NOTES AND COMMENTS

ROLE OF MORALITY IN LAW-MAKING: A CRITICAL STUDY

VALUES ARE the life-blood of law.[1] The legislators when they formulate their laws and the judges when they give their decisions are not working in vacuum. They are guided by the values recognized in society. Values are the social ideals which form the matrix from which legal principles are evolved by the judges or legislators. Values are more than potential materials for the legislative law-maker. They serve as critique of proposed measures of law making. The very nature of judicial process importing choice and discretion are guided by values. These values may themselves change with the progress of society. When values change law tends to change. Then the attitude of the legislators and the judges will also undergo a metamorphosis.[2]

Morality is a value-impregnated concept relating to certain normative patterns which aim at the augmentation of good and reduction of evil in individual and social life.[3] The great majority of the writers use the terms 'ethical' and 'moral' interchangeably.[4] While ethics is the sphere of ideal forms of life set by the individuals for themselves, the sphere of morality denotes rules or principles governing human behaviour which apply universally within a community or class.[5] The science of ethics deals with the principles and moral considerations affecting human conduct. Ethics does not rely upon compulsion.[6] For Salmond, philosophical jurisprudence is the common ground of law and ethics.[7] Blacksone[8] speaks of ethics or natural law as synonymous and of natural law as the ultimate measure of obligations by which all legal precepts must be tried and from which they derive their whole force and authority. In this paper an attempt is made to trace the historical origin of morality in shaping the society; to analyse the relation between

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1. Holmes, *The Common Law* at 35; for details see Dias, *Jurisprudence* Ch.10 (1994).
2. G.C.V.Subba Rao, *Jurisprudence and Legal Theory* 304-06 (1993) .
3. Paul Tillich, *Morality and Beyond* 22 (1963).
4. Broad, *Five Types of Ethical Theory,* 276 *et seq* (1930); Frankena, *Ethical Theory in Philosophy* 347 (1964).
5. Strawson, "Social Morality and Individual Ideal" 37 *Philosophy* 1 (1961)
6. J.B. Schneewind and Peter Lauchlan Heath, *Kant's Lectures on Ethics* (1997).
7. *Supra* note 2 at 14-15.
8. Blackstone, *Commentaries,* 41.

law and morality and to study critically as to how the law-making in common law countries is influenced by morality by its varied shades.

Historical origin of morality and ethical foundations

The ancient Greeks put a theoretical moral foundation under law by the doctrine of natural rights. At Rome, in the classical period, Greek ethical philosophy was drawn upon. The Roman jurists sought to discover the content of the natural law and declare it. They gave us an ethical philosophical natural law with an ideal form of Roman legal precepts. The Middle Ages put a theological foundation under natural law and Christian morals were considered as the basis of law.[9] Natural law theories, which had a rational moral foundation, became very popular in seventeenth and eighteenth centuries.

In England, with the rise of the court of chancery and development of equity, ethical ideas from the *casuist* literature of the sixteenth century[10] and the general notions of right and wrong held by chancellors were made liberalizing agencies. In the Continental Europe of the seventeenth and eighteenth centuries the philosophical ideas of juristic writers upon the law of nature were used in the same way. Thus, moral duty was turned into legal duty. The individual human being as the moral unit became the legal unit. It was conceived that moral principle was to be also a legal rule and consequent progression of moral ideas into legal ideas. It clearly shows that how once a moral principle became an equitable principle and then a rule of law in all legal systems of the world.

At the end of eighteenth century Kant replaced the rational foundation by a metaphysical natural law used to demonstrate the obligatory force of the legal order as it is. The analytical jurists argued that no foundation was needed for law as the law stands upon its own basis as a system of precepts imposed or enforced by the sovereign. Down to Kant, positive law had been contrasted with a body of ideal moral law on the one hand and natural law on the other. Kant instead set over against positive law the immutable principles governing the making of law, by which law and law-making must be judged.[11] Kant

9. See Pound, *Interpretation of Legal History* 98-99 (1967).

10. *Day* v. *Slaughter*, Prec Ch. 16 (1690); *Fursakar* v. *Robinson*, Prec.Ch. 475 (1717); *Chaman* v. *Gibson*, 3 Bros. C-C 229 (1791). For details see, Roscoe Pound, *Law and Morals* 31-9 (The Mc. Nair Lectures, 1969).

11. E.g. Dr. Johnson said that, the law is the last result of human wisdom acting upon human experience for the benefit of the public; Boswell, *Life of Johnson* II, 258 (Croker ed. 1859).

wrote that positive law and doctrines were regarded as products of human wisdom. However, a study of the historical development of moral ideas makes it quite clear that the primary source of moral commands cannot be found in the autonomous reason of individuals. They owe their origin to the strong desire of organized groups to create tolerable conditions of social existence.[12]

Relationship between law and morality: A perspective of different schools

So far as the relation between law and morals is concerned, in the early stages of the society, there was no distinction between law and morals. The ancient Hindu jurists too did not make any distinction between law and morals.[13] For them morals have their source in the religion or conscience. In the Post-Reformation Europe, it was asserted that law and morals are distinct and separate and law derives its authority from the state and not from the morals. However, when the natural law theories became popular in the seventeenth and eighteenth centuries, law again came to be linked with morals. In the nineteenth century under the powerful influence of analytical positivism, only legal norms were made the subject of jurisprudence and morals were excluded from the study of law. In Kant's theory law and morals are distinguished.[14]

Historical jurist banished ethical considerations from jurisprudence and rejected all creative participation of judge and jurist or law-giver in the making or even the real formulation of the law. The historical jurist merely found that all universal ideal principles to which positive law must confirm were not principles of morals but principles of customary action. They were discovered not by reason but by historical study. The morals, as such were quite out of the domain of judge and jurist.[15] However, it is submitted that even customs immemorial should not be opposed to morals.

The revival of natural law in the twentieth century is new theories of legal precepts as having for their end the realization of moral

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12. B.F. Skinner, *Beyond Freedom and Dignity* 20(1971).

13. However, later on *Mimansa* laid down certain principles to distinguish between obligatory from recommendatory injunctions. See B.N.Mani Tripathi, *Jurisprudence* 130-31 (2005) .

14. *Supra* note 6; on Kant's philosophy of morality and freedom see H.J.Paton, *Categorical Imperative* (1946); Kant, *The Metaphysical Elements of Justice* 43-44 (1965).

15. See Pollock, *Essays in Jurisprudence and Ethics* 25-6 (1882); see also Bentham, *Principles of Morals and Legislation* 324 (1789).

values.[16] Consequently, there is a revival of the old subordination of jurisprudence to ethics. As far back as 1878, Jellinck made the transition from a contrasting of law and morals to a subsuming of the former under the latter. Law, he said, was minimum ethics. So regarded, law is only a part of morals. In the broader sense, morals include the whole.[17] The view of Stammler is that jurisprudence depends much upon moral ideas as just law has need of ethical doctrine for its complete realization.[18] Positive law and just law correspond to positive morality and rationally grounded ethics.[19]

However, there is a perceptible change in trend of thought in modern times. The sociological approach to law indirectly studies morals also. Their field of study extends to the various social sciences including morals. For them, jurisprudence, ethics, economics, politics and sociology are distinct enough at the core, but shade out into each other.[20] When one looks at the core, the analytical distinctions are sound enough. However, all the social sciences must be co-workers, and emphatically all must be co-workers with jurisprudence.[21]

It is to be noted that the retributive and expiatory theories of punishment too had ethical basis.[22] However, the criminologists believe that ethical basis has been substituted by sociological base. It is submitted that sociological approach is of moral only and nothing else. As Keeton writes:[23] "In developed societies at any rate, the pendulum will again swing from sociological to the ethical approach". As the social utilitarians put it, the immediate end of law is to secure interests.[24] Morals are an evaluation of interests. Therefore, jurisprudence is a branch of applied ethics and law-making is not primarily a juridical but an ethical process.[25]

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16. Roscoe Pound, *Law and Morals* 110 (McNair Lectures, 1923).

17. *Ibid*

18. On Stammler see Morris Ginsberg, "Stammler's Philosophy of Law", in *Modern Theories of Law* 38-51 (1933); George H. Sabine, "Rudolf Stammler's Critical Philosophy of law" 18 *Cornell Law Quarterly* 321 (1993).

19. For details see, V.D. Mahajan, *Jurisprudence and Legal Theory* 103 (2005).

20. Benzamin N. Cardazo, *The Nature of Judicial Process* 112 (1931).

21. *Id*. at 123 ; see also S.N. Dhyani, *Fundamentals of Jurisprudence* 223 (1992).

22. While Plato was a supporter of the retributive theory, Paton was for expiatory theory of punishment.

23. Keeton, *The Elementary Principles of Jurisprudence* (1949).

24. The idea of value is, therefore, the basal conception of ethics.

25. Hobhouse, *Elements of Social Justice* (1958).

Separation of law and morality debate

Analytical jurisprudence broke with philosophy and ethics completely.[26] The analytical jurists regarded the science of law as wholly self-sufficient and autonomous by rejecting the infusion of ethics into law. David Hume, rejected natural law and insisted on the separation of law and morals.[27] For Bentham, pleasure and pain were the ultimate standards on which law was to be judged.[28] It is for this reason that consideration of morality had no place in Bentham's utilitarian approach. Bentham had spoken of justice in a deprecatory fashion and had subordinated it completely to the dictates of utility.[29] J.S.Mill took the position that the standard of justice should be grounded on utility.[30] John Austin criticized Lord Mansfield for importing moral considerations into some of its judicial opinions.[31] The separation of jurisprudence from ethics which Austin advocated is one of the most important characteristics of analytical jurisprudence. However, Austin did not deny that moral influences were at work in the creation of law though he allowed nowhere in his theory any place for the moral element while defining the nature of law.[32] It is surprising to note that although Hart as positivist generally excludes morality from the concept of law, has spoken elsewhere of the acceptable proposition that some shared morality is essential to the continued existence of any society.[33] Thus, it is not immoral for a husband and wife to have intercourse with each other, but it would be offensive for them to do so in public.[34] That is why such public behaviour is rightly forbidden. For him, private morality is not the concern of law. Ronald M. Dworkin denounces Hart's view of law as a union of primary and secondary rules and exclusion of morality from law.[35] Lord Devlin maintained that law should continue to support a minimum morality.[36] Some moral ideas are part of the fabric of a

26. Austin, *The Province of Jurisprudence Determined* 1 (1832).

27. See the Introduction by Charles Hendel to Hume, *An Inquiry Concerning the Principles of Morals* (1957).

28. Bentham, *Introduction to the Principles of Morals and Legislation* 1 (1823).

29. *Ibid*.

30. Piest (Ed.) *J.S.Mill, Utilitarianism* 63 (1957).

31. H.L.A. Hart (Ed.) *The Province of Jurisprudence Determined* 184-91(1954).

32. Bodenheimer, *Jurisprudence* 96 (1976).

33. H.L.A. Hart, *The Concept of Law* 188 (1961); Hart, *The Morality of the Criminal Law* (1964); see also Hart, *Law, Liberty and Morality* (1963).

34. *The Concept of Law, id.* at 169-76.

35. Dworkin, "The Model of Rules", in G.Hughes (Ed) *Law, Reason and Justice* 13-35 (1969); Dworkin, "Social Rules and Legal Theory", 81 *Yale Law Journal* 855, 879-90 (1972).

36. Lord Devlin, *The Enforcement of Morals* (1965)

given society that society is entitled to preserve them. Devlin has also emphasized the need for morality in the administration of justice.[37]

Morality is implicit in Hart's system of law, which he describes as union of primary and secondary rules. In fact, Hart's positivism has scope for natural law as well as for morality, which has made him both a positivist as well as naturalist. According to him, the minimum content of natural law is shared by both law and morals.[38] For Lon L. Fuller law is the enterprise of subjecting human conduct to the governance of rules. It is the morality that makes the governance of the human conduct of rules possible. He says that substantive natural law can be derived from the 'external morality'. 'Internal morality' is a procedural version of natural law. It is a pre-condition of good law. In his opinion, it is impossible to study and analyze the law apart from its ethical context.[39] It is to be noted that human law is subject to natural law and if on any point it is directly contrary to the law of nature, it would no longer be law but a corruption of law. Thus, positive law is really an implementation of the natural law and has to vary with the changing circumstances and conditions of social life.[40]

Influence of morality in law-making

English position

All the laws against violence and frauds are grounded in the morality of the people and, in turn, the morality of the people is influenced by those laws. The morals with which criminal law is concerned are the morals of the society. Therefore, without the aid of some moral ideas, the understanding of criminal law would be difficult since criminal laws embody moral rules.[41] Lord Devlin observed "public morality provides a firm structure to any human society, and that the law, especially the criminal law, must regard as its primary function to maintain this public morality.[42] This view of Lord Devlin received support from the House of Lords in the *Ladies Directory* case,[43] wherein Lord Simmonds held that a conspiracy to corrupt public morals

37. Lord Devlin severely criticized the Wolfenden Committee Report on Prostitution and Homosexuality

38. Hart, "Positivism and Separation of Law and Morals" 71 *HLR* 593 (1958).

39. Lon L. Fuller, *The Law in Quest of Itself* 5(1940) ; *The Morality of Law* (1964); "Human purpose and Natural Law" 3 *Natural Law Forum*, 68 (1958).

40. See P.D. Dinakaran J, "Law and Justice", *The Hindu* 2 Jan 2006 .

41. Gerald Abrahams, *Morality and the Law* 91(1971).

42. See *supra* note 36.

43. *Shaw* v. *Director of Public Prosecutions,* (1962) AC 220.

was a common law misdemeanour in England. This case would serve to emphasize the role of values as the ultimate source of law.

In *Lady Directory* case, a person was prosecuted for printing and selling a classified list of prostitutes with their addresses and phone numbers. It was contended that what was done by the accused was not contrary to law. Viscount Simmonds rejected the contention by emphasizing the duty of the judges to preserve moral standards. It was held that, the accused was guilty of an attempt to undermine public morals – a dictum of Lord Mansfield in *Jones v. Randall*[44] was reiterated by Simmonds. Lord Mansfield maintained that the 'the law of England prohibits everything which is *contra bonos mores*'.

According to Devlin, the state may claim on two grounds to legislate on matters of morals: It could function to promote virtue among its citizens; alternatively, society may legislate to preserve itself. In his judgment[45] the House of Lords in *Shaws* case had done just this when it sought to indict the defendant, *inter alia* for corruption of the moral welfare of the state. The same problem was raised in a socially more serious context, by the report of the Wolfenden Committee, which recommended that homosexual behaviour between consenting adults in private should no longer be treated as a criminal offence.

Allen said that the judges have always kept their fingers delicately but firmly upon the pulse of the accepted morality of the day.[46] The purchase of honours has long been held illegal.[47] The attitude towards sexual immorality has changed, generally speaking, from one of prohibition to a refusal to assist the parties in the enforcement of claims based on immorality. An immoral consideration still avoids a contract.[48] In *R.* v. *Prince*[49] it was a sense of the immorality of Prince's conduct in abducting a girl that influenced the court to reject his defence of a bonafide mistake that she was of statutory age. However, in *R.* v. *Tolson*,[50] Mrs. Tolson intended to do nothing immoral by re-marrying when she reasonably believed that her first husband had died. The court allowed her bonafide belief to be a defence. The manufacturer of unexaminable articles owes a moral duty to the world

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44. (1774) 1 Comp 17.

45. See Hart's, *Law, Liberty and Morality* (1963) and Lord Devlin's, *The Enforcement of Morals* (1965) centered round the question

46. C.K. Allen, *Law in the Making,* (1964).

47. *Egerton* v. *Browlow* (1853) 4 HL Cas 1; *Parkinson* v. *College of Ambulance Ltd. and Harrison*(1925) 2 KBI.

48. *Ayerst* v. *Jenkins,* (1873) LR 16 Eq 275; *Alexander* v. *Rayson* (1936)1 KB 169.

49. (1875) LR 2 CCR 154 cf *R* v. *Hibbert*(1869) LR 1 CCR 184.

50. (1889) 23 QBD 168.

to be careful, few would dispute. Until *Donoghue* v. *Stevenson*,[51] that moral obligation was not translated into a legal obligation.

The principles laid down in *Queen* v. *Dudley and Stephenson*[52] 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 water in the boat and in order to save themselves from certain death, they put the boy to death and fed on the boy's body, when they were picked up by a passing vessel. They were tried for the killing of the boy. The principle that emerged from the observation of Coleridge CJ is that 'no man has a right to take another's life to save his own'[53]. Hence, the killing of the boy is immoral and contrary to ethical considerations.

In principle, in English criminal jurisprudence, *jus necessitates* though relevant for assessing the measure of liability, would not be ground for releasing a person from all penal liability. In *Dudley & Stephens*, the court held that they were guilty of murder and the plea of *jus necessitates* was not accepted. Thus, pulling down a house on fire to prevent its spread to other property or throwing goods overboard to lighten a ship caught in a storm, surgeon killing a child in mother's womb to effect safe delivery and save mother's life etc., are common illustrations of *jus necessitates*.[54]

For this reason, the great philosopher-jurist, Bacon was of the opinion that if A and B two ship wrecked sailors, catch hold of a plank not large enough to hold both of them, and A for self-preservation pushes B into the sea, A cannot be held guilty of crime. The reliance upon Bacon's illustration of the shipwrecked sailors in *Dudley* was of no use. This in the opinion of Sir James Stephens, is not a crime. Glanvile Williams[55] refers to a similar American case[56] wherein the accused Holmes was a member of a crew who had under the orders of the mate, thrown out sixteen male passengers to save the ship from wrecking. He was charged with manslaughter and sentenced to six months imprisonment.

Whether any particular law of today be regarded as bad or good, there is undoubtedly a great moral 'content' in modern English

51. (1932) A.C. 562; Lord Esher in the case of *Haven* v. *Pender* (1883) 11 QBD, 503 observed that a person could be liable for the consequences of his lack of care to the world at large. However, this proposition was not accepted as it was too wide.

52. 14 QBD 273.

53. *Id.* at 288.

54. Winfield, *Law of Torts* 63 (6th ed. 1960).

55. Glanville Williams, *Text Book of Criminal Law* 597-623 (2003).

56. *U.S.* v. *Holmes*, (1842) 26 FC 360.

law.[57] The moral-legal dialogue proper is heard when some fundamental human right is being considered as when Lord Mansfield pronounced the status of slavery to be incompatible with the English law.[58] In the pioneer decision of *Sommersett* case, the assertion of a ownership by slave-owner over his slave was rejected. Lord Mansfield made it very clear that slavery was repugnant to English ideas that *Sommersett* should go free. In *Horwood* v.*Miller's Timber and Trading Co. Ltd.,*[59] the court rejected as unreasonable a contract which would have reduced a person to a condition of virtual slavery. This was followed by the statutory prohibition of the slave trade.

It is submitted that in the socio-economic circumstances of the ancient East, of ancient Greece and Rome and later of the southern states of the American Union, slavery was the background of civilized life. Humane persons saw no wrong in it. Aristotle and Grotius thought it natural. The Roman lawyers in the Christian period accepted it as *jus gentium* and so valid. But modern morality seems to declare, indeed to postulate, the immorality of treating a human being as a chattel.[60]

In the area of conflict of laws, general conditions of fairness and justice have played a particularly important part in developing this branch of law.[61] There are a number of judicial decisions, especially under the Anglo-American systems of law, where the courts without any specific authorization by the positive law to decide 'unprovided case' according to considerations of equity, have granted relief in novel situations on grounds of 'natural justice and reason'. There is, for example, the case of *Moses* v. *Macfelan*[62] wherein Lord Mansfield stated that a recipient of money was obliged by the ties of natural justice and equity to refund it.

Considerations of justice may also be thrown decisively into the scale when two principles of positive law or two judicial precedents pointing in different directions and suggesting different conclusions both appear to be from the point of view of logic applicable in a case. Cardazo, J in dealing with this question,[63] cited the case of *Riggs* v.

57. See *B* v. *B & E* (1969)3 All ER 1106; DPP Carey (1969)3 All ER. 16162.

58. *R* v. *Sommersett* (20 State Trials-I); for a re-appraisal of *Sommersett* case, see *Shyllon Black Slaves* in Britain.

59. (1917) 1 KB 305; see also *Chamberline* v. *Harvey* (1696) 5 Mod 186; *Forbes* v. *Cochrane*(1824) 2 B&C 448.

60. *Supra* note 46 at 49-50.

61. This was particularly true during the formative period of conflicts of law, when precedents upon which the courts could rely were scarce.

62. 2 Burr 1005 (1760).

63. See *supra* note 20 at 40.

Palmer[64] as an illustration of such conflict. The case decided that a legatee under a will who had murdered his testator would not be permitted to take the property bequeathed to him. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in law-making by courts.[65]

The case of conflicting interests such as national safety, sanctity of the person, sanctity of the property etc which will prevail over the other presents an interesting study in English law. *Sommersett's* case decided that in the choice between personal liberty and property, there is a discernible tilt in favour of the former. Respect for property has given rise to the rule that there should be no deprivation without compensation.[66] But the sanctity of the person and of property yield to the safety of the nation or society. Thus, in *Liversidge* v. *Anderson*,[67] the validity of the Home Secretary's order for Liversidge's incarceration was in question. The majority held that sanctity of the person must yield before national security.

In *R.* v. *Secretary of State for the Home Department, Exp Hosenball*[68] the principles of natural justice were modified in the national interest and the court of appeal held that in the national interest, the secretary of state did not have to disclose the source of highly confidential information on which he made a deportation order. *In Council of Civil Service Unions* v. *Minister for the Civil Service*,[69] the House of Lords held that the courts will not inquire into the exercise of the prerogative if this was in the interest of national security. Likewise with regard to the seizure of property, the national interest in times of peril might be held to justify it.[70] In *Entick* v. *Carrington*[71] moral attributes are attached to freedom from interference, to property, privacy and the absence of privilege from the law. These principles are embodied in the American Constitution, and the bill of rights.

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64. 22 N.E..188 (N.Y., 1889); see the comments of Ronald M. Dworkin, "The Model of Rules", in G.Huges (Ed.) *Law, Reason and Justice* 14-15, 21-24, 31-32 (1969).

65. Justice Felix Frankfurter in *National City Bank* v. *Republic of China*, 348 U.S. 356 at 360(1955).

66. See *Burmah Oil Co. (Burma Trading) Ltd.* v. *Lord Advocate* (1965) AC 75, (1964) 2 All ER 348. See the parallel case of the *First World War R* v. *Holliday* AC 260.

67. (1942) AC 206, (1941) 3 ALL ER 338. A vivid American Illustration in point is *Korematsu* v. *U.S.* 214(1944).

68. (1977) 3 All ER 452; (1977) 1 WLR 766 CA.

69. (1984) 3 All ER 935, (1984) 3 WLR 1174 HL.

70. Kings prerogative in *Saltpetre* (1606) 12 *Co Rep* 12; *R* v. *Hampden, Ship Money* case (1937) 3 State Tr 826.

71. (1765) 19 State Trials, 7.

American position

In the United States of America under the influence of individualism law guarded contractual freedom, property rights and individual freedom of action. For instance, judges have invalidated legislation, which interfered with these freedoms. Laws prescribing minimum wages[72] and maximum hours of work in industries[73] were struck down in this way by the Supreme Court of the US. The taking of property or abridgment of the rights of the owner was made subject to the doctrine of eminent domain.[74] That doctrine requires payment of full compensation by the state for the loss occasioned to the owner by taking of property or abridgment of property rights.[75]

The doctrine of police power[76] was invented in the US to counteract the excesses of individualism. By this doctrine, the state can regulate and control within reasonable limits the activities of the citizen in the interest of public safety, morality and the like public purposes. Thus, in wartime the war powers of the Government are interpreted in such a way as to enable the state to control every phase of the activity of the citizen. Price control of essential commodities, rent control, accommodation control, compulsory acquisition of private property etc., all these are cheerfully accepted in a time of emergency.

Similarly, in new deal legislation the court encountered serious departures from the ethics of individualism.[77] Since the days of the second Roosevelt, socially beneficial action is being accepted by the courts in derogation of individual rights and moral overtones sound in the pronouncements.[78] The atmosphere of thought changed with the appointment of new justices from individualistic freedom to collectivist concept of equality. It is to be noted that the concept of equality is

72. *Adkins* v. *Children's Hospital,* (1923) 261 U.S. 525-67 L. ed. 785.

73. *Lochner* v. *New York,* (1905) 198 U.S. 45-49 L.Ed. 937.

74. *U.S. Ex Rel. T.V.A.* v. *Welch,* 327 U.S. 546, 554; *Kohl* v. *U.S.,* 91 U.S. 367.

75. *Chicago B & R Co* v.*Chicago,*166 US 226; see Kauper, *Constitutional Law: Cases & Materials,*1083-4(1960).

76. For details see *Muller* v. *Oregon* (1908)208U.S.412-52L.Ed.551; *Dent* v.*West Virginia* (1889)129 U.S.114-32 L.Ed.628; *Donglas* v. *Noble* (1922) 261U.S.165-67 L. Ed. 590; *Weigle* v. *Curtice Bros* (1919)248 U.S. 285-63 L.Ed. 242; *Nebbia* v. *New York,* (1934) 291 U.S. 502-78 L.Ed. 940; *Jacabson* v. *Massachusetts,* (1905) 197 U.S. 11-49 L .Ed. 643; *Block* v. *Hirsh,* (1921)256 U.S.135-65 L.Ed. 865; *Mugler* v. *Kansas,* (1887)123 U.S. 623-31 L.Ed.205; *Murphy* v. *California,* (1912) 225 U.S. 623.

77. Charles E. Hughes, *The Supreme Court of the US,* 84-7(1936); Cope, Alfred Haines, *Franklin D. Roosevelt and the Supreme Court* (1952).

78. *Breithaupt* v. *Abram* (1957) 352 US 445; Jackson, *the Supreme Court in the American System of Government* 23 (1965).

richer in ethical overtones than is the concept of individual freedom. An increase in the claims of the coloured population has given a new meaning to equality and in *Brown's*[79] case the subtleties of equality were recognized. The American Supreme Court virtually faced with this problem in the application of desegregation law.

The municipal law, as actually administered in Europe and America is composed of ethics and history.[80] In *Dred Scott* v. *Sanford*[81] Curtis J asserted dogmatically that slavery cannot exist except as a creature of municipal law. Slavery being contrary to natural right is created only by municipal law. It appears that Curtis assumed apparently Lord Mansfield statement of English law of the last half of the eighteenth century[82] that was declaratory of natural law. It is submitted that experience as the basis for the development of law by the Supreme Court of America is clearly reflected in these trend setting cases. The court realized that the values which guided the society when *Dred Scott* case or *Plessy* v. *Ferguson*[83] came to be decided had undergone sea change and could not stand the scrutiny of the age when the judgment in *Brown's* case or *Bakke's*[84] case was given.

When there is ambiguity and doubt in the law, the ethical convictions of the judge as to the rightness or wrongness of a certain solution will often have a decisive bearing upon the interpretation of a statute or the application of an established rule to a novel situation.[85] As Cardazo J has stated, judges will stretch a point here and there "in response to a moral urge."[86] In a similar view, Frankfurter J has said that the function of the judiciary is not so limited that it must sanction the use of federal courts as instruments of injustice in disregard of moral and equitable principles, which have been part of the law for centuries.[87] A reliance on moral ideas may also occur when, courts in overruling a precedent, depart from the doctrine of s*tare decisis*. Hocking points out that the principle of *stare decisis* is an ethical principle.[88]

Furthermore, a judge may become confronted with the moral dimension in the law when he is called upon to enforce an enactment which is totally repugnant to the community's sense of justice. Morals

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79. *Brown* v. *Board of Education*(1954), 345 US 972.
80. Pomeroy, *Introduction to Muncipal Law* 7 (1864).
81. 19 How. 393, 624.
82. 20 *State Trials* 1, 82.
83. 163 US 537 (1896).
84. *Regents of the University of California* v. *Bakke*, 438 US 265 (1978).
85. See *Supra note* 32.
86. Benjamin N. Cardazo, *The Paradoxes of Legal Science* 43 (1928).
87. *United States* v. *Bethlehem Steel Corporation*, 315 US 289 at 312-13 (1942).
88. Williom E. Hocking, "Ways of Thinking About Rights" in *Law: A Century of Progress* II 1259 (1937).

do more than serve as a last resort when all else fails. As Gray asserts, moral ideas and statutory provisions are but raw materials from which courts make the law by judicial decision.[89] When case law and statute are wanting, the judicial decisions of the past are but raw materials for the judicial decisions of the moment. Therefore, it is submitted that courts decide without law on the basis of sources of law.

Indian position

The values which India cherishes have been incorporated in the Constitution as fundamental rights and directive principles of state policy. These include equality before the law, freedom of speech, religion etc. Broadly speaking, these are the values prized by society at the present day not only in India but throughout the democratic world. These values are deeply rooted in the great epics and greatly embedded in the *Vedas* etc. Krishna Iyer J rightly observed "we cannot regain our past glory unless we realize the importance of morality in our present legal system."[90] Just as morality fosters and strengthens the soul in the same way morality in law provides greater force to it and commands voluntarily obedience from the people.

Even in ancient Hindu law great importance was given to *sadachar*[91] which meant 'good conduct'. It represents the principles of good behaviour. It deals with the principles of right and wrong. It relates to good and virtuous living. It is equal to righteousness and honesty. Further, custom must not be immoral or opposed to public policy or against equity, justice and good conscience. In *Madhura Naikin* v. *Esu Naikin*[92] the Bombay High Court has held that the custom of adoption of girls for immoral purposes is illegal as it was designed to perpetuate this profession. Likewise customs regarding divorce have been held to be immoral, a custom permitting a woman to desert her husband at pleasure and marry again without his consent etc., have been held immoral. A divorce granted by the caste panchayat also has been held opposed to public policy and could not be enforced by the courts.[93] The custom permitting marriage with daughters' daughter has also been held[94] immoral. An agreement is unlawful for immorality.[95]

89. Gray, *Nature and Sources of the Law* 84, 170 (2ed.).

90. N.V.Paranjape, *Studies in Jurisprudence & Legal Theory* 360-61 (1997).

91. Manu said *Sadachara,* aspect of *Dharma* corresponds to law, which in modern sense means a code of conduct that modulates human relations.

92. (1880) *ILR* 4 Bom 545.

93. *Nallathangal* v. *Nainam Abbalam,* AIR 1945 Mad 308.

94. *Balusami* v. *Balakrishna,* AIR 1957 Mad. 97.

95. S. 23 of the Indian Contract Act, 1872 declares that the object or the consideration of an agreement is not lawful in certain cases.

It is rather unfortunate that the modern law bothers little about the moral or ethical values of life. It is meticulously confined to rights and legal obligations and is silent about moral obligations or improprieties. A society is bound to decay without maintaining high standards of decency and morality. It is imperative for its preservation that the base, carnal and low instincts of its members must be curbed. Hence, the need arose to include the ground "decency and morality" in article 19(2) of the Indian Constitution to justify restrictions on freedom of speech and expression, which may otherwise be conveniently abused for deliberately lowering the public morals.[96] The Supreme Court in *Ranjit D. Udeshi* v. *State of Maharashtra*[97] by applying the *Hicklin*[98] test upheld the constitutionality of section 292 of IPC. This clearly indicates that the framers of the Indian Constitution did not completely ignore moral element in law. The courts, however, are expected to preserve the ethical values of law by judicial intervention whenever the laws framed by the legislators are vitiated by immorality.[99] The moral fabric of Indian society can be preserved if the judiciary acts as an effective check on legislature and executive when they attempt to outrage public morals by their nefarious activities.

In *Mr. 'X'* v. *Hospital 'Z'*,[100] the Supreme Court has held that although the right to privacy is a fundamental right under article 21 of the Constitution, it is not an absolute right and restrictions can be imposed on it for the protection of health or morals. Right to marry is an essential element of right to privacy but is not absolute. Marriage is the sacred union, legally permissible, of two bodies of opposite sexes. The court said that in case of a conflict between two fundamental rights available under article 21, the right which would advance the public morality or public interest would alone be enforced through the process of the court.

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96. See K.C.Joshi, "The Need for Curbing Obscenity", *ALR* 97 (1970-71); R.D.Garg, "Many Facets of Obscenity" *id* at 72; see also A.N.Grover, *The Law of Obscenity and Freedom of Expression* 14 (1968).

97. AIR 1965 SC 881. S. 292 of IPC makes punishable to sell, distribute obscene literature etc.

98. *Queen*. v. *Hicklin* (1868) 3 QB 360 at 371.

99. Right to freedom of religion guaranteed under Art. 25 is subject to public order, morality and health. The Supreme Court in *Acharya Jagadheeswarananda Avadhutha* v. *Commissioner of Police, Culcutta* (1984) 4 SCC 522 held that prohibition of "Tandava" dance at public places by Ananda Margis carrying lethal weapons and human skulls in the interest of public order and morality was not violative of Art. 25.

100. AIR 1995 SC 495.

Another example at balancing conflicting rights[101] is seen in *T.K. Rangarajan* v. *State of Tamilnadu.*[102] The Supreme Court in this case deliberated upon the friction between the individual interests and the society's interest at peace and well-being, and concluded that where larger interests of the community are in question, the individuals freedom of expression takes a backseat. It is submitted that the court gave weightage to maximum satisfaction of interests – the current natural philosophy[103] and held that there is neither any fundamental, legal or any moral right to strike on the part of workmen. In this case the court reiterated its earlier ruling in *Communist party of India (Marxist)* v. *Bharath Kumar and Others*[104] for holding that a *bandh* imposes unreasonable restrictions to the fundamental rights of the people in general causing hardship to them.

To take a simple illustration a debt barred by time is irrecoverable under the law but such law is clearly against morality. Again the Special Bearer Bonds (Immunities & Exemptions) Act, 1981 which appeared like a reward for the tax-evaders by granting immunities and exemptions under the Income Tax Act, 1961, Wealth Tax Act, 1957 and the Gift Tax Act, 1958, while burdening the honest tax payer with tax-liabilities under these Acts, was against all norms of morality. The above legislation was challenged in the so-called *Bearer Bonds* case.[105]

In *Bearer Bonds* case the petitioners contended that morality is the foundation of laws and no law is valid if it is manifestly lacking in moral foundation. The Act that confers legal sanctity to black money and rewards tax-evaders and black marketeers is totally devoid of all standards of morality and vitiated by gross immorality and is manifestly against public interest. However, the Supreme Court by majority judgment held the Act valid because it helped to unearth bulk of black money, which would otherwise remained secreted, and hence the enactment was in the interest of national economy. It is submitted that this decision completely overlooked the reasonableness of the impugned legislation on ethical grounds.

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101. Theoretical explanation of balancing conflicting rights is to be found in Ronald Dworkin, *Taking Rights Seriously* (1978)

102. (2003) 6 SCC 581.

103. See Sai Ramani Garimella, "Balancing Conflicting Interests – The Judicial Response" in G. Manohar Rao (ed.) *Constitutional Development Through Judicial Process*214-18 (2006).

104. 1998 (1) SCC 201.

105. *R.K.Garg* v. *Union of India,* AIR 1981 SC 2138.

In the case of pollution around the Taj Mahal,[106] air pollution in Delhi[107] and *In Re Noise Pollution*[108] the Supreme Court has been virtually setting policy on critical issues of the environment. The ban on smoking in public places ordered by the Supreme Court[109] was another instance of activism as was the order drafting detailed rules for protection of women from sexual harassment in the work place.[110] Many of those orders were based on creative legal reasoning that read into the right to life. In no other democracy are such issues of policy decided by the judiciary. It is submitted that the Indian judiciary known for extended activism has been doing social and economic policy making in the above said areas. It is in line with 'policy' approach to law in the place of technical 'doctrinal' approach to law as advocated by Lasswell and MC. Dougal.[111] It is submitted that morality plays a significant role in such policy choices.

The orders of Supreme Court in *PUCL* v. *Union of India*[112] bear great relevance for social rights jurisprudence. The human rights approach of the Supreme Court[113] ordering payment of salaries to the starving employees of PSUs who were denied their salaries for a long time is another shot in its arm. Incorporating of international legal norms into the municipal field by the Supreme Court though they are of soft laws is a welcome development.[114] The apex court's decision in *ONGC* case[115] that an award could be set aside if it is contrary to justice or morality was reiterated in *Hindustan Zinc Ltd.* v. *Friends Coal Carbonization.*[116]

However, the Supreme Court has overlooked the rights of the poor while allowing the construction of mega projects. For example in *Narmada Bachao Andolan* v. *Union of India*[117] the court's ideology

106. *M.C. Mehta* v. U*nion of India,* AIR 1997 SC 735.

107. *M.C. Mehta* v. U*nion of India*, AIR 1996 SC 2231; *M.C. Mehta* v. *Union of India*,(2003) 10 SCC 561.

108. AIR 2005 SC 3136. The court said that under Art. 21 every person has a right to live in a noise free atmosphere which cannot be defeated by the exercise of right under Art. 19 (1) (a) of the Constitution.

109. *Murali S. Deora* v. *Union of India,* AIR 2002 SC 40.

110. *Vishakha* v. *State of Rajasthan,* AIR 1997 SC 3014.

111. See Lasswell and MC Dougal, "Legal Education and Public Policy", 52 *Yale Law Journal* 2003 at 212 (1943); see also MC. Dougal, "Law as a process of Decision: A Policy–oriented Approach to legal study", 1 *Nat L For* 53 at 58 (1956).

112. (2003) 9 SCALE 835 at 840; (2004) 5 SCALE 484.

113. *Kapila Hingorani* v. *State of Bihar,* (2005) 2 SCC 262.

114. *PUCL* v. *Union of India* (2005) 5 SCC 363.

115. *Oil & Natural Gas Commission* v. *Saw Pipes Ltd* ., AIR 2003 SC 2629.

116. (2006) 4 SCC 445.

117. AIR 2005 SC 2994; see also *N.D.Jayal* v. *Union of India,* AIR 2004 SC

tended to subordinate environment to development. In *P.A.Inamdar* v. *Maharashtra*[118] the court's ruling was against social justice wherein quota system was done away within private educational institutions. This was neutralized by constitutional 93rd Amendment Act, 2005 in the same way when the first ever constitutional Amendment, 1951 was passed to undo *State of Madras* v. *Champakam Dorairajan*.[119] The legislative measure seeks to harmonize the claims of the citizen's right to freedom with the obligation of the state to fulfill the promise of social justice to weaker sections. This clearly shows that there is a set back to pro-poor interpretation of the Supreme Court inspired by value-oriented jurisprudence. Is it due to change in economic policy of the government?[120] Does it augur well particularly when country's economy is in transition? This will definitely lend its credence to the statement that the shift towards market economy does make social justice irrelevant.

Conclusion

From the foregoing discussion, it is concluded that law and morals are the two agencies of social control. The ethical element and the infusion of morals in the legislative as well as judicial law making were never excluded. Further, the separation of law from morality doctrine was not extended to the field of law-making. As Holmes J[121] who was a protagonist of the doctrine rightly remarked that "the law is the witness and external deposit of our moral life". Moral considerations do influence rules of law. Though the influence of morality is indispensable in the process of law making, it is submitted that morality of the courts is higher than the morality of politicians.[122] Because legislation is generally the product of the will of politicians, who are liable to be affected by popular passions of the hour.

The "cash for query" episode in India has raised a substantial question of morality and constitutionalism.[123] The involvement of legislators in the human trafficking case hitting the headlines of the

118. AIR 2005 SC 3226.

119. AIR 1951 SC 226.

120. For details see *Hombe Gowda Educational Trust* v. *Karnataka* (2006) 1 SCC 430; *U.P.State Brass Ware Corporation Ltd.* v. *Uday Narayan Pandey,* (2006) 1 SCC 479.

121. O.W.Holmes, "The Path of the Law", in *Collected Legal Papers* 170 (1920).

122. Dicey, *Law and Public Opinion in England* at 368 (1962).

123. Parliament responded quickly by expelling all the tainted MPs who figured in the sting operation. The motion was passed on the last day of the winter session, 23 Dec. 2005. See *T.R. Andhyarujina,* "Expelling Members from the Parliament", *The Hindu* 2 Jan 2006 at 10.

newspapers has again got its implications on their moral values.[124] Judicial law, on the other hand, is made in the serene atmosphere of courts of justice by persons trained to hold the scales of justice evenly. Judicial law is thus more equitable than statutory law. Frequently, the judiciary denounces statutes as wrong, tyrannical and unjust. However, the precepts of morality and ethical values were thrown to winds by the parliamentarians in power during the impeachment motion against Ramaswamy J by the political strategy of abstention from voting just to save him from being condemned.[125]

In the name of justice, equity, good faith and conscience morals have infiltrated into the fabrics of law. It is the morals that ensure obedience to law apart from legal sanctions. When morality has changed, the law has tended to follow. Thus, morals perfect the law. Law is only a branch of morals in the wider sense. The ultimate foundation of law and morals is one and the same. It is submitted that ethics is the common foundation. The Declaration of Human Rights, the U N Charter, the principles of international law, humanitarian law, the Nuremberg principles are the glaring examples containing rich moral principles having strong ethical background.

*A.Raghunadha Reddy**

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124. See *The Hindu* 5th Apr 2007 at 1

125 The impeachment motion was brought against Justice Ramaswamy on 10th May 1993. He resigned subsequently on 13th May 1993

* Professor of International Law, The Tamil Nadu Dr.Ambedkar Law University, Chennai.