

Social Morality Vs. Legal Reality : A Critical Study on Present Scenario

Abstract

Law and morality are closely related to each other. Usually legislators are guided by moral values of society in framing law. But judges only impart justice in accordance with the law. It can be said that courts put life in the black and dead letters of law. But when the courts legislate they are supposed to follow the established moral values. They must try every possible attempt in making a balance between law and morality.

Keywords: Homosexuality, Law, Morality, S.377 IPC, S.497 IPC.

Introduction

Society is made up of men and women. Certain rules have been made for controlling their activities. These rules may be ----

1. Legal rules i.e. law or
2. Social rules i.e. morality.

Enforcement of legal rules is backed by penalty. Whereas enforcement of social rules in the form of morality is supported by public opinion. Morality is the basis of social life. Concept of morality has a twofold relationship with society. First, it is associated with the society as its basis and secondly, it is a concept which is relative to society.

Expressing their views on social morality, the Stoic philosophers commented that the whole universe is governed by logic. And this may be-

1. Personal logic, or
2. Universal logic.

Out of the above two, personal logic is directly associated with social morality, because the foundation of social moral values (i.e. social morality) lies upon the balanced personal logic of men in society.

There must be a balance between peoples' personal logic and social morality. In fact the principles of personal policies of men when becomes enforceable, attains the status of social policy or social value or social morality. Legislature while legislating and judges while making decisions do take help up of these moral rules.

In the ancient time there was no separation between law and morality. The reason behind that, was the law prevalent then was totally based on social morality and moral rules. In the course of development of society a rift had been crafted in between two, and they got separated from each other. Resultantly law in its least had a basis in moral values.

According to the ideology of Natural law school, human logic was the basis to decide the "just and unjust" for the society. On the other hand Analytical School advocated that there is no room for morality in law.

H.L.A. Hart in his book "*concept of law*" writes that law should have minimum morality in it. In this furtherance Historical school and Sociological school had also recognised the importance of morality in law.

Relation between social morality and legal order-

Social morality and legal order are closely related to each other, because social morality is the basis of legal system. So many legal provisions are there which shows the dependence of legal system on social morality eg.-

1. Maternity benefits
2. maintenance provisions regarding wife, children and parents
3. morality as a ground of restriction on certain fundamental rights as freedom of speech, freedom of religion etc.
4. Section 228-A, I.P.C. provides punishment for disclosing the identity of rape victim, on the basis of morality.

Hence it can be said that social morality affects the legal system a lot. Dean Roscoe Pound had also supported this view .He discussed the development of law in association with morality and moral behaviour of society. He divided the growth into following four phases-



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First Phase

It was the time when there was no separation between ethically designed customs, religion and law. They all were intermingled.

Second Phase

During this time codification of law has been started.

Third Phase

Norms of social morality got merged in law and legal system.

Fourth Phase

It was the most important phase. Law got mature in this phase and it has been fully established that morality and its other aspects are for the guidance of legislators only. Morality is not directly associated with judges and justice delivery system, because they are only concerned with law.

Enforcement of Morality Through Law

Law is always designed to fulfill the political, economical, social and other demands of society. Society behaves in conformity with such law and does not challenge it until it falls short in the fulfillment of social needs. Generally the norms of social morality always exist in the society in the form of usages and customs in the sub-conscious state. Thus law and morality co-exist peacefully.

Problem arises only when the society grows faster in comparison to the established norms of social morality. This imbalance creates hue and cry in the society.

Generally these conditions provide opportunities for the creation of new social morality for attaining the state of equilibrium between law and morality. At that time the biggest task of the legal system is to check the limit up to which the newly created morality should be allowed in society.

Dispute regarding the enforcement of morality through law is not new. It started in 1957 when the report of Wolfenden Committee was published. Committee recommended that homosexual behaviour between adults, with their full consent is not an offence. Likely prostitution is also not illegal unless and until it is in public place and affects others. In this reference following debates and views should be considered.

Hart Fuller Debate

H.L.A. Hart advocated that the only task of law is to prevent society from any harm. On the other hand Fuller classified morality as inner and outer morality. Fuller explained that a judge may overlook to obey the outer morality but if he remains neutral in the observance of inner morality then he is not discharging his duties up to its fullest extent.

Hart-Fuller debate can be understood on following points-

Separation of law and morality---

It is a big question. Hart says that, "there is no relation between law and morality and the morality is not a standard to check the legality of law".

But according to Fuller, "morality is inherent in law and the study and analysis of law cannot be done in separation of morality".

Obedience of Law

Hart says that obedience of law by society is only due to the penalty. Whereas Fuller states that the society obeys law due to inner morality in them and not because of mere penalty.

Hart Devlin Debate

Devlin strongly pleads that morality is an essential element of society. It may vary in different societies. Weakening of established principles of morality results into degradation of society. Eg. even though offences of corruption and exploitation in private do not harm others but they gradually weaken the social morality as a result of which society tends towards its downfall.

Hence it can be said that Devlin believes, "that morality can be enforced through law, and public morality should be extended up to its fullest extent." But Hart says that extending the limits of public morality may increase the interference of state in private matter. So only minimum morality should be followed.

Strawson's View

P.E. Strawson was an English philosopher. He gave the principle of minimum and maximum morality. He told that it depends upon law that how far it allows morality in it. According to Strawson law is like a pendulum which sometime gives more importance to morality and sometimes less.

On the basis of above discussion it can be said that law and morality are connected to each other as follows-----

1. Morality as the basis of law
2. Morality as the criteria for testing the law
3. Morality as an object of law

Present Scenario**Case Study 1****Joseph Shine vs Union of India¹****Held**

Supreme Court of India held section 497 Indian Penal Code as unconstitutional in this case. Section 497 Indian Penal Code defines and provides penalty for adultery. According to Section 497, "whoever has sexual intercourse with a person who is and whom he knows or has a reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with the imprisonment of description for a term which may be five years or with fine, or with both. In such a case the wife shall not be punishable as an abettor.

Following points are clear from the language of section 497-

1. Sexual intercourse by a man with the wife of other person must be there.
2. Such sexual intercourse should not amount to the offence of rape.
3. Such sexual intercourse must be done without the consent or connivance of the husband of that woman.

Analysis of section 497

1. Provision of section 497 was discriminatory on the point that it provides punishment only for the male person as adulterer but it does not provide

- any for the married woman who joins the sexual intercourse with her full consent.
- Section 497 fails to cover the cases of sexual intercourse of a man with unmarried girl or with widow.
 - It is a discriminative provision on this point also that it does not provide any right to take recourse of section 497 to the wife of such adulteror against her husband.
 - Extra marital sexual activity is not a morally good thing then how come it is justified when it is done with the consent or connivance of husband.

Critical study of decision Joseph Shine vs Union of India

- Adultery has now become legally right but not morally right.
- Adultery has now just as civil wrong for which parties may ask for the remedy of divorce.
- Court held that since men and women are equal and no bar can be placed on the sexual urge of a woman and thus granted a freedom in the name of sexual autonomy. First of all our Indian society is not mature enough to adopt this type of western culture thoughts regarding sexual autonomy for a married woman. Secondly if the Judiciary was intended to put men and women on equal footing then it should have been given a penalty for such women also.
- Who was of the view that a married woman cannot be held guilty under section 497 because she was protected under article 15 (3) of Indian Constitution. If it is absolutely true then why food should not have extended this protection of article 15(3) to that woman who is wife of adulteror, so that she may get the right to bring a Criminal action against her husband.
- It is absolutely true that the judgement not in the confirm of the mortality of Indian society regarding the purity of marriage.

Case study 2

Navtez Singh Johar & Others vs. Union Of India Through Secretary²

Held

The Supreme Court held S.377 Indian Penal Code unconstitutional partially. Only that part of S.377 which criminalised "carnal intercourse against the order of nature was declared unconstitutional". S.377 defines and provides penalty for unnatural offences. Section 377 reads as----"Whoever voluntary has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation

Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Following points are clear from the language of section 377-----

- Voluntary carnal intercourse should be made.
- Such intercourse must be made against the order of nature with any man, woman or animal.

- Explanation provides that mere penetration is sufficient for constituting the carnal intercourse.

Analysis of Section 377

- Section 377 was designed to protect the society from unnatural sexual activities.
- It penalises the homosexual behaviour of persons as well as Sodomy and Bestiality.

Critical study of decision in Navtez Singh Johar & Others vs. Union Of India Through Secretary

- It strikes down the first part of S.377. Since the passing of decision in this case homosexual behaviour as well as sodomy does not remains a criminal wrong.
- Homosexuality and Sodomy is now legally right but still it is morally wrong in the eyes of the majority of people in India.
- Decision is progressive in nature. It changed the established norms of morality regarding traditional concept of heterosexuality in our society.
- Decision is in confirmity of the spirit of our Indian Constitution. According to the preamble of our Constitution, "We, the people of India, having.....and to provide to all its citizens, Justice....., Liberty....., Equality....., Fraternity....."
- This decision also confirms the right to privacy because the consented sexual activity whether homosexual or heterosexual if done privately does not impair public decency or morality.
- Court discussed that "what is natural?" In reply C.J.I. Misra and J.Malhotra held that a person's sexual orientation is itself natural. That's true about the sexual need of human being, but how come we justify its satisfaction through any means. The word natural should be read in connection with the relation of 'man with woman' or 'woman with man' because they are biologically desinged to satisfy the sexual needs of each other. But they extended the term "natural" by including the relation of man with man or woman with woman in it. A question which raises in my mind is that why they not included the relation of a man or woman with animal. If the only truth is the sexual desire and not the way of its fulfillment then they should have justified bestiality.

J. Chandrachud held that the categorisation of "natural" and "unnatural" was created by the majority suppressive groups in the past. He also illustrated this by saying that, merely because something is natural it doesn't mean that it is desirable e.g. DEATH and just because something is unnatural e.g. ORGAN TRANSPLANT it doesn't mean that it ought to be criminalised. Again a query raises in my mind that how can they forget the object behind the organ transplant. It was discovered to serve the humanity. Infact it is tied nicely by a competent legislation on it. So if they are of the view that by allowing homosexuality they are serving the suppressed group then they must have legislated therefor.

Objective of The Study

In this paper an attempt has been made to find the relation between law and morality in present scenario.

Review of Literature

On reviewing the existing literature this paper aims at highlighting the real relation between social morality and legal reality with special reference to recent decision of Supreme Court on S.377 and S.497 Of Indian Penal Code.

Concept and Hypothesis

Law and morality are two sides of a single coin. None of them can be fully ignored.

My hypothesis for writing this paper is to check whether courts are guided by moral principles while deciding sensitive issues or they are changing the norms of existing morality to meet out the present demand of society.

Research Design

I have gone through Bare Acts, and the study material available in the authentic articles, journals, and websites for writing this paper. Thus I adopted doctrinal method for writing this article.

Findings

In the course of writing this paper I found that courts have very rapidly changed the social norms of morality. It is good only for those who claim such rights but for rest of the society it is not easy to adopt all of this suddenly. I also found that courts have just decided the matter before them and pleased the deprived group in the name of so called freedom but not ensured any legislation for the proper regulation of the respective issues.

Conclusion

On the basis of the study I conclude that law should follow the morality. In cases where the observance of morality in its full extent is not possible then the minimum morality should atleast be followed.

Suggestions

On the basis of above study following suggestions are proposed from my side----

1. A firm law should be made for dealing homosexual relations and its other aspects.
2. Decision on S.497 should be revised on other aspects.
3. Directions should have been given to cover the related issues, which likely may arise as a consequence of the above decisions.

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Footnotes

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