"LAW & MORALITY IN THE PRESENT-DAY SOCIETY: PRAGMATIC & CONCILIATORY APPROACH IS A DESIDERATUM"

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THE EXORDIUM

The functioning of law and morality in the society has always attracted repeated questions to be answered looking into their significance and contribution in the survival and progress of the society. Different theories and opinions have been witnessed on issues of enforcing law and morality. Some views support and encourage enforcement of morality while others are against. This issue has been debated time and again and still remains a burning and live issue which indicates the apparent and omnipresent conflict between traditional moral rules and laws passed to cater to the changing needs of the modern society. The law has a duty to organize the conduct of the people and protect harm to citizens by keeping the society safe, but cannot always do so due to a number of hindrances in its way. Sometimes, laws prove to be counterproductive or harmful when it is applied in various diverse situations in the complex modern society addressing more troublesome and hidden problems. These problems are required to be evaluated against the background of the leading contemporary moral theories prevalent in the society giving way to various fertile grounds for discussing the extent to which the law should and does enforce moral principles and values.

THE PHILOSOPHY OF "RULE OF LAW"

The concept of Rule of law is of old origin and is an ancient ideal. It was discussed by ancient Greek philosophers such as Plato and Aristotle around 350 BC. Plato wrote: "*Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state". Likewise, Aristotle also endorsed the concept of Rule of law by writing that "law should govern and those in power should be servants of the laws.*"

The phrase 'Rule of Law' is derived from the French phrase '*la principe de legalite*' (the principle of legality) which refers to a government based on principles of law

and not of men. Rule of law is one of the basic principles of the English Constitution and the doctrine is accepted in the Constitution of U.S.A and India as well. The entire basis of Administrative Law is the doctrine of the rule of law. Sir Edward Coke, the Chief Justice of King James I's reign was the originator of this concept. He maintained that the King should be under God and the Law and he established the supremacy of the law against the executive and that there is nothing higher than law. Later, Albert Venn Dicey (a British jurist and constitutional theorist) developed the concept in his book 'The Law of the Constitution' (1885).

In India, the concept of Rule of law can be traced back to the Upanishads. In modern day as well, the scheme of the Indian Constitution is based upon the concept of rule of law. The framers of the Constitution were well familiar with the postulates of rule of law as propounded by Dicey and as modified in its application to British India. It was therefore, in the fitness of things that the founding fathers of the Constitution gave due recognition to the concept of rule of law. The doctrine of Rule of Law as enunciated by Dicey has been adopted and very succinctly incorporated in the Indian Constitution. The ideals of the Constitution vis; justice, liberty and equality are enshrined in the Preamble itself (which is part of the Constitution). The Constitution of India has been made the supreme law of the country and other laws are required to be in conformity with it. Any law which is found in violation of any provision of the Constitution, particularly, the fundamental rights, is declared void. The Indian Constitution also incorporates the principle of equality before law and equal protection of laws enumerated by Dicey under Article 14.

The very basic human right to life and personal liberty has also been enshrined under Article 21. Article 19(1) (a) of the Indian Constitution guarantees the third principle of the Rule of law (freedom of speech and Expression). No person can be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence is also very well recognized in the Indian Constitution. The principles of double jeopardy and self-incrimination also found its rightful place in the Constitution. Articles 14, 19 and 21 are so basic that they are also called the golden triangle Articles of the Indian Constitution.

THE DETOUR BETWEEN LAW & MORALITY

There is a marked distinction between law and morality. The first point of difference is that laws are enforced by the state whereas canons of morality are

followed at the call of institution. If one disobeys the commands of law or violates the laws, he is liable to be punished by the state but if one fails to observe the scruples of morality, he is not liable to be awarded physical punishment. The severest punishment that can be awarded to a person for not observing the scruples of morality is his social boycott. Morality is concerned with both internal and external affairs of man whereas law is concerned only with the external affairs of man. Hence, law punishes only those persons who violate laws by their external actions. For example, law punishes a person only when he-commits a theft or dacoits or murder or any other physical crime. Law cannot punish a person for telling a lie or for abusing some-one.

Telling lies, condemning someone, showing disgrace to others, being ungrateful and many other internal actions of man are sins but they are not crimes. There are many things which are not illegal according to law but are unacceptable to morality. For example, telling lies, showing disgrace to others, feeling greedy, being ungrateful and not helping the poor, are not against the spirit of law. Not only this, sometimes the adoption of immoral policies by the state for the cause of common welfare is not illegal in the eyes of laws. Machiavelli maintained that even the immoral practices are legal, if they are applied for the benefit of the state. Similarly, there are many things which are illegal in the eyes of the state but are acceptable to morality. For example, it is not a sin not to keep to the left or to drive the vehicle fast in the market. The fact is that the canons of morality are concerned with the moral duties whereas the laws of the state are concerned with the legal duties.

LAW & MORALITY: THE APPROACH AND POINT OF VIEW OF THE ANALYTICAL JURISTS

Nineteenth-century analytical views of the relation of law and morals were strongly influenced by the assumption of the separation of powers as fundamental for juristic thinking, not merely a constitutional device. Accordingly, assuming an exact, logically defined separation of powers, the analytical jurist contended that law and morals were distinct and unrelated and that he was concerned only with law. If he saw that their sphere came in contact or even overlapped in practice, he assumed that it was because, although in a theoretically fully developed legal system, judicial and legislative functions are fully separated, this separation has not been realized to its full extent in practice. He would say: So far as and where this separation is still incomplete, there is still confusion of or overlapping of law and morality and morals.

From his standpoint there were four such points of contact:

(1) in judicial lawmaking,

(2) in interpretation of legal precepts,

(3) in application of standards, and

(4) in judicial discretion.

At these four points he conceived there was a border zone where the separation of powers was not complete. So far as the separation of judicial and legislative functions was complete, law was for courts, morals and morality were for legislators; legal precepts were for jurisprudence, moral principles were for ethics. But so far as the separation was not yet complete and in what he took to be the continually narrowing field in which judges must make as well as administer legal precepts, morality had to stand for the law which ought to but did not exist as the rule of judicial determination. It was not unnatural that Austin should have thought of judicial decision as turning precepts of "positive morality" into legal precepts since English barristers of his time knew how some such process actually took place in the work of the Judicial Committee of the Privy Council in appeals from newly settled areas in which the British were setting up courts for the first time. Such a situation arose later in a case where a succession was governed neither by English nor by Hindu nor by Mohammedan law. Lord Westbury said that it must be determined "by the principles of natural justice.

With such cases before them we may understand how the first English analytical jurists like the historical jurists thought that judicial finding or making of law was no more than a reaching out for precepts of positive morality and in the absence of authoritative grounds of decision giving them the guinea stamp of precedent. But the view of the nineteenth-century analytical jurists that morals are to be looked to only in an immature stage of legal development before the separation of powers is complete, involves two other false assumptions, one, the possibility of a complete analytical separation of powers, the other, the possibility of a complete body of legal precepts which will require no supplementing and no development by judicial action. Implementing and no development by judicial action. Granting, however, that these two assumptions are not well taken, we do not entirely dispose of the contention of the analytical school. For although, we admit that legislator

and judge each make and shape and develop and extend or restrict legal precepts, there is a difference of the first moment between legislative lawmaking and judicial lawmaking.

THEORIES GOVERNING THE ISSUE OF MORALITY

Natural law theory like legal positivism has appeared in a variety of forms and in many guises. One of the most elaborate statements of natural law theory can be found in Aquinas who distinguished four types of law: eternal, divine, natural, and man-made. So, according to Aquinas, eternal law reflected God's grand design for the whole shebang. Divine law was that set of principles revealed by Scripture, and natural law was eternal law as it applied to human conduct. Man-made law was constructed by human beings to fit and accommodate the requirements of natural law to the needs and contexts of different and changing societies. Also, according to Aquinas, the fundamental precepts of natural law were not only ascertainable (mere mortals like you and me could and did find them out) but self-evident, i.e., they required no proof. They were, in Aquinas' terms, per se nota, known through themselves. Like his predecessor, Aristotle, Aquinas distinguished two kinds of reasoning: theoretical and practical. Human beings were capable of both sorts of reasoning. Theoretical reason was the capacity to apprehend certain truths, such as the truths of mathematics. Practical reason was the capacity to apprehend those principles guiding human conduct which tell us how we ought to live, what things we should value, what goods we should seek, and how we ought to order our lives. Like Aristotle, Aquinas believed that there were principles of practical reason and that they were no less fundamental than the principles of theoretical or speculative reason. Thus, for Aquinas, the principle of non-contradiction was as self-evident as the first and most fundamental principle of natural law ("Good is to be done and evil is to be avoided"). Like the principle of non-contradiction, the precepts of natural law were, according to Aquinas, general and unchanging. They were the same for everyone. But man-made or human law has to take the particularities of each human situation into account. Man-made law must adjust natural law to specific and often changing circumstances. Man-made law is accommodating and changeable.

India has witnessed several incidents in the past which has shown close connection with the delicate relationship between law and morality. To cite an example, the practice of ***sati*** was prevalent in India as an old age custom of the Indian society wherein the widow of a deceased husband was under the moral obligation to enter

the funeral pyre and get herself burnt along with the dead body of her husband to fulfil her final duty as a wife. This practice was considered to be a pious obligation prevailing among communities in India. This required an urgent intervention of law[1] following the universal realization that this kind of barbaric practice was against basic human rights and was highly discriminatory against women. This intervention was a commendable step which witnessed acceptance from different sections of the society, irrespective of religion and community because this was based on right reasons and there was no point in tolerating a practice which could not pass the test of right reason, and hence was contrary to natural law and justice. This is how natural law theory has shown a close nexus with the issues of morality. On the other hand, the positivist theory has tried to get rid of this connection between law and morality and considered law as something different and apart from morality even if any particular custom is well accepted in the society and directed towards it's welfare. Participants of this theory believed that law can be brought to the people through the instrumentation of legislation and not through age old traditional and moral rules as the sole objective of any legislation is to do public good and not to move towards idealism. One of the major proponents of this theory, John Austin distinguished his theory from moral law by stating that law is a rule led down for guiding an intelligent being by an intelligent being having power him. The disobedience of this rule laid down by the sovereign in terms of the command will follow sanctions ensuring strict adherence to the same H.L.A Hart, a positivist, adopted a more balanced approach than his predecessors and indicated that law and morality are very close though not necessarily related. According to him, rules of morality cannot totally be ignored in any legal system.[2]

MISUSE OF LAW IN THE ABSENCE OF STRICT ENFORCEMENT OF MORAL PRINCIPLES

There are various legislative interventions which cannot be supported morally. Laws are, no doubt, made with the objective of protecting life in all forms and thereby protecting the very essence of the society. But, the question arises as to whether laws, which are passed without taking into consideration moral values on which the entire edifice of the society is founded, can succeed and achieved those goals for which they were enacted originally. For instance, abortion has been criticized and remarked as highly condemnable and punishable, but due to the

[1] The Commission of Sati (Prevention) Act, 1987

[2] V.B. Coutinho, Legal Theory & Jurisprudence, (1st ed. 2018)

changing needs, law is required to adjust and accommodate such things by creation of an exception to the generally accepted rules, if there is any risk to the life of the pregnant women. But, this is nor the end of the story, this exception is not only confined to the health of the pregnant women, rather it, forcibly, goes to the extent of giving shelter to others specially many unmarried girls who want to get rid of their unwanted pregnancy. Hence, the right of the unborn, which has been well protected by the constitution and the personal laws, gets outweighed by the immoral needs of others. Likewise, various modern technologies use of which have been encouraged in order to be used for providing better health facilities to the people, are being used to do highly nefarious, immoral and anti-national acts by many without having regard to the havoc being caused in the society. For example, with the help of developed technologies many people, pretending to act under the condition permitted by the law, go for sex determination of the unborn which is usually followed by the female foeticides and the law governing this problem, incorporating measures to punish wrongdoers, can't achieve in predetermined goals.

THE DENOUEMENT

The significance of moral principles in the general public can't be undermined. Different laws have been passed based on these standards so as to preserve moral values without securing which welfare of the general public remains a far off dream. History is full of instances where many civilizations have fallen and disappeared due to the moral breakdown and many others have lived and move towards prosperity following basic moral and ethical rules indispensable for the advancement of the society. Morality can be seen as a relative concept has different individuals and groups can be found with different ideals aiming for perfection, which may change over a period of time. Hence, it is the soundness of any moral principle which should be taken into account looking into the reasonable demands of the contemporary society. Law has continually been subjected to moral scrutiny in Indian society both directly or indirectly, but the past experiences have shown that legal response to morality has not always been positive as, sometimes, parliament and judiciary keep their fingers very delicately upon the pulse of well-established morality of the day. If any moral doctrine can be treated as just, that can very well lend support for the legal development. A balanced approach can be welcomed by the society while dealing with morality, vis-a-vis the application of law.