

# From Natural Law to Legal Positivism: Understanding the Relationship between Law and Morality

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*Abstract- Law and morality are too vague to understand. The notions of law and justice can't be captured and presented before us within a few sentences. These notions are too vast that even words are not sufficient to define them. Many jurists from the ancient Greek period to the modern and even the post-modern era have attempted numerously to define these concepts, but have failed. One of the reasons may be that the roots of these concepts lie somewhere within the human psyche, which is extremely random and versatile. These two terms have a vast sphere, the reason for not finding any definite meaning of these terms can be that both these terms are dynamic in nature, with the time, situation and place meaning and value of these terms keep changing. In the present research paper an attempt has been made by the author to deeply analyze the true nature of law and morality, their relationship, their position in current scenario and the approach of judiciary towards the same.*

**Key words:** Law, Morality, Justice, Judiciary

## I. INTRODUCTION

Ever since the revival of the scientific study of jurisprudence the connection of law and morality has much discussed, but the question is not yet and perhaps never will be settled. Every variety of opinion has been entertained, from the extreme doctrine held by Austin that for the purpose of the jurist, law is absolutely independent of morality, almost o the opposite positions held by every Oriental Cadi, that morality and law are one<sup>1</sup>.

*Definition of law:*

'Law' defines the political organization and structure of society, provides a scheme of individual

relationship within it and contributes to the stability of society by offering an objective mechanism for the resolution of disputes and conflicts within the community. All extensive human societies possess the law in one or other form. Legal system is the totality of the laws of a state or community. Broadly speaking law is notional pattern of conduct to which actions do or ought to conform. However, there is no simple definition of law and every person defines law according to his own perception. Further law being social science, it grows and develops with the society and the concept of law depends largely on the social values, accepted norms and behavioral patterns of a particular society at a given time. There are many who would like to achieve an object through the instrumentality of law and therefore they would like to define law in terms of its purpose. While others might define law in terms of what it does in the form of actual court decision.

Law has been defined from different approaches like: (1) its basis in reason, religion or ethics (natural law approach); (2) by its source in custom, precedent or legislation; (3) by its effects on the life of society; (4) by the method of its formal expression or authoritative application, and; (5) by the ends that it seeks to achieve. Thus failure to provide an authoritative definition of law can be ascribed to the fact that practical application of law does not depend on definition of law.<sup>2</sup>

However various jurists gave a various definition of law

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<sup>1</sup> Theory of Relationship between Law and Morality, available at: <http://www.Legalserviceindia.com/article/1931/Theory-of-Relationship-between-Law-and-Morality.html>. (last visited on 5th April 2020).

<sup>2</sup> Law and Morality, available at: <http://www.legalservicesindia.com/article/1842/Law-and-Morality.html>. (last visited on 27th March 2020).

According to *Salmond law*, “as the body of principles recognized and applied by the state for the administration of justice”.

*Kelson* defined law, as “law is characterized not as an end but as a specified means, as an apparatus of compulsion to which, as such there adheres no political or ethical value, law apparatus whose value derives rather from some end which transcends the law”

*Gray* defined law, as “the rules which the courts lay down for the determination of rights and duties”.

All of the definition have common elements in them like a law making authority, set of rule and regulations, an instrument of justice, protection of rights of the citizen, a technique of social organization, thus central idea of law is what one is doing, should be accepted by the social group as a part of it.<sup>3</sup>

*Definition of Morality:*

In simple terms, morality is nothing but what kinds of conducts are wrong and what kind of conducts are correct thus it the concept of right and wrong and has a wide sphere. Or we can say morality are body of standards or principles derived from a code of conduct from a particular philosophy, religion or culture, or it can be derived from a standard to which person believes and should be universal. <sup>4</sup>

## II. RELATION BETWEEN LAW AND MORALITY: MORALITY OF LAW AND LEGALITY OF MORAL

A study of various legal systems make it clear that law and morals have had a long union with occasional desertion and judicial separation but have never been completely divorced. There are indeed many different types of relations between law and morals and there is nothing that can profitably be signed out for study as the relation between them<sup>5</sup>. However the relation between law and morality can be understood by two

theories of law i.e. positivism theory and natural law theory.

1. *Natural law theory:* According to this theory both law and morality are connected and human law is based on the principle of morality, not on any human-made principles. The term natural law/status of law under natural theory does not depend only on acts, but also religion, custom and ethics. Thus this theory talks about what ought to be and is inherent, not required any authority to impose it.
2. *Positivism law theory:* According to this theory, law is sovereign authority. A command of human beings for other human beings where the previous one is more powerful, strong then other and enjoy the power, status and the authority of the lawmaker is unquestionable, and according to the matter of law it will decide what is right and what is wrong and if one does not follow the law there will be a punishment.<sup>6</sup>

Thus in considering the relationship between law and morals, much will depend on how one defines the law. Analytical, Historical, Philosophical and Sociological jurists all have defined law in their own way and these definitions materially differ from each other.<sup>7</sup> The view of *Stammler* is that jurisprudence depends much upon moral ideas as just law has need of ethical doctrine for its complete realization. Positive law and just law correspond to positive morality and rationally grounded ethics. There is no difference and if any, it is only the difference of manner in which the desire for justice present itself. *C.K.Allen* observes thus on the relationship between law and morality: “our judges have always kept their fingers delicately but firmly upon the pulse of the accepted morality of the day. “*Lord Mansfield* says that “the law of England prohibits everything which is contra *bonos mores*”. It is true that the development of law, at all times and places, has in fact been profoundly influenced both by

<sup>3</sup> Ibid.

<sup>4</sup> Morality, available at: <https://en.m.wiki.pedia.org>. (last visited on 27<sup>th</sup> March 2020).

<sup>5</sup> Law and Morality, available at: <https://indianlegalsolution.com/law-and-morality/>. (last visited on 30<sup>th</sup> March 2020).

<sup>6</sup> *Supra* Note 1.

<sup>7</sup> *B N Mani Tripathi*, “*Jurisprudence The Legal Theory*” (Allahabad Law Publications).

conventionally morality and ideals of particular social groups and also by the forms of enlightened moral criticism of those people whose moral horizon has transcended the morality currently accepted<sup>8</sup>.

*Common field:*

A fairly large area of operation is available where law and moral work together like good friends. One helps the other to flourish, grow and establish and gets equal and similar responses from the other. Moral and law both derive much of their content out of human experience, and life of man is neither law alone nor moral alone. It is neither wholly material nor spiritual. It is one and integral. So what is just is quite often legal or lawful also what is lawful is moral also. Similarly, anything that is immoral is in most cases illegal also and what is illegal is in most cases immoral also. For example, offences relating to body are unlawful as well as immoral<sup>9</sup>.

*Common but not identical:*

The field is common but law and moral approve or disapprove of a particular action for their own reasons, these need not to be same or even similar. For example euthanasia (mercy killing) is suicide in eye of law but morality may not see eye to eye with law in this case. Similarly in capital sentence, law upholds it because blood for blood is the rule or because the criminal is to be made an example for rest of the potential criminals. Can these reasons ever find approval of morality though it itself may favour capital sentence. Law may cheer up with every hanging but morality may look down on it with indignation<sup>10</sup>.

*Where each holds the field separately but amicably:*

The life in the society is not simple. Situations come when law and moral may hold fields separately. Law is free to take legal decisions, act legally and execute legally without bothering at all about morality and morality may likewise do without bothering for the law. For example, areas of private morality or private behavior are within complete control of moral. Areas

of public morality are reserved for morality but law has legitimate access. The human life beyond these two is domains specifically left to law. The law and moral still remain friends and there is no cutthroat behavior at this stage between the two. For example to save one from drowning is moral concern. if one does not jump to save the man drowning, the morality frowns, the law does not react: giving alms to poor, water to the thirsty, food to the hungry are many acts where morality may react in one way or other, the conscience of the man involved or those seeing him may be pricked but one cannot expect law to intervene<sup>11</sup>.

*When each operates in same field but relation is that one cuts the throat of the other:*

The situation may arise in specific instances when law and moral both speak different languages and in antagonistic tones, what law punishes, morality upholds, what morality approves, law disapproves. In these cases neither law supports morality nor does morality uphold law.<sup>12</sup>

### III. CURRENT JUDICIAL TREND WITH CONTEMPORARY ISSUES

Presently, scenario is such, that law and morality has different meaning and application. These values are dynamic and in this changing society, social values are changing rapidly. The recent controversy of Section 377 of IPC, 1860 can be taken as example in which Delhi High Court permitted the gay marriage and on the other hand, section 377 talks about homosexuality and lays down that “carnal intercourse against the order of nature with any man, women or animal” shall be punishable. As this offence is unnatural, therefore, immoral and socially insufferable and thereby imposes liability on the person. Though, it was immoral (for many) but the court permitted the same in that case<sup>13</sup> and even today, for a set of people, extramarital sex or adultery is one of the grounds to broken marriages. In

<sup>8</sup> V.D.Mahajan, “Jurisprudence and Legal Theory”(Eastern Book Company).

<sup>9</sup> G.P.Tripathi, “Indian Jurisprudence” (Allahabad Law Agency).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Morality is Backbone of Law: Myth or Reality file:///C:/Users/hp/Documents/6.%20Mr.%20Hitesh%20A grawal.pdf

*Smt. Sarla v. Mahendra Kumar*<sup>14</sup>, the Rajasthan High Court, awarding maintenance to a wife, who was leading an adulterous life held, “It is not unnatural, when a husband leaves his newly wedded wife alone and himself goes away at a distant place to earn his livelihood, a lady who is suffering sexual deprivation may develop intimacy as well as illicit relations with a stranger.”

When the same is a crime, under section 497 of IPC, 1860 as well as civil wrong, which can be remedied by way of divorce only, to commit adultery, the court itself reiterates that a lady can develop illicit relation with a stranger if suffering from sexual deprivation. Further, court itself has not taken into account the moral aspect related to the subject of the case and gave its conclusion against the morality. The National Women’s Commission has also recommended that “the issue of adultery should be viewed as a breach of trust and treated as a civil wrong rather than as a criminal offence”<sup>15</sup> because there may be chances to save her marital life at the instance of woman. It shows the liberal view of the court, which emphasizes on changing notion of morality.

Another criminal issue is obscenity, defined by the Indian Penal Code, 1860, and the Apex court through number of its judgments sets the principles that obscenity means, “the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive<sup>16</sup>” and vary from country to country depending on the standards of morals of contemporary society.” This verdict of the Supreme Court states that it also depends upon the morals, which differs from person to person or society to society<sup>17</sup> and according to me, by this verdict, court has accepted the view, that morals and law are two different things in contemporary society.

In *K.A. Abbas v. Union of India*<sup>18</sup>, the Court held that sex and obscenity are not always synonymous and it was wrong to classify sex as essential of obscene or

even indecent or immoral. Further, in Bobby Art International case<sup>19</sup>, regarding the depiction of the rape scene in the film *Bandit Queen*, the Court held that the object was not to arouse prurient feelings but revulsion for the perpetrators. In determining, whether an act is obscene, regard should be given to recent times or modern scenario of that place.

Euthanasia is also a debatable issue and can be contextualized in terms of morality and law. Whether a person, who is on a death bed and is not able to do anything on his own except breathing, who, even after large number of efforts cannot handle the things, which is completely dependent on others for his each and every caring activity, has right to die? If law ensures right to life, should also provide for, right to die? The argument that comes from the world is, it is against the moral principle to make the person die but considering the above situations, where a person has no expectation of a healthy human life, person should be given right to die also. Even when it is against the moral values of the society, a person should be given right to end his life and the law does not provide for the same. According to me, sufferings of such person should be end rather than following the morals even when, those are not his own.

In a recent case, *Aruna Shanbaug v. Union of India and others*<sup>20</sup>, Supreme Court permitted the euthanasia after the completion of 37 years by the lady on the bed.

Needs are changing rapidly so are morals. Therefore, law and morality are separable and due to the rapid growth of the society, morals cannot stand static.

In *Ram Chandra Bhagat v. State of Jharkhand*<sup>21</sup>, there was difference of opinion between the judges. According to Justice Katju, “Often an act may be regarded as immoral by society, but it may not be illegal. To be illegal the act must clearly attract some specific provision of the Penal Code, or some other statute. In the present case, it can be said that the

<sup>14</sup> 1989 Cri.L.J. 729.

<sup>15</sup> Draft National Policy on Criminal Justice, Ministry of Home Affairs, Government of India, 2007

<sup>16</sup> Ranjit D. Udeshi v. State of Maharashtra AIR 1965 SC 881 at p.885.

<sup>17</sup> Chandrakant Kalyandas Kakodkar v. State of Maharashtra (1969) 2 SCC 687 at p. 693

<sup>18</sup> (1970) 2 SCC 780

<sup>19</sup> Bobby Art International v. Om Pal Singh Hoon (1996) 4 SCC 1

<sup>20</sup> Decided on 7 March, 2011

<sup>21</sup> Decided on 24 November, 2010

appellant has not behaved like a decent man and Section 493 of IPC is not attracted” thus law is different from morality Whereas Justice Mrs. Mishra said “While there is no difficulty in accepting the position that law and morality might stand on a different footing although they are inextricably linked in my perception, yet I agree that legal decision cannot be based purely on morality.” and it can be said that moral aspects of a particular actions are relevant to determine the act of the accused.

In *Naz Foundation v Government of NCT of Delhi*<sup>22</sup>, Chief Justice A. P. Shah and Justice S.Muralidhar held “Consensual sex amongst adults is legal, which includes even gay sex and sex among the same sexes”. Section 377 of IPC, pertains to homosexuality or consensual sex among major people. It was a historic decision by court of law which has not been given since 1950s and ultra-virus to the Constitution. Now changing moral values are visible after the decision of the court.

In *D. Velusamy v D. Patchaiamma*<sup>23</sup>, after examining the evidences, Apex Court came to the conclusion that women who has a living relationship with a man can claim for maintenance under section 20 (1) (d) of The Protection of Women from Domestic Violence Act, 2005. The court further held that, “Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005”.

Living relationship which is a new phenomenon and was not recognized by the law before the Act of 2005, but the judgment of this case considered, the dynamic social values and morals, and awarded the maintenance to the lady without encountering it as immoral by the society. If one looks at Preamble of Indian Constitution, in the end, it endeavors to accomplish the morals and it indicates that moral of the contemporary age. Considering all these cases, it can be said that social values of the people have changed due to globalization and rapid growth of the country.

#### IV. INFLUENCE OF MORALS ON LAW

Law and morals act and react upon and mould each other in the name of justice, equity, good faith and conscience morals have in filtered into the fabrics of law. In judicial law making, in the interpretation of legal precepts, in exercising judicial discretion (as in awarding punishment) moral considerations play a very important role. Morals work as a restraint upon the power of legislature, because the legislature cannot venture to make a law which is completely against the morals of the society. Secondly, all human conduct and social relations cannot be regulated and governed by law alone. A considerable number of them are regulated by morals

#### Law and morality: Current Scenario

We are now living in the 21st century still there are some issues where law and morality stand against each other, sometimes law prevails and sometimes morality.

#### 1. Section 377 of Indian penal code, 1860 and morality

Section 377 of Indian penal code, 1860 is related to homosexuality this section criminalize all the sexual act which are not according to the nature and are punishable offence, further these acts include all the sexual acts which are non vaginal or not productive and because of this section the member of LGBT(lesbian, gay, bisexual, transgender,) faces social discrimination because of their different sexual orientation then what is normally accepted. But if we see this law from moral perspective every human being should be given equal rights to choose the way they want so as to fulfill their needs. But in practical law talks differently and prevails the concept of moral principle.

#### 2. Female genital mutilation

The practice of genital mutilation is practiced in India by Dwoodi Bohra community, a Shia Muslim community originated from Yemen, settled in the 16th century in India. The main reason behind this practice is to follow shariat. This is against the moral values and is always practiced by an untrained person, having not any kind of medical expertise, and because of these factors, the victim of this practice have to suffer

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<sup>22</sup> 2009 (160) DLT 27

<sup>23</sup> (2010) 10 SCC 469

physical and mental pain. Further any act of touching to the female genital parts other than medical purpose is a crime under IPC and POCSO act. Something that is criminal cannot be essential practice; it is against the dignity and privacy of women. Still, this practice is carried out in India.

### 3. Refuges and morality

Helping a needy one is a moral duty or is according to moral principles. Today some countries in the world have more resources and some have not enough. So the countries should help each other in this type of situation because of morality. But what is happening right now is a different picture, countries are passing refugee entry preventing law by giving the reason that it is a threat to the nation's security, draining of resources and etc. for example the USA government banned entry of refugees from seven Islamic countries.<sup>24</sup>

## V. CONCLUSION

The terms law and morality are such standards that control and regulate behaviors in a human community. Both the notions have their common foundation in the concept of individual autonomy and equal respect for everyone. Both the terms have complementary relationship. Where sometimes law compensates the functional weaknesses of morality and morality tempers the mechanical implementation of positive law through the notion of solidarity and responsibility.

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<sup>24</sup> Supra note 2.