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RAMA UNIVERSITY

Lecture-9

LECTURE : Law & Morality

Law and morality:

ever since law has been recognized as an effective instrument of social ordering there has been an ongoing debate on its relationship with morality.
According to Paton, morals or ethics is a study of the supreme good. In general, morality has been defined to include:
all manner of rules, standards, principles or norms by which men regulate, guide and control their relationships with themselves and with others.

Both, law and morality, have a common origin. In fact, morals gave rise to laws. The State put its own sanction behind moral rules and enforced them. These rules were given the name law.

In the words of Hart The law of every modern State shows at a thousand points the influence of both the accepted social morality and wider moral ideal. Both, law and morality have a common object or end in so far as both of them direct the actions of men in such a way as to produce maximum social and individual good. Both, law and morality are backed by social or external sanction.

Bentham said that legislation has the same center with morals, but it has not the same circumference. Morality is generally the basis of law, i.e. illegal (murder, theft, etc.) is also immoral. But there are many immoral acts such as sexual relationship between two unmarried adults, hard-heartedness, ingratitude, etc. which are immoral but are not illegal. Similarly, there may be laws which are not based upon morals and some of them may be even opposed to morals, e.g. laws on technical matters, traffic laws, etc.

Morals as test of law: several jurists have observed that law must conform to morals, and the law which does not conform to morals must be disobeyed and the government which makes such law should be overthrown.

Paton said that if the law lags behind popular standard, it falls into dispute, if the legal standards are too high; there are great difficulties of enforcement.
Morals as end of law: According to some jurists, the purpose of the law is do justice.

Paton said that justice is the end of law. In its popular sense, t he word â€˜justiceâ€™ is based on morals. Thus, such morals being part of justice become end of justice. The end which the preamble of our constitution tries to achieve is the morals.

Prologue
No distinction in ancient times: in the early stages of the society there was any distinction between law and morals. In Hindu law, the prime sources of which are the Vedas and the Smritis, we do not find such distinction in the beginning.

However, later on, Mimansa laid down certain principles to distinguish obligatory from

recommendatory injunctions. In the West also the position was similar. The Greeks in the name of the doctrine of natural rights formulated a theoretical moral foundation of law.

The Roman jurists in the name of â€˜natural law recognised certain moral principles as the basis of law. In the middle Ages, the Church became dominant in Europe. The natural law was given a theological basis and Christian morals were considered as the basis of law.

A distinction drawn in post-Reformation Europe
Modern trends: In the post-Reformation Europe (when the yoke of the Church was thrown off) it was asserted that law and morals are distinct and separate, and law derives its authority from the state and not from the morals. Morals have their source in the religion or conscience. However, in the 17th and 18th centuries natural law theories became very popular and, more or less, they had a moral foundation. Law again came to be linked with morals.

Again there came a reaction. In the 19th century, Austin propounded his theory that the law has nothing to do with the morals. He defined law as the command of the sovereign. He further said that it was law (command) alone which is subject-matter of jurisprudence. Morals are not a subject-matter of study for jurisprudence.

Many later jurists supported the view of Austin. In the 20th century, Kelsen said that only the legal norms are the subject-matter of jurisprudence. He excluded all other extraneous things including the morals from the study of law. There is a change in trend of thought in modern times.

The sociological approach to law indirectly studies morals also. Though they always make a distinction between law and morals and consider the former as the proper subject-matter of study, in tracing the origin, development, function and ends of law, they make a study of the forces which influence it. Thus their field of study extends to the various social sciences including morals.

India: As observed earlier, the ancient Hindu jurists did not make any distinction between law and morals. Later on, in actual practice some distinction started to be observed. The Mimansa made a distinction between obligatory and recommendatory rules. By the time the commentaries were written the distinction was clearly established in theory also.

The Commentators pointed out the distinction and in many cases dropped those rules which were based purely on morals. The doctrine of â€˜factum valetâ€™ was recognised which means that an act which is in contravention of some moral injunction, if accomplished in fact, should be considered valid.

However, this rule does not apply to legal injunctions. In modern times, the Privy Council in its decision always made a distinction between legal and moral injunctions. Now there is no longer any confusion between law and morals and when the law is gradually being codified, there are little chances of such confusion.

Distinction Between Law and Morals

It has been repeatedly observed in the preceding paragraphs that in modern times there is a clear distinction between law and morals in every developed and civilized society.

Now the points of distinction between the two shall be discussed as:

a. The morals are concerned with the individual and lay down rule for the moulding of his character. Law concentrates mainly on the society and lays down rules concerning the relationships of individuals with each other and with the state.
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b. Morals look to the instrinsic value of conduct or in other words, they look into motive. Law is concerned with the conduct of the individual for which it lays down standards.
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c. The morals are an end in themselves. They should be followed because they are good in themselves. Law is for the purpose of convenience and expediency, and its chief aim is to help a smooth running of the society.
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d. The observance of morals is a matter of individual conscience. Law brings into picture the complete machinery of the state where the individual submits himself to the will of the organised society and is bound to follow its rules.
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e. The morals are considered to be of universal value. Law is relative-related to the time and place, and, therefore, it varies from society to society.
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f. Law and morals, again, differ in their application. The morals are applied taking into consideration the individual cases whereas the application of law is uniform.

Roscoe Pound therefore, says that:

as to application of moral principles and legal precepts respectively, it is said that moral principles are of individual and relative application; they must be applied with reference to circumstances and individuals, whereas legal rules are of general and absolute application.

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 defined law in their own way and these definitions materially differ from each other.

A study of the relationship 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 societyâ€™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 morals 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.

Queen v. Dudley and Stephenâ€™s case:
Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be a fatal consequence. The principles laid down in Queen v. Dudley and Stephenâ€™s (14 Q.B.D. 273) are worth mentioning in this connection. In that case three seamen and a boy, the crew of an English yacht, were cast away in a storm on the high seas and were compelled to put into an open boat belonging to the said yacht.

They had no food and no water in the boat and in order to save themselves from certain death, they put the boy to death and fed on the boyâ€™s body, when they were picked up by a passing vessel. They were tried for the killing of the boy and jury returned a special verdict.

The case came before a bench of five judges of Queenâ€™s Bench Division. Coleridge C.J. (the other four judges concurring) observed:
To preserve oneâ€™s life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is manâ€™s duty not to live but to die. The duty in case of ship wreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children.....

These duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all it is to be hoped in England will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity for preserving oneâ€™s life. It is not needful to point out the lawful danger of admitting the principle which has been contended for.

- Who is to be the judge of this sort of necessity?
- By what measure is the comparative value of lives to be measured?
- Is it to be strength, or intellect or what?

It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking anotherâ€™s life to save his own. In this case

the weakest, the youngest, the most unresisting, was chosen.

- Was it more necessary to kill him than one of the grown-up men?

The answer must be, No..

So spoke the Fiend, and with necessity. The tyrantâ€™s plea excused his devilish deeds.

It is not suggested that in this particular case the deeds were â€˜devilishâ€™, but it is quite plain that such a principle, once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment and if in any case the law appears to be too severe to individuals, to leave it to the sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fitted to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how lawful the suffering; how hard in such trials to keep the judgment straight and the conduct pure.

We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, or allow compassion for the criminal to change or weaken in any manner the legal definition of crime.

Grove J. while concurring added
If the two accused men were justified in killing Parker, then if not rescued in time two of the three survivors would be justified in killing the third, and, of the two who remained, the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving.

Thus, the principle is that no man has a right to take anotherâ€™s life to save his own (Common wealth v. Holmes).

Recently Supreme Court of India held that in case of conflict of fundamental rights of two individuals the decision is to be made on the basis of morals.

In this case, the appellant's blood sample was found to be HIV (+). On account of this disclosure the appellantâ€™s proposed marriage to one A which had been accepted, was called off. The appellant sued the hospital for damages on the ground that the doctors violated their duty to maintain confidentiality as well as his right to privacy. This was contested on the ground that the disclosure of the health conditions of the appellant to ,the girl to whom he was proposed to be married was protected under the right to life of the girl which includes the right to a healthy life.

The court held:
As a human being A must also enjoy, as she obviously is entitled to, all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21. This right would positively include the right to be

told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable.

Since right to life includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy.

Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellantâ€™s right to privacy as part of right to life and Aâ€™s right to lead a healthy life which is her Fundamental Right under Article 21 the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day. (Mr. X v. Hospital Z, (1998) 8 SCC 296)

However, it does not mean that morals are the basis of all the legal rules. There are a number of legal rules which are not based upon morals and some of them are even opposed to morals. Morals will not hold a man vicariously liable, one liable for the act of another, where the person made liable is in no way blame able. In the same way, in cases where both the parties are blameless and they have suffered by the fraud of a third, law may impose the loss upon the party who is capable of bearing it but such a course will not be approved by morals.

(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 the Romans. In Rome, law to some extent, was made to conform to â€˜natural lawâ€™ which was based on certain moral principles and as a result â€˜jus civilâ€™ was transformed into â€˜jus gentiumâ€™.

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 Fathers preached forcefully that law conform to Christian morals and said that any law against it is invalid. In the 17th and the 18th centuries, when the â€˜natural lawâ€™ 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 overthrown. It was this theory which inspired the French Revolution.

In modern times, such views that law must conform to morals and if it is not in 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 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 the life of a community, and in the life of the community morals have got an important place.

Paton rightly observes that:
if the law lags behind popular standard it falls into disrepute, if the legal standards are too high; there are great difficulties of enforcement.

(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, â€˜justiceâ€™. They say that the aim of â€˜lawâ€™ 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 who 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 are an evaluation of interests; law is or at least seeks to be delimitation in accordance therewith.

Korkunovâ€™s view:
he 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 value.

Many of the modern definitions of law say that the evaluation of interests is a very important test of law. This can be done properly in the context of socially recognised 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.

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), and some are based on the 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 of morals on law:
Law and morals act and react upon and mould each other. In the name of â€˜justice', â€˜equityâ€™, â€˜good faithâ€™, and â€˜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 the 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. A number of actions and relations in the life of the community go on very smoothly without any intervention by law. Their observance is secured by morals. So far as the legal rules are concerned, it is not the legal sanction alone that ensures their obedience but morals also help in it. Thus, morals perfect the law. 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.

Hartâ€™s view:
The law of every modern state shows as 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 connation 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, recognised, 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.

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)
1.	The state put its own sanction behind these rules and enforced them. These rules were called **law**.	True	False
2.	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**.	True	False
3.	law and morals have the common origin but in the course of development they came to differ.	True	False
4.	Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be a fatal consequence.	True	False
5.	In case of conflict of fundamental rights of two individuals the decision is to be made on the basis of morals.	True	False

Answers: 1-(a),2-(a), 3-(a),4-(a),5-(a)