which law in it's making should confirm.

Justice is reconciliation of the actual behavior of an individual with ideals of society. Since the aspiration of ideals always involves an ethical or moral attitude, the ideals of society, when formulated in law cannot dispute of ethical import. The law being moral on the substantive side has to be moral on the procedural side too. Justice appears to be manifestly done when the procedure for its administration is fair and appeals to the natural fairness in men. Justice is based substantially on natural ideas in human values.

²⁰ Cardozo, The Growth of Law, New Haven, 1927,p.87

The administration of justice is to be freed from the narrow and restricted consideration which is usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Justice ought to be administered in such a way which leaves the least doubt to the praying nature of man and which convinces him that justice is being done because it has appeared to him to have been done.

When justice was administered by kings or Caliphs, there was no complex system of enacted laws, as is seen in the modern times. Despite this drawback they had given to the world justice in ideal and did administer it with the fullest of probity and highest of public confidence. It is insignificant what law they applied, but it is significant what manner they adopted to ascertain facts for the application of a given law.

However, people are not concerned with whether justice was administered in India by the Emperor Jahangir or in Baghdad by the Caliph Haroon-Al-Rashid, but they are concerned with whether the justice is seemed to be done equally and fairly. The constitutions of all nations have to agree on the fundamental of substantial justice. The law of different countries may be different but justice is one. Laws are changeable but fundamentals of justice are universal. It is not the law alone but it is the morality, culture and mindset of the judge which make the justice appear to have been done. The judgment delivered by the Indian Supreme Court in contempt of court case of Kalia Singh, the UP chief minister and Zahira Sheikh, a poor young girl, was different though the contempt law in India is one and same. It reflects the morality, culture and mindset of the judge.

Therefore law and morality are interwoven and intermixed. Society is not a machine which can be run by law alone. The judge having knowledge of law devoid of morality, culture and ethics can impart justice according to law no doubt, but it is not justice in real sense.