



## THE DICHOTOMY OF LAW AND MORALITY WITH INDIAN PERSPECTIVE

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### Abstract

The inter-link between the law and morality has been an unceasing talk among the jurists. The two concepts can easily be understood but an attempt to define the same is a difficult task. The legal rights and duties enforced by the state and backed by sanction are termed as "Law". Whereas, morality on the other hand is human behavior based on moral duties and obligations. Unlike law, disobedience of moral values leads to disapprobation in society. Both law and morality aim to serve society and achieve peace and order by regulating and coordinating human behavior.

At times law supersedes custom, moral values, usage, and yet another moment it rests on it. Therefore, we are intrigued with questions about whether the law can be tested to the touchstone of morality or whether it is morally justified to disobey bad laws? The purpose of this article is twofold: to understand the dynamic of Law and morality, and to see the effect of this relationship upon the Indian legal system.

**Key Words:** Analytical school, Natural school, Nazi law, Moral values.

### Introduction

The revival of the scientific study of jurisprudence leads to an unsettled discussion on the connection between law and morality.

In the earlier stages of society, there was no distinction between the law and morals. Customs, moral duties and obligations, usage, traditions, and common practices were the standards governing the actions of the people. Actions of the people whether right or wrong are judged on the above factors. These principles were the prolonged practices passed on from generation to generation. The principles were recommendatory meaning thereby if one doesn't adhere to the standards, they were not held legally liable and punished for the same. If one does the right thing they experience praise and virtue and if someone acts contrary to the moral standards, they suffer guilt. Over time, the difference in religion, traditions, and opinions, modernization, and urbanization of societies adversely affected the uniformity of moral standards eventually ruining the peace and order among the people. This unrest demanded authoritative standards to coordinate human behavior. Every society comes into being for some purpose, i.e., a society is a unity of order determined by its last end and goal,<sup>1</sup> and different societies are classified according to their different needs.<sup>2</sup>

Post-Reformation Europe asserted that law and morals distinct and separate. Morals have their source in origin, while law derives its authority from the state. The Greeks, the Romans, the Christians in the name of the doctrine of "natural right" drafted moral standards as a basis of law. The moral foundations with some modifications and backed by sanction lead to the origin of "law". Laws are essential in any society because they are necessary means to attain the end of the State, and the goal to which all laws aim is the common good, i.e., the

<sup>1</sup> Cf. De regimine principum ad regem Cypri. I, 15

<sup>2</sup> Summa Theologica I, q. 11 a.2.



attainment of the end for which a society exists.<sup>3</sup>

Every extent of opinion has been entertained, from the extreme doctrine held by Austin that for the jurist, the law is independent of morality, almost to the opposite positions held by every Oriental cadí, that morality and law are one.<sup>4</sup> Hart has very aptly stated that "Defining law" is one of the persistent questions in jurisprudence. The relationship between law and morals depends much on how one defines the law. Analytical,<sup>5</sup> Sociological,<sup>6</sup> Historical<sup>7</sup> and Philosophical<sup>8</sup> jurists have all defined law in their way. The correspondence between law and morals can be summarized as: morals as the basis of law; morals as the test of law; and morals as the end of the law. But none of the theories stands complete and hence rebuttable by the jurists and the professors.

The popular conception of the relation between law and morality is that in some way

of the law exists to promote morality, to preserve those conditions which make the moral life possible and thus enable man to lead sober and industrious lives.

### Concept of law

Law is a complex term that is subjected to many distinctions. Such distinctions necessitate complexities and are the strings of understanding winding through the labyrinth of human affairs.<sup>9</sup> Law is an ordination of the reason for the common good by him who care of the community and promulgated.<sup>10</sup> The attitude towards law should be of caution rather than celebration. There is no 'pure' theory of law.

What officials do about disputes is....the law itself;<sup>11</sup>, The prophecies of what the courts will do... are what I mean by the law;<sup>12</sup>, Statutes are the sources of Law... not parts of the Law itself;<sup>13</sup>, Constitutional law is positive morality merely;<sup>14</sup>, One shall not steal; if somebody steals he shall be

<sup>3</sup> Arthur Scheller Jr., *Law, and Morality*, 15 Marq. L. Review 319 (1953)

<sup>4</sup> Taylor T.W., *The Conception of Morality in Jurisprudence* *The Philosophical Review*, Vol. 5 no.1 JSTOR p. 36-50 (1896)

<sup>5</sup> Analytical school is the product of fiction. It rests upon an analysis of 'law as it is' and not as 'law ought to be'. Austin regards the sovereign power in a state as absolute, an ultimate datum. Law is a general command backed by sanction and differs from morality, as not being founded on morality, for it springs directly from the supreme sovereign political authority, which is above all limitations

<sup>6</sup> Law of community is to be found, in social facts and not in formal sources of law. The gravity of legal development lies not in legislation, nor in juristic person, nor in the judicial decision but in society itself. Law is the result of constant struggle or conflict to attain peace and order.

<sup>7</sup> Sir Henry Maine's investigations revealed political societies in which it is impossible to discover any determinate political authority to which the bulk of the

people yielded habitual obedience; disclosed laws which can by no stretch be termed as Commands. In morality, the law had its origin. In law moral principles are embodied; upon those principles its force depends, and they hedge around and control the sovereign authority as truly as they control the actions of the humblest subject.

<sup>8</sup> Also known as Natural law school. It seeks to investigate the purpose for which a particular law has been enacted. Law is the product of human reason and its purpose is to elevate and ennoble human personality.

<sup>9</sup> Arthur Scheller, *supra* note 3 at 2

<sup>10</sup> Cf. Summa Theol., I-II, q. 90, a.4

<sup>11</sup> Llewellyn, *The Bramble Bush*, 9 (2<sup>nd</sup> edn., 1951)

<sup>12</sup> O.W Holmes, *The Path of the Law*, 173 (Collected Papers 1920)

<sup>13</sup> J.C Gray, *The Nature and Source of the Law*, s. 276 (1902)

<sup>14</sup> Austin, *The Province of Jurisprudence Determined*, 259 (Lecture VI edn., 1954)



punished. If it all existed, the first norm is contained in the second norm which is the only genuine norm...Law is the primary norm that stipulates the sanction.<sup>15</sup> These are just a glimpse of many other assertions and denials reflecting the nature of law.

Fuller defines law as a particular way of achieving social order by guiding human behavior according to rules. It is the enterprise of subjecting human conduct to the governance of rules<sup>16</sup>

### Concept of Morality

Morality as a concept can be loosely divided into two discrete categories: that derived from the religious doctrine on the one hand, and that which is universal to all human societies.<sup>17</sup> Morality is equated with order and human actions that target one another and to some end. The idea of value (good of veil) is the crux of any moral system.<sup>18</sup> Hence the concept of value is the beginning of morality. The moral act derives its quality from its agreement with some norm and since man has the real seal of Divine Intelligence inscribed on "his heart" in the form of general principles of action by which the ends of his strivings are measured.<sup>19</sup> Therefore, rational human nature is the norm of morality, and morality is the transformation of a known order of values.<sup>20</sup>

Morality is nothing more than conformity with the rule which regulates human life; namely, the rule of reason. Thus, the essence of morality is man's approach to his goal; man's particular goal is the perfection of his spiritual and moral nature and his ultimate goal is union with God.<sup>21</sup>

Hart considers the concept of morality as vague and complex. It lacks definite standards on which moral values can be tested. Moral values are dependent on the upbringing, surroundings, teachings, culture, and a-like features of the society. What can be moral for one sect of the society may be immoral for the other sect. Modernization has given a severe blow to moral values. Pre and post modernization shows a vast decline in the uniformity and power of the set moral values. For instance, practices that are moral for the present society like same-sex marriage, living relationships, love marriages, widow re-marriage, inter-caste marriage, are still not morally acceptable by some societies in India. Similarly, evil practices like Sati, dowry, child marriage, female infanticide, discrimination on the ground of sex, caste, religion, and triple talaq, which were prevalent in India, are now targeted as immoral practices.

<sup>15</sup> Kelsen, *General Theory of Law and State*, 61 (Transaction Publishers, 1949)

<sup>16</sup> Lon L. Fuller, *The Morality of Law*, 95 (Revised edn., Universal Law Publishing Co. Pvt. Ltd., 2000)

<sup>17</sup> Basil Mitchell, *Morality: Religious and Secular*, p. 7-8 (2000)

<sup>18</sup> I Ethica Nicomachea, 1, 1094a

<sup>19</sup> Summa Theol., I-II, q. 91, a. 2. Cf. Commonweal 36: 83-5, May 15, 1942: "This very figure of speech has often been disastrous, leading men to conceive the natural law as a readymade code neatly packed in each man's consciousness, and which each as only to

unwrap- and whereof all men should by nature have equal knowledge-Men know it with greater or less ease, and in different degree, and here, as elsewhere, they run the risk of error. The only practical knowledge which all men naturally and infallibly share in common is that one must do good and avoid evil.-that every sort of error and aberration should be possible in our determination of these things merely goes to show that our insight is weak and that innumerable accidents can prevent our judgment."

<sup>20</sup> *Id.*

<sup>21</sup> Arthur Scheller, *supra* note 3 at 2



The standards of morality are dynamic; it keeps developing with the society. It is an inner belief of an individual which regulates and controls their actions as right or wrong.

### HLA Hart –Prof. Fuller Debate

Morality seeks to control both the internal-external behavior of people; the law on the other hand seeks only to interfere with external behavior. The interface between law and moral values has always attracted the jurists' view, but the Grudge Informer case<sup>22</sup> concerning Nazi law lead to the most celebrated debate between Prof. H.L.A Hart and Prof. Fuller.

In 1949, a woman was prosecuted for the offense of depriving a person illegally of his freedom. The offense having been committed by her having denounced her husband to the wartime Nazi authorities as having made insulting remarks about Hitler. The woman, in defense, claimed that her action had not been illegal since her husband's conduct had contravened the laws made at that time of the Nazi regime. The court found that the Nazi statute is contrary to the sound conscience and sense of justice of all decent human beings did not have legality that supports the woman's defense, and she was found guilty. The German Courts faced a serious dilemma. On one hand, there was a moral duty to obey the law. On the other hand, there was a moral duty to do what people thought was right and decent. Then, there was also the need to restore respect for law and justice. They agreed that it was not possible to declare all the laws made by the Nazi regime and the actions of citizens in conformity with such

laws to be illegal, as it would result in total destabilization of the society. However, they felt that some of the laws made by the Nazi regime were so repulsive to human morals, that there was a need for disapproving actions taken in conformity with such laws, to assure people that the new regime did not approve of such twisted laws. Accordingly, the Court held the wife to be liable for having acted in a contrary manner to sound conscience and sense of justice of all decent human beings and stated that they did not consider such which were so repulsive in nature.

In the light of the above facts of the case, the diverse views of the two jurists are as follow:

- 1. Rule of recognition:** According to Hart, the decision of the court is wrong on the basis that no matter how hideous and monstrous Nazi laws were, they were framed by the superior authority (Enabling Act passed by the Reichstag) and thus were valid laws.<sup>23</sup> The Nazi laws satisfied the Rule of recognition. Even though Hart opposed the retrospective application of criminal statutes, but considered Hitler's regime to be an exceptional case for the application of the retrospective effect. Hart criticized the concept of morality depicted by the court.
- 2. Internal/Inner Morality:** Fuller, on the other hand holding the court's decision valid, said that law and morality cannot be classed as mutually exclusive of one another. According to him, the decision respected both morality and law. He believes that all Nazi laws were invalid on the ground of it being immoral. Moreover, the laws lacked internal morality, which is the essence of the law-making process.<sup>24</sup>

<sup>22</sup> Justice Markandey Katju, *The Hart Fuller Debate*, ebcindia, (2001) [http://www.ebcindia.com/lawyer/articles/496\\_1.htm](http://www.ebcindia.com/lawyer/articles/496_1.htm)

<sup>23</sup> H. L. A. Hart, *The Concept of Law*, 10 Oxford Univ. Press 3<sup>rd</sup> edn., (2012)

<sup>24</sup> Prof. Fuller believes that for a law to be called a law in the true sense, it must pass a moral functional test.



3. **Hard cases and Penumbra:** According to Hart, morality is not required while applying the law or to test the validity of the law. If the law is passed by some superior authority, it is Law irrespective of its moral nature. He explains this by a hypothetical illustration of "vehicles not allowed in the park".<sup>25</sup> With this illustration, Hart submits that in hard cases (legal rules have settled meaning) there is no need to interpret the law from the moral point of view. The intersection of law and moral comes into the picture in Penumbra<sup>26</sup> where judges settle the dispute by way of judicial interpretation. Hart says that law is "what it is" and not what it "ought to be" (moral).
4. **Fidelity to legality (ensuring that laws are public, clear, non-contradictory, proscriptive, reliable, possible to comply with and applied as articulated):** To challenge the above observation of Hart, Fuller extends the above vehicle illustration to lay down that the core of law can't be interpreted through language alone, it is impossible to determine the applicability of the rule without knowing the purpose of the enactment. He states the fidelity of law can be achieved only when the law aligns with the morals at all stages beginning with the enactment to the implementation stage. People will comply with the law only if they are convinced that the law is based on strong moral foundations enacted for their common good.
5. **Internal Morality of law:** Fuller, lays his contentions on the general theory of law, according to which legal systems are not constituted by the mere existence of officials who share an internal perspective on what counts as a valid set of laws, but rather by an orientation shared by officials and legal subjects alike- towards governing their interactions with one another in a manner that displays fidelity to the principles of legality, or, as Fuller sometimes called it, to the "internal morality of law."<sup>27</sup>
6. To conclude, Hart upheld that there is not and shouldn't be any necessary relationship between a legal system and the ideas of morality because the legal system can effectively function without morals. For E.g. Hitler's Third Reich is an apt example where he discriminated against individuals on racial grounds, due to the rising anti-Semitic beliefs and the pervading notion of the purity and dominance of the Aryan race. In Hart's view, it is a legal system.
7. Fuller further states that Law is deprived of any definite definition, similarly, morality also lacks any precise definition, hence it would be wrong to say that both law and morality are separate when both of them lack definition.

#### **Law and Morality in Changing Society**

The Sociological school of jurisprudence gives the most suitable theory on the law which very efficiently suits the changing society. According to Roscoe Pound,<sup>28</sup> law is a social institution to satisfy social wants, the claims, and demands involved in the exercise

If a rule or a set of rules fails to conform to this function, it doesn't count as law.

<sup>25</sup> Bell, Bernard W., *No Motor Vehicles in the Park: Reviving the Hart-Fuller Debate to Introduce Construction*, 48 Journal of Legal Education, p. 88-101(1998)

<sup>26</sup> HLA Hart, *Positivism and the Separation of law and morals*, 71 Harvard Law Rev 4, p. 593-629 (1958)

<sup>27</sup> Benjamin C Zipursky, *Practical Positivism versus Practical Perfectionism: The Hart Fuller Debate at Fifty*, 83 New York University Law Review, p. 1170-1212 (2008)

<sup>28</sup> He was an American leader belonging to a Sociological school from Harvard Law School. He propounded that the main task of law is Social engineering. He concentrates more on the functional



of civilized society by giving effects to as much as we may with least sacrifice, so far as such wants may be satisfied or such claims given effect to by an ordering of human conduct through politically organized society.

Law and morals have many common elements like

1. Both lay down desirable behavior expected from human beings.<sup>29</sup>
2. Both strive to achieve peace and order in society.
3. Both the concepts are dynamic and keep developing with the changing society.

The status of the relation between law and morality is still a debatable topic and will remain till both concepts become static. The two concepts are so deeply tangled to be understood as one or as coextensive. Hence the relationship between law and morality can be made from three angles:

1. Morals as the basis of law: in the early stages of society, the rules observed by the people regulated human behavior. When the state came into being, it transformed those minimal ethics/ moral values and backed them by the authoritative sanction which came to be known as “law”.
2. Morals as the test of law: the law is drafted to govern the people; to achieve peace and order in the society and the same can be achieved only when law conforms to the acceptable behavior/practice of the people. If any law is framed which doesn't adhere to the moral standard of the people, it would lead to disharmony and distress in the society;

aspect of law hence the school is also known as Functional school.

arising war-like situations between the people and the state.

3. Morals as the end of law: the law aims to secure justice, and justice in a broader sense aims upon morals. According to the utilitarian approach, the immediate end of law is to secure social interests, that is, to secure harmony of claims and demands. It means that conflicting interest in the society should be weighted and evaluated and the interest which can bring benefit with the least sacrifice should be recognized and protected.

#### Position in India

In India, the major sources of laws are Vedas, Smriti, Customs, and Conscience. In earlier times, the actions of the people were judged as right or wrong on the standards set by moral values. There was no stringent morality standard to govern human behavior because of the dynamic nature of moral values. Moral values keep on changing with the development of society. Today what stands as moral stood as immoral prior modernization of the society.

The growing differences in opinions, conscience, belief among the society could not hold the uniformity in the above principles or minimal ethics. The tensed situation lead to the entry of the state, which in turn to secure justice picked up those rules and backed them with the sanction and termed those transformed rules as “law”. Just like moral values, law too is not static and is amended to suit the changing society. Since laws are framed to coordinate human behavior, the minimal test for the law to succeed is that it should adhere to human moral values to some extent.

<sup>29</sup> Steven Shavell, *Law versus morality as regulators of conduct*, 4 American Journal and Economics review at p. 227-257 (2002)



If the law has to be accepted by the people then it should conform to the behavior standard that people desire. These standards are largely influenced by moral values. Also practically, it is not feasible to separate law from morals. The concept of morality keeps on changing, as society progresses. New legislations are brought about to accommodate those changes. Even when interpreting the legislation, the dictators of law look back to the moral values to analyze the purpose of the new law. For instance, the progressive judgments recognizing living relationships, inter-caste marriages, show how the judiciary has interpreted law taking into account the changing moral values in our society.

Another celebrated case, The Sabarimala Temple case<sup>30</sup> is one such piece which saw the battle between moral values and legal principles. The entry of the women into the temple was prohibited on religious and moral grounds. If looked at from the legal point of view, the entry was violating the fundamental rights of the women by discrimination on the ground of sex. Today, moral values have changed with time, what was immoral then, is the infringement of Fundamental rights today.

From the above instances, one can predict that neither law -morality stand exclusive to each other nor they are synonyms to one another. Both have the same origin but differ as they develop further. It can be suggested that one holds the back of the other. Stopping the vehicle at the red light has nothing to do with moral values, but if one doesn't obey, one will be faced with a penalty. Similarly,

not feeding a poor person is morally wrong, but this won't attract legal provisions. On the same line, killing somebody or stealing something is both morally and legally a wrong act. Thus, from the above illustrations; one can draw the complex relationship between the two theories.

### CONCLUSION

Societies are necessitated by the dignities and needs of the person: homo homini amicus. But while society is a necessity, the form of the polity is left to man's free determination. Consequently, there is an essential relationship between political society and man's nature and purpose. Morality and law cannot be divorced from each other. The immoral and unjust legal system would not stable and long-lived. Legal systems aim at achieving justice, which is grounded in morality, the legitimacy of a government is derived from morality. A vast majority of society will not conform to the law's dictates if they don't feel any sense of moral obligation. A system that lacks morality and justice will face repression.

Substantive rules have to necessarily be moral for promoting the objectives of mankind. And, it is only possible if it takes into consideration the nature of man.

The correspondence doesn't mean that everything that is immoral is ought to be illegal. But it does provide an intelligent reason for the claim that law and morality ought to be related, that is, for requiring that law be cast to protect fundamental moral rights.

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<sup>30</sup> A 5-judge constitutional bench by a majority in Indian Young Lawyers Assn. vs. the State of Kerala, 2018 SC 1690, held not allowing entry of women of

the age group 10-50 years in Sabarimala Temple is unconstitutional.