

What is law?



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Law, in its widest sense, means and involves a uniformity of behavior, a constancy of happenings or a cause of events, rules of action, whether in the phenomena of nature or in the ways rational human beings. In its general sense law means an order of the universe, of events, of things or actions.

In simple words, Law may be referred to as a body of rules that are determined and enforced by the state and that are intended to channel behaviour and to resolve certain adverse events.

Thus a legal rule might forbid littering in a park and impose a Rs 500/- fine for its violation, might impose expectation damages for violation of a contract, or might declare murder a crime and punish it with a sentence of atleast of 10 years of imprisonment.[1]

The effectiveness of law enforcement depends, other things being equal, on the magnitude of sanctions and on the probability with which they are imposed for violations. The magnitude of sanctions is chosen by the state and can be as high as the wealth of violator if monetary and as a life term if imprisonment. The probability of sanctions depends on the actions of private parties who might bring the suit if the violation is civil and on effort of public enforcement agents, otherwise.[2]

Keeping a practical view in mind it is necessary to look into some definitions of law.

Definations of Law:

According to Salmond “ the law may be defined as the body of the principles recognized and applied by the State in the administration of justice”.

According to Austin, “ A law, in the strict sense, is a general command of the sovereign individual or the sovereign body, issued to those in subjectivity and enforced by the physical power of the State. According to Austin, “ law is the aggregate of rules set by men as politically superior or sovereign to men as politically subject”.

According to Duguit, law is essentially and exclusively a social fact. It is in no sense a body of rules laying down rights. Foundation of law is in the essential requirements of the community life. Thus Duguits definition gives a moral dimension to law.

Holmes J. says that “ the prophesy of what Courts will do, in fact, and nothing more pretentious, are what I mean by law”.

While Dias says, “ Law consists largely of ‘ ought’ (normative) propositions prescribing how people ought to behave. The ‘ oughts’ of laws are variously dictated by social, moral, economic, political and other purposes”.

Thus some definitions ascribe a moral quality to law while some don’t do so expressly. Thus it is necessary to look into what is morality.

What is morality?

Morality may be defined as

Conformance to a recognized code, doctrine, or system of rules of what is right or wrong and to behave accordingly. No system of morality is accepted as universal, and the answers to the question “ What is morality?” differ sharply from place to place, group to group, and time to time. For some it

means conscious and deliberate effort in guiding one's conduct by reason based on fairness and religious beliefs. For others it is, what the majority then and there happen to like, and immorality is what they dislike.”[3]

Morality may be equated with order and has as its object human actions that are ordered to one another and to some end. The idea of value (good or end) is the crux of any moral system since the concept of value is a primary concept in the order of our practical concepts, i. e., ultimate in its genus. Hence the moral act is a combination of the subject that makes the act (rational and free act) and the object that is intended (objective goods and values that result from this activity); objectively the moral act is made up of three elements-the object, the end and the circumstance. Therefore rational human nature is the norm of morality, and morality is the transformation of a known order of values. To put it quite succinctly, 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.[4]

In general a moral rule has it that, when a person obeys the rule, he will tend to feel the sentiment known as virtue, and if he disobeys the rule he will feel the sentiment known as guilt. A moral rule also has the property that, when a person obeys a rule and is observed to have done so by another party, that party may bestow praise on the first party who will enjoy the praise; and if the person disobeys the rule and is observed to have done so by another party, the second party will tend to disapprove the first party, who will dislike the disapproval.[5]

Enforcement of moral rules comes about through internal incentives of virtue for obeying the rules and guilt for not doing so. Enforcement is also effected by external incentives, such as if a person believes that his conduct will be observed by others, who will reward him with praise for doing good or chastise him for not doing so, he will be lead to do good.[6]

The effectiveness of enforcement of moral rules depends in part on the magnitude of moral incentives, i. e. on how much guilt and virtue, and admonition and praise, matter to individuals. The degree to which they matter is shaped by, and determined hand in hand with, socialization and inculcation that governs the absorption of rules themselves. In any case moral sanctions have definite limits.

The effectiveness of moral incentives also depends on their likelihood of application, in respect to which one must distinguish the internal from the external moral incentives. The internal incentives of guilt and virtue function automatically for a person knows what he does and cannot hide from it. By contrast external incentives operate only if others observe conduct and respond with praise or disapproval.[7]

Thus, with a basic idea of morality being presented, it is necessary to look into the relation between law and morality.

A COMPARISION OF LAW AND MORALITY

Law brings with itself some reflections of public morality, but can law be separated from morality? The relation between law and morality can beb understood only after looking at the views of Hart, Fuller and Benthem.

Broadly there are two schools, the positivist, which feels that law and morality can be separated and the naturalist which feels the the two are inseparable.

Gustav Radbruch, a Jew by birth lived in Germany prior to Second World War. He was a firm believer in “ positivist” doctrine. After seeing the atrocities perpetrated by Nazi regime on the Jews under Nazi laws he changed his belief and became a staunch supporter of Natural Law Theory and exhorted everybody to discard the doctrine of the separation of law and morals.[8]This was also a provocation for Prof Hart to initiate this discourse. The conflicts faced by the German jurists in post war Germany, is well illustrated by a category of cases which may be called “ informer cases”.[9]One such case is discussed by both Prof Hart and Prof Fuller. The case is as under[10]

In 1944 a German soldier came home from far front for a short visit. In his conversation with his wife he criticized the Hitler government and Nazi Party. He even expressed his dismay that the man who attempted to assassinate Hitler did not succeed. During his long absence there were other men in her life and hence she was keen to get rid of her husband. After his departure to war front the wife reported his remarks to the local leader of the Nazi party. The husband was tried by a military tribunal and sentenced to death. However he was not executed. After a short period of imprisonment, he was sent to the front again. After the collapse of the Nazi regime, a case was initiated against for illegally depriving the husband of his freedom. After the collapse of the Nazi regime, the wife was brought to trial for having procured unlawfully the imprisonment of her husband.

The wife's defense was that she was required to furnish such information to the authorities under the Nazi statutes and she did not commit any crime. The court of appeal which decided the case held that the statute under which the wife was claiming protection " was contrary to the sound conscience and sense of justice of all decent human beings." [11] Hence it was reasoned that she could not be given protection under such statute. This reasoning became a precedent in many other informer cases. This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. [12]

According to Prof Hart there were only two options: a) to let the woman go free because the statute protected her; b) to make a retrospective legislation repealing the statute under which she claimed protection. [13] Because retrospective legislation is anathema in most criminal justice system the woman should have been allowed to go free if integrity of judicial principles was to be preserved. Prof Hart considers it a cardinal mistake of the Court of Appeal to introduce the concept of morality of the law, under which she was claiming protection, to say that law was no law at all.

Professor Hart's views

Prof Hart believes in the theories of law as put forward by jurists like Bentham and Austin. These jurists propounded utilitarian theory of law. Bentham and Austin, constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be. [14] Austin formulated the doctrine: The existence of law is one thing; its

merit or demerit is another.[15]A judge deciding a case should go by law as it is.

Prof. Hart points out that all cases may not fall exactly within the law as it is which he calls the 'core'. There will be cases in the penumbra of law. Hart's view is that morals can be an influential factor in deciding cases in the penumbra.

Bentham criticized Natural Law theory on the ground that "the natural tendency of such a doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like".

[16]Bentham also feared that under natural law theory courts might be legally bound to decide in accordance with what they thought just or best.

[17]Such an approach can lead to all round confusion.

Prof Hart presents the discussion of separation of law and morals as a problem of separating "law as it is" and "law as it ought to be". He criticizes natural law thinkers for ignoring this difference.

" Prof Hart identifies the essentials of positivism as the following: [18]

(i) The contention that laws are commands of human beings,

(ii) The contention that there is no necessary connection between law and morals or law as it is and ought to be

(iii) A legal system is a "closed logical system" in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards,

Prof Hart also deals with the issue lack of precision in the words used in any human language and the role of this factor in judicial interpretation. While applying legal rules to the facts of a case it become necessary quite often to decide the meaning of the words in a statute and to decide whether the words used covers the facts to be decided. Sometime “ standard instances” of the words may not be sufficient to give proper effect to the law. Prof Hart calls these as “ problems of the penumbra”.^[19]

Problems of penumbra cannot be solved by logical deduction. The criterion which makes a decision sound in such cases is some concept of what the law ought to be.^[20]This is where a moral judgment is made about what law ought to be. This is called by Prof. Hart as necessary “ intersection between law and morals”.^[21]

Prof Fuller’s views:

Fuller on the other hand believes in the Natural Theory of Law and the moral foundations of a legal order. So for him law should always conform to the idea of God’s justice. He emphasizes the view point that fidelity to law can be achieved only if law is consistent with morals at all stages that is during its making and during its application by the court whether the case is in the core or the penumbra of law.

The primary concern of Prof Hart is to preserve the integrity of the concept of law.^[22]For Prof Fuller fidelity to law is of utmost importance. He argues that there will be fidelity to law only if laws are consistent with moral values of the people who have to follow law.

People comply with law only if they are convinced that the law is for common good. That is to say for achieving fidelity to law, Law should have moral foundations.

The Balance

The conflict between law and morals came to sharp focus in the predicament faced by the German Court after the collapse of the Nazi Regime. It was not possible to declare all the laws made by the Nazi regime and actions of citizens in conformity with such laws to be illegal. This would have resulted in total destabilization of the society. On the other hand some of the laws made by Nazi regime was so repulsive to human morals that there was a need for disapproving actions taken in conformity with such wicked laws. There was also a need to send a message that the new regime does not approve all the wicked laws of the Nazi regime

Thus on the one hand, there was a moral duty to obey law. On the other hand, there was a moral duty to do what people thought (after the war) was right and decent. The fundamental postulate of positivism that law must be strictly severed from morality seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations.[23]

Thus the German Courts faced a serious dilemma in restoring both respect for law and respect for justice. Essentially Radbruch saw the dilemma as that of meeting the demands of order, on the one hand, and those of good order, on the other.[24]Order by itself is no good unless it serves some purpose for the society. So we should not get obsessed with just order. At the same time in the process of seeking good order we should lose order itself leading to

anarchy. As we seek to make our order good, we can remind ourselves that justice itself is impossible without order, and that we must not lose order itself in the attempt to make it good.[25] Thus we must strive for a balance.

Homosexuality: “ God created Adam and Eve, not Adam and Steve”[26]

This quote summarises the attitude of morality developed along the lines of religion with regard to homosexuality. The Church has always condemned the practice of homosexuality vehemently. The Bible preaches that a man may not lie with a man in a way he lies with a woman.[27]

Unlike the West, the Hindu society does not have the concept of ‘ sexual orientation’ that classifies males on the basis of who they desire. However, there is a strong, ancient concept of third gender, which is for individuals who have strong elements of both male and female in them.

Sexuality between men (as distinct from third genders) has nevertheless thrived, mostly unspoken, informally, within men’s spaces, without being seen as ‘ different’ in the way its seen in the West.[28]

In India homosexuality was criminalized in 1861 by the Britishers through Section 377 of the India Penal Code. It criminalized carnal intercourse. Contemporary to the global movements for giving rights to the homosexuals, the Indian movement has also been running. In 2009 it got a huge success when the High Court of Delhi in Naz Foundation v. Govt. of NCT Delhi ruled the Section 377 of IPC as unconstitutional and thus decriminalized homosexuality. But in 2013 the Supreme Court of India overruled the judgement of the High Court of Delhi and recriminalized homosexuality.

In the modern Indian society those opposing homosexuality argue that it is against morality and Indian culture.

However if one delves into history one would easily find out that this homophobia was part of a more generalized attack on Indian sexual mores and practices undertaken by British missionaries as well as educators. It is evident not only in the anti-sodomy law introduced by the British in the Indian Penal Code of 1860 but also in the deliberate heterosexualization of entire literary canons and genres. This is one reason why modern institutions such as the police force, and educational as well as religious organizations today typically respond to same-sex unions with horror and even violence.

[29]

Thus, a slow and gradual change in morals lead to an inherent opposition among a large of population against homosexuality. This subsequently impacted the law as well. These acts of consensual homosexuality, which was once recognized as acceptable in the society thus became totally unacceptable.

The major argument against the validity of Section 377 of the IPC in the Naz Foundation cases was that it violated right to life under Article 21, since the acts were consensual acts. Thus it was argued that since this rule violated a constitutional law which are part of the very basic laws of the land, the section should be declared void. However, on the other hand inspite of the fact that Section 377 of IPC is not contained in the chapter of offences against morality and is instead contained in the chapter on offences against body it was argued that these acts violated morality. Finally Section 377 was

declared to be valid by the Supreme Court. Thus it is quite clear morality influenced the law against homosexuality.

[1] Steven Shavell, Law versus Morality as Regulators of Conduct, 4 American Law Economic Review at 229.

[2] *Ibid.*

[3] Morality, Business Dictionary, <http://www.businessdictionary.com/definition/morality.html#ixzz3ViKuh0pt>, Accessed On 18th March, 2015.

[4] Jurisprudence Law and Morality, Marquette Law Review, 1953, Vol 36, 319.

[5] Steven Shavell, Law versus Morality as Regulators of Conduct, 4 American Law Economic Review at 230.

[6] *Ibid.*

[7] *Supra* note 5 at 232.

[8] H. L. A. Hart, Positivism and the Separation of Law and Morals, 71 Harvard Law Review, 616 (1958)

[9] Lon L. Fuller, Positivism and Fidelity to Law -A Reply to Professor Hart, 71 Harvard Law Review, 658 (1958)

[10] *Supra* note 8 at 618-619.

[11] *Supra* note 8 at 619.

[12] *Ibid*

[13] *Ibid*

[14] *Supra* note 8 at 594.

[15] *Id* at 596.

[16] *Ibid.*; See also BENTHAM. , A COMMENT ON THE COMMENTARIES 49 (1928)

[17] *Id.* At 599.

[18] *Supra* note 8 at 601-602.

[19] *Id.* At 607.

[20] *Supra* note 8 at 608.

[21] *Ibid.*

[22] *Supra* note 9 at 635.

[23] *Supra* note 9 at 656.

[24] *Supra* note 9 at 657.

[25] *Ibid.*

[26] Victoria Clarke, What about the children? arguments against lesbian and gay parenting, Women's Studies

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International Forums, 555-570 (2001)

[27]Tennessee Nashville, The Book of Discipline of The United Methodist Church 161G (The United Methodist Publishing House 2010).

[28]S Asthana and R. Oostvogels , The social construction of male ‘ homosexuality’ in India, February 15th 2014, <http://linkinghub.elsevier.com/retrieve/pii/S0277953600001672>

[29]Ruth Vanita, *Same-sex weddings, Hindu traditions and modern India* , Feminist Review, No. 91, pp. 47-60, (2009)