

LAW AND MORALITY – CO-EXIST

Morality is implicit in HART's system of law which he describes as union of primary and secondary rules. These rules being normative in character set a standard of behaviour that obligates subjects for acceptance and observance of such rules beyond the threat that may enforce it. Being as members of the society or groups they feel to abide by the rule both as matter of duty and obligation. There are several conjunctions in HART's system of law where law and morality co-exist, overlapping and are even complimentary and supplementary in nature. The customary nature of primary rules, the nature of secondary rules of change introduced to supplement the primary rules to bring about change in the primary rules to meet requirements of society and limited discretion to judges where rules of recognition provide no guidance to judges to decide are some of the areas where HART concedes decisive influence of morality on law. Moreover, his rejection of law as a gun-man situation further implies the inseparable character of relationship between law and morality. Indeed in his positivism there is perceptible impact of natural law which signify HART's infusion of higher law.

In fact, HART's positivism has scope for natural law as well as morality which has made him both a positivist as well as naturalist. According to HART the minimum content of natural law is shared by both law and morals. He further attempts to distinguish morality from law, custom, etiquette, and other kinds of social rules. It is four features of morality which, HART says, are necessary for a clear picture of his concept of law. These four features, he describes¹, under the heads of "*Importance, Immunity from deliberate change, Voluntary character of moral offences, and Forms of moral pressure*".

1) IMPORTANCE

An essential feature of any moral rule or standard is that it is regarded as something of great importance. It cannot be omitted in any faithful account of the morality of any social group or individual nor can it be made more precise.

This is evident in several ways, namely,

- i) First, moral standards are maintained against the drive of strong passions which they restrict;
- ii) Secondly, in serious forms of social pressure exerted not only to obtain conformity in individual cases but to secure that moral standards are taught or communicated as a matter of course to all in society.
- iii) Thirdly, if the moral standards were not generally accepted for reaching and distasteful changes in the life of the individuals would occur.

For instance, says HART the most prominent part of the morality of any society consists of the rules concerning sexual behaviour and it is far from clear that the importance attached to them is connected with the belief that the conduct they forbid is harmful to others. Even in the so-called modern societies sexual morality is most prominent aspect of what ordinary men think of morality.

II) IMMUNITY FROM DELIBERATE CHANGE

It is a characteristic of a legal system that new legal rules can be introduced and old ones changed or replaced by deliberate enactment. By contract moral rules or principles cannot be brought into being or changed or eliminated in this way.

III) VOLUNTARY CHARACTER OF MORAL OFFENCE

Moral responsibility or blame is a matter of internal matter while law is generally concerned with "external" behaviour "mens rea" playing an important part in criminal responsibility. If a particular person has offended against moral rules or offences and succeeds in establishing that he did this unintentionally he is excused from moral responsibility and to blame him in these circumstances would itself be considered morally objectionable.

IV) THE FORM OF MORAL PRESSURE

A further distinguishing feature of morality is the characteristic form of moral pressure which is exerted in its support. While the typical form of legal

pressure may consist in physical punishment or unpleasant consequences with morals on the other hand typical form of pressure consists in appeals to the respect of rules and of the demands for morality appeal to conscience.

LEGAL PHILOSOPHY OF LAW AND MORALITY

Writers like AUSITN, KELSEN and others have tried to make a clear distinction between law and morality although the two are bound to be affected by each other. The whole of life of man cannot be regulated by law alone and the same is true of morality. Law is concerned with the external actions of individuals and morality with their inner conscience.

According to ARNDTS, *"there are four points of difference.*

- 1) *In law man is considered as a person, that is 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 other others; morals give a guide to lead him even if he were alone;*
- 3) *Law has to do with acts in so far as they operated externally; morals look to the intention - the inner determination and direction of the will;*
- 4) *Law governs the will so far as it may be external coercion; morals seek a free self - determination towards the good."*

According to PATON, *"morals or ethics is a study of the supreme good. Law lays down what is convenient for that time and place; ethics concentrates on the individual rather than society; law is concerned with the social relationship of man rather than the individual excellence of their character; ethics considers motive all-important; law insists merely by conduct with certain standards and seldom worries for motive. But it is too narrow to say that ethics deals only with the individual or that ethics treats only of the interior and law only of the exterior, for ethics in judging acts must consider the consequences that flow from them. Moreover, ethics duties of man cannot be considered without considering his obligation to his fellows or his place in society"*.

RELATION BETWEEN LAW AND MORALS

In the preceding paragraph the points of distinction between law and moral have been discussed, but due to these points of distinction between the two it should not be gathered that they are opposed to each other and there is no relationship between the two. Really speaking, they are very closely related to each other. In considering the relationship between law and morals much will depend on how one defines law. Analytical, historical, philosophical and sociological jurists all have define law in their own way and these definitions materially differ from each other.

A definition which regards law as *"the command of the sovereign, would not make any concession for morals to have any place in law"*. But a definition which regards all the rules and principles which govern or influence human conduct as law, allows morals to play a very important role in the field of law. Here, within the limited scope of this, it is not possible for us to enumerate the various definitions of law and consider what place morals have in them. Therefore, a general view of the relationship between law and morals shall be presented.

A study of the relationships between law and morals can be made from three angles:-

- 1) Morals as the basis of law.
- 2) Morals as the test of *"positive"* law.
- 3) Morals as the end of law.

1) MORALS AS THE BASIS OF LAW

As observed earlier, in the early stages of the society no distinction was made between law and morals. All the rules originated from the common source, and the sanction behind them was of the same nature *"mostly supernatural fear"*. When state came into being, it picked up those rules which were important from the society's point of view and the observance of which could be secured by it. The state put its own sanction behind these rules and enforced them. These rules were called *"law"*. The rules which were meant for some supreme good of the individual *"in the metaphysical sense"* and the

state could not ensure their observance continued in their original condition. These rules are known as morals. Thus law and morals have the common origin but in the course of development they came to differ. Therefore, *"it could be said that law and moral have a common origin but diverge in their development"*. As the law and morals have come from the common stock many rules are common to both. For example, to kill a man or to steal are acts against law and morals both. It is on this ground that, sometimes, law is said to be *"minimum ethics"*.

2) MORALS AS THE TEST OF LAW

It has been contended by a number of jurists, since very early times, that law must conform to morals. This view was supported by the Greeks and Romans. In Roman law, to some extent, was made to conform to "*natural law*" which was based on certain moral principles and as a result "*jus civili*" was transformed into "*jus gentium*". Most of the ancient jurists expressed their views in a spirit of compromise and attached sanctity to legal rules and institutions. They said that law, even if it is not in conformity with morals is valid and binding. During the Dark Ages Christian Father's preached forcefully that law must conform to Christian morals and said that any law against it is invalid. In the 17th and the 18th centuries, when the "*natural law*" theory "*which was based on certain morals*" was at its highest, it was contended that law "*positive law*" must conform to "*natural law*". They said that any law which does not conform to "*natural law*" is to be disobeyed and the government which makes such law should be over thrown. It was this theory which inspired the French revolution. In modern times, such views that law must conform to morals and if it is no to conformity with morals it is not valid and binding are no longer heard. However, in practice to a great extent law conforms to morals. Generally, law cannot depart far from the morals due to many reasons. The law does not enforce itself. There are a number of

¹ See also Umar Din, 67 I.C. 340 and Commonwealth V. Holmes, cited in Wharton's Homicide, P.237

factors which secure the obedience of law. The conformity of law with morals is a very important factor. There is always a very close relation between the law and life of a community and in life of the community morals have got an important place. PATON rightly observed that *"if the law lays behind popular standard it falls into disrepute, if the legal's standards are too high, there are great difficulties of enforcement"*¹

3) MORALS AS THE END OF LAW

Morals have often been considered to be the end of law. A number of eminent jurists have defined law in terms of, justice. They say that the aim of "law" is to secure justice. Justice in its popular sense is very much based upon morals. In most of the languages of the world the words used for law convey an idea of justice and morals also. According to analytical jurists, any study of the ends of law falls beyond the domain of jurisprudence. But sociological approach considers this study as very important. It says that law has always a purpose; it is a means to an end, and this end is the welfare of the society. according to this utilitarian point of view, the immediate end of law is to secure social interests, that is, to secure harmony of claims or demands. It means that the conflicting interests *"in the society"* should be weighed and evaluated and the interests which can bring greater benefit with the least sacrifice should be recognized and protected. Thus this all becomes a question of choice. In making this choice and in weighing or evaluating interest, whether in legislation or judicial decision, or juristic writing, whether we do it by law making or in the application of law, we must turn to ethics for principles. Morals is an evaluation of interests; law is or at least seeks to be a delimitation in accordance therewith².

KORKUNOV'S VIEW

KORKUNOV also says that the *"idea of value is, therefore, the basal conception ethics. No other terms, such as duty, law, or rights is final for thought; each logically demands the idea of value as the foundation upon which it finally rests. One may ask, when facing some apparent claim or*

morality, 'why is this my duty, I must obey this law, or why regard this course of action as right'? The answer to any of these questions consists in showing that the requirements of duty, law and right tend in each case to promote human welfare to yield what men do actually find to be of value¹.

Many of the modern definitions of law says that the evaluation of interests is a very important test of law. This can be done properly in the context of socially recognized values which in their turn are closely related to morals. Thus, ultimately morals become the end of law. This end has been expressed in the constitutions of many countries. If we look at the preamble of our own constitution, we shall find that the ends which it endeavours to achieve are the morals, of course, they are the morals of the modern age

MORALS AS PART OF LAW

It is contended by some writers that even if law and morals are distinguishable, morality is in some way an integral part of law or of legal development. Morality is "*secreted in the interstices*" of the legal system and to that extent is inseparable from it. This view point has been put forward in various ways. It is said that law in action is not a mere system of rules but involve the use of certain principles, such as that of equitable and the good. By the skilled application of these principles, such as that of equitable and the good. By the skilled application of these principles to legal rules, the judicial process distils a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the general ground of their morality. Another approach confers upon the legal process an inherent power to reject immoral rules as essentially non-legal. Even the positivist does not deny that many factors, including morality, may and do concur in the development of a legal rule and where there is a gap or a possible choice within the legal system, moral or other extra legal pressures may cause that gap to be filled or the choice to be determined in one way rather than another. What the positivists insist is that once the rule is laid down or determined, it

does not cease to be law because it may be said or shown to be in conflict with morality.

LEGAL ENFORCEMENT OF MORALS

A good deal of controversy has arisen in recent years as to whether the fact that conduct is, by common standards, regarded as immoral, in itself justifies making that conduct punishable by law. The view of Lord DEVLIN is that there is public morality which provides the cement of any human society and law, especially criminal law, must regard it as its primary function maintain this public morality. Whether in fact in any particular case the law should be brought into play by specific criminal sanctions, must depend upon the state of public feeling. Conduct which arouses a widespread feeling of reprobation, a mixture of intolerance, indignation and disgust, deserves to be suppressed by legal coercion in the interests of the integrity of society. The conclusion of Lord DEVLIN is that if vice is not suppressed, society could crumble. To quote him: *"the suppression of vice is as much the law's business as the suppression of subversive activities"*.

Prof. HART also accepts the need for law to enforce some morality. The real area of dispute is where the line should be drawn.

J.S.MILL drew it at harm to others. According to HART, some shared morality is essential to society. If any society is to survive, if any legal system is to function, then there must be rules prohibiting, for example, murder. The rules, essential for a particular society may also be enforced. *"For any society there is to be found a central core of rules or principles which constitutes its pervasive and distinctive style of life."*

CONCLUSION

Generally, legal rules are composite and are derived from heterogeneous sources. In India, if we examine all the legal precepts, we shall find that some of them have come from personal laws and local customs, a good number of them are based on foreign rules and principles *"mainly English"*, some are based on some logic or political ideology and so on.

Secondly, "*public opinion*" which greatly influences law is made up of a number of things - political ideas, economic theory, ethical philosophy etc. These directly and indirectly influence law. Therefore, when so many elements work in shaping the legal precepts, the matter cannot be put in such a simple way as the "*relation between law and morals*", because a number of factors join hands in influencing law and morals is only one of them. However, some observations can be made about the relation between law and morals.

INFLUENCE ON MORALS OF LAW

Law and moral act and react upon and mould each other. In the name of justice, equity, good faith and conscience, morals have infiltrated into the fabric of law. Moral considerations play an important part while making law, interpreting law and exercising judicial discretion. Morals act as a restraint upon the power of the legislature. No legislature will dare to make a law which is opposed to the moral of society. All human conduct and social relations cannot be regulated and governed by law alone and very many relations are left to be regulated by morals and law does not interfere with them. Morals perfect the law. PATON writes: "*in marriage, so long as love persists, there is little need of law to rule the relations of the husband and wife - but the solicitor comes in through the door as love flies out of the window*".

The sociological approach is very much concerned with the ends to be pursued by law. The result is that morals have become a very important subject of study for good law-making. Morals also exercise a great influence on international law. The brutalities committed during the world wars have forced the people to turn back to morals and efforts are being made to establish standards and values which must be followed by nations. If law is to remain closer to the life of the people, it cannot ignore morals.

About the influence of morals on law: HART says:

HART'S VIEW

"The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems as in England where there are no formal restrictions on the competency of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality. The further ways in which law mirrors morality which are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility. No positivist could deny that these are facts or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connection of law and morals, its existence should be conceded".

GROWING IMPORTANCE OF MORALS

Now, sociological approach has got its impact upon the modern age. This approach is more concerned with the ends that law has to pursue. Thus, recognized values, or in other words, morals "of course the morals of the modern age" have become a very important subject of study for good law making. On international law also morals are exercising a great influence. The brutalities and inhuman acts in world wars made the people to turn back to morals and efforts are being made to establish standards and values which the nations must follow. Perhaps there is no other so forceful ground to justify the Nuremberg trials as morals. If the law is to remain closer to the life of the people and effective, it must not ignore morals.