Title of the Paper: **Morality is Backbone of Law: Myth or Reality**

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Abstract:

Purpose – The present paper deals with law and morality, how they differ from each other. The purpose of author is to critically analyze the two terms, considering the contemporary scenario. These two terms are very much connected yet they are distinct.

Design/methodology/approach – I resorted myself to various article of scholars such as Ronald Dworkin, H.L.A.Hart, Dooyeweerd and Books.

Findings – The conception was, morality has been an integrated part of law as part III and part IV of Indian Constitution also supports the same but Modern legal positivist approach regards it obsolete and I found, today Law can be identified without reference to morality except where law accepts the moral criteria for creating it. Morality stems from individual’s conscience and values of a society, therefore, what morality means to me, may not be to you. It is very technical to create a law on a point when there is conflict of opinion and morality always differs from individual to individual, however, morality cannot be invariably on the back of every statute. If something is immoral does not inevitably makes it illegal and vice-versa. This makes difference between the two.

Research limitations/implications – My research paper is significant in order to determine the role of morality in drafting laws, to what extent it affects laws and available alternatives.

Practical implications – It would help others to correct their perception about morality and law.

Originality/value – The study is not a copy of any paper or article. The present work is original and what the author thinks about the subject.

Keywords – Law, Morality, Contemporary Scenario and Alternatives.

Paper type – Research Paper
“The distinction between morals and law can be formulated very simply. Morality furnishes the criterion for the proper evaluation of our interests; law marks out of limits within which they ought to be confined.” - Korkunov

Introduction:

According to the sources of Hindu Law like Shrutis, Smritis and Vedas, there was no distinction between law and morality. Ancient times speaks that both the terms conveyed same meaning. It is evident that both law and morality serve to channel the behaviour of an individual. Mimansa has laid down certain rationales, which separates obligatory from recommendatory injunctions or norms. Around 17th or 18th centuries, theories of natural law were very famous and they had moral foundation for their existence but in 19th century, Austin came with an argument that law has nothing to do with morals. He said, ‘Command of the sovereign is law’ and law is the subject matter of jurisprudence and not morals. Later on in 20th century, Kelsen also accepted his view to the exclusion of all the matters from jurisprudence except law. This was the situation prevailed almost across the globe but now, the meaning of both the terms has changed.

Some people conceives morality in terms of an immutable percept of conduct or discoverable by cause. It is an expression of human postures which may vary from society to society or from person to person. What morality means to you may not be means to me. For example, in some parts of Rajasthan, Child marriage is considered as good and it is their custom or accomplishing morals but for rest of the society, it is not a good practice. From the Greek period to contemporary world, many researchers have tried to clarify these aspects but they failed because it lies within the human psyche, which is extremely versatile and random. A morality can have negative impact on one set of people and on the other hand, another morality can have positive impact on the other set of people. Law and morality both are
normative in nature and the main distinction between law and morality is that law is coercive whereas morality is not.

Morality is the basis of law only at the places where the law accepts the grounds of morals for making it otherwise, in contemporary world, morality and law has different meaning. Law can be identified without any reference to morality. The doctrine of “factum valet”’’ is discerned in modern times, which provides that an act which is in contravention of some moral principles, if accomplished in fact, should be considered valid. Even Privy Council has made distinction between law and morality in its judgements.

**Law:**

These are the rules and regulations which has sanction of the state and enforceability on its back. Law of the land is regulations where an individual has to submit himself to the will of the state or society. Violations of any law may bring a loss or reduction in the property or physical detention of the accused. The chief object of the law is to preserve order and smooth functioning in the society. It is binding in nature which has to be applicable over all sets of people except stated in law itself.

**Morality:**

My inner conscience is my morality. It is best to control behavior solely on the basis of morality. As law is coercive in nature, one person follows the legal rules due to fear of consequences of not following, in the form of punishment but when a person follow the rules or morality on account of its conscience or will, it is the best way to control behaviour. There will be least chances for any misconduct if it is a good moral. These are end in themselves and should be followed because they are good. The social value of law over morality does not hold good as use of morality will be sufficient as said above.
**Nexus of Law and Morality:**

Though, these terms were synonyms at one point of time but in modern age, both the terms have significant independent meaning which can be found in the respective sphere. Law is a code of rules and regulations governing human conduct. It consists of positive and negative directions imposed by sovereign. As it is a coercive in nature, therefore, every one falling under its territory, bound to follow these sets of rules.

Relation between law and morality can be traced in following ways:

a) Morality as basis of law (former Concept)

b) Morality as basis of law where law acknowledges the morality for making it (Present Concept).

Morality generally means ‘rules governing human behaviour’ or sometimes one’s personal views about a thing or activity which should not be imposed upon others as these are not enforceable. As already said, earlier law was purely based on morals. When state came into being, the society opted for those values and rules which were important from its point and put its own sanction behind it. These norms were known as law. The rules meant for good of the individual and which were not observed continuously by the state in its real term called morals. However, law and morality have same inception but by the time, they diverged in the course of its development. Many rules are mutual for both law and morality like murder, theft, decoity and robbery are some of the acts, against law as well as morality. In *Queen v. Dudley & Stephens*¹, three seamen and a boy were cast away in the storm on the high seas in an open boat. They had no food and drinking water in the boat. In order to save themselves from certain deaths as many days had passed without food, they killed the boy and jury returned a special verdict. CJ Colerige observed: “Was it more necessary to kill him than one of the grown up men? The answer must be No…..” The bench of five judges held, no man has
a right to take another’s life to save his own. However, it cannot be said that morals are the basis of legal rules.

It can be said that usually law has some base of morals but in contemporary world, law and morality can be described separately. There are many things, which may be immoral but not necessarily illegal like cheating on your friend or spouse, breaking promises (for certain sets of people) and which may be illegal but not necessarily immoral like drinking under age, abortion (for certain sets of people).

Some scholars argue that “morality cannot be legislated” and I am agree with those scholars because it is individual’s will or conscience. For example, in Indian Society, morals say that inter caste marriages or love marriages should not take place but when two individuals, with their will and consent want to marry, it is an independent state and everyone has right to choose his life partner according to his/her will. Where the issue of intervention by the law in such Indian democratic system arises? Indeed, that person has to take a look at his family but law has nothing to do with such situation.

Take another issue of living relationships, which has a moral ban on it. My view is that when two major individuals with their free consent decide to live together, where the question of infringement of moral standards arises. There is no infringement of moral standards and no intervention by law. There are also other issues like homosexuality, prostitution which are conflicting in order to decide morality and law, therefore, morality cannot be legislated and as it depends upon the wishes of the individual except under certain circumstances.

Morality has power to control the behavior of an individual therefore, it importance must not be excluded in the society. Even International Humanitarian Laws, laid certain moral standards as ingredient of law. Whenever, morality raises affirmative impact on society, a complete separation of law and morality is not possible in order to maintain balance. The aim
of the law is to provide justice to people and justice in its popular meaning based upon the morals.

In Stephen’s case\(^2\), it was held that the principle evolved that no man has a right to take another’s life to save his own life.

In India, Supreme Court has also laid that in case of conflict of fundamental rights of two individuals, the decision is to be made on the basis of morals. In the case, the appellant’s blood sample was detected HIV (+). When due to disclosure, it was acknowledged by the ‘A’, fiancée of appellant and the proposed marriage of the appellant was called off. The appellant sued the hospital authorities for damages on account of violation of appellant’s right to privacy as well as doctor’s duty to maintain confidentiality. The Apex Court held that “where there is a clash between two fundamental rights, as in the instant case, namely the appellant’s right to privacy as a part of right to life and A’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 the court, for the reason that moral consideration 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”\(^3\).

Law cannot make people completely perfect. It is just for having minimum standards and setting up of standards at very high level can render the laws very ineffective. The purpose of law is not to render laws of the land ineffective but to maintain law and order in the country. If someone violates these minimum standards, then punishment is remedy.

In this way, morality has got recognition but it does not convey that all the legal rules are based on morals. There are legal rules which are not based on morality. Some of the examples are vicarious liability, principle of Absolute liability where one man is punished for
the act of another and one has to pay the incurred obligations in a case, when he has not done any act, arising any obligation, respectively.

**Distinction:**

In modern times, there is a distinction between law and morality. Roscoe Pound states that “as to application of moral and legal percepts respectively, it is said that moral principles are of individual and relative application; they must be applied in reference to circumstances and individuals, whereas legal rules are of general and absolute application”.

The morality depends upon the conscience or will of the individual. An act moral for me may be immoral for you and morals mould the character of an individual. The best example can be taken of marriage in Hindus and Muslims. In Hindus, only one marriage is considered as sacred and bigamy is a sin and in Muslims, they are allowed to marry four women at one point of time. Law is concerned with the society collectively and not with the wishes of the individual.

Law looks for act of the individual, meaning thereby, it has nothing to do with the motive of the person, committed the wrong whereas morality sees for the motive or intention of the person, what his conscience says.

There is a famous maxim, “Ignorantia juris non execusat” meaning thereby, ignorance of law is no excuse. It is presumed that one should know the law of the land, if a person does not follow the law; state is empowered to punish that person whereas morality is not coercive in nature. State has no power to punish for violation of such morality.

In case of application of law, it has universal character with no ambiguity or vagueness whereas in case of application of morality, it differs from case to case as it is vague and uncertain. It is a matter of choice of a person.
Despite of the differences stated above, there is affinity between the two. Law ensures conformity to the code of behavioral law and it is essential as it cannot completely ignore the ethical and moral aspects. If there are laws, not up to the standards of ethical behaviour, such laws cannot survive in contemporary India. In a sensitive country in terms of ethics like India, riots take place even on very small causes. In order to survive, a law must meet the expected criteria or social consciousness.

**Current Judicial Trend with Contemporary Issues:**

Presently, scenario is such that law and morality has different meaning and application. These values are dynamic. In this changing society, social values are changing rapidly. The recent controversy of Section 377 of IPC, 1860 can be taken as example in which Delhi High Court permitted the gay marriage, on the other hand, section 377 talks about homosexuality and lays down that “carnal intercourse against the order of nature with any man, women or animal” shall be punishable. As this offence is unnatural, therefore, immoral and socially insufferable and thereby imposes liability on the person. Though, it was immoral (for many) but the court permitted for the same in that case.

Today, for a set of people, extramarital sex or adultery is one of the grounds to broken marriages. In *Smt. Sarla v. Mahendra Kumar*, the Rajasthan High Court, awarding maintenance to a wife who was leading an adulterous life held, “It is not unnatural that when a husband leaves his newly wedded wife alone and himself goes away at a distant place to earn his livelihood, a lady who is suffering sexual deprivation may develop intimacy as well as illicit relations with a stranger.”

When it is a crime, under section 497 of IPC, 1860 as well as civil wrong, which can be remedied by way of divorce, to commit adultery, the court itself reiterates that a lady can
develop illicit relation with a stranger if suffering from sexual deprivation. Further, court itself has not taken into account the moral aspect related to the subject of the case and gave its conclusion against the morality. The National Women’s Commission has also recommended that “the issue of adultery should be viewed as a breach of trust and treated as a civil wrong rather than as a criminal offence” because there may be chances to save her marital life at the instance of woman. It shows the liberal view of the court, which emphasizes on changing notion of morality.

Another criminal issue is obscenity, defined by the Indian Penal Code, 1860, where the Apex court through no. of its judgements sets the principles that it Obscenity means “the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive” and vary from country to country depending on the standards of morals of contemporary society.” This verdict of the Supreme Court states that it also depends upon the morals, which differs from person to person or society to society and according to me, by this verdict, court has accepted the view, that morals and law are two different things in contemporary society.

In K.A. Abbas v. Union of India, the Court held that sex and obscenity are not always synonymous and it was wrong to classify sex as essentially obscene or even indecent or immoral. Further, in Bobby Art International case, regarding the depiction of the rape scene in the film Bandit Queen, the Court held that the object was not to arouse prurient feelings but revulsion for the perpetrators. In determining, whether an act is obscene, regard should be given to recent times or modern scenario of that place.

Euthanasia is also a debatable issue which can be contextualized in terms of morality and law. Whether a person, who is on a death bad, who is not able to do anything on his own except breathing, who, even after large no. of efforts cannot be made to handle the things,
who is completely dependent on others for his each and every caring activity, has right to
die? The very phrase which comes to my mind is, if law ensures right to life, should it also
provide for right to die? The argument comes from the world is that, it is against the moral
principle to make the person died but considering the above situations, where a person has no
expectation of a healthy human life, he should be given right to die. Even when it is against
the moral values of the society, a person should be given to end with his life but law does not
provide for the same. According to me, sufferings of such person should be end rather than
following the morals even when, those are not his own.

In a recent case, *Aruna Shanbaug v. Union of India and others*\(^1\), Supreme Court permitted
the euthanasia after the completion of 37 years by the lady on the bed. The petition was
presented by one NGO working in the concerned field but I did not find the worth for not
permitting euthanasia earlier on the justification of immorality. At the end, court permitted.
Needs are changing rapidly so as morals. Therefore, law and morality are separable and due
to the rapid growth of the society, morals cannot stand static.

In *Ram Chandra Bhagat v. State of Jharkhand*\(^2\), there was difference of opinion between the
judges. According to Justice Katju, “Often an act may be regarded as immoral by society, but
it may not be illegal. To be illegal the act must clearly attract some specific provision of the
Penal Code, or some other statute. In the present case, it can be said that the appellant has not
behaved like a decent man but, in my opinion, Section 493 of IPC is not attracted” and thus
law is different from morality Whereas Justice Mrs. Mishra said “While there is no difficulty
in accepting the position that law and morality might stand on a different footing although
they are inextricably linked in my perception, yet I agree that legal decision cannot be based
purely on morality,” and it can be said that moral aspects of a particular actions are relevant
to determine the act of the accused.
In *Naz Foundation v Government of NCT of Delhi*¹³, Chief Justice A. P. Shah and Justice S. Muralidhar held “Consensual sex amongst adults is legal, which includes even gay sex and sex among the same sexes”. Section 377 of IPC, pertains to homosexuality or consensual sex among major people. It was a historic decision by court of law which has not been given since 1950s and ultra-virus to the Constitution. Now changing moral values are visible after the decision of the court.

In *D. Velusamy v D. Patchaiammat*¹⁴, after examining the evidences, Apex Court came to the conclusion that women who has a living in relationship with a man can claim for maintenance under section 20 (1) (d) of The Protection of Women from Domestic Violence Act, 2005. The subordinate court was declined to grant maintenance as the lady was not legally wedded wife. They said “Indian society is changing, and this change has been reflected and recognized by Parliament by enacting The Protection of Women from Domestic Violence Act, 2005”.

Living relationship is a new phenomenon, which was not recognized by the law before the Act of 2005 and judgement of this case but now considering the dynamic social values and morals, court awarded the maintenance to the lady without encountering it as immoral by the society.

If one looks at Preamble of Indian Constitution, in the end, it endeavours to accomplish the morals and it indicates that moral of the contemporary age.

Considering all these cases, it can be said that social values of the people have changed due to globalization and rapid growth of the country.
**Critical Analysis:**

H.L.A. Hart says that existence of law be identified with reference to legislations, without reference to morality except where the law itself accepts the moral criteria for its incorporation and Dworkin states that law necessarily involves a moral judgement. If law subordinates itself to the morality, then theory of human rights will be violated. Often people believe that law provides moral justice but it does not happen always. Dworkin has been criticized by the scholars at many instances. Law has to maintain a balance between individual’s conscience and interest of the society considering morals. It can be said that morals are one of the criteria for incorporating laws but there are also other grounds which prevails along with morality. Law and morality has become a separate concepts and morality can be identified without any reference to law and vice-versa. Immanuel Kant has distinguished the concept of law and morality by saying that law deals with external conduct of human being and morality deals with internal conduct of a person.15

A vigilant legal system has a great value under democracy. In the era of dynamic perceptions of life, legal system plays key role. As I said people believe that law provide for moral justice but it can be seen often that so called obvious criminals being acquitted on technical grounds which lead to the failure of criminal justice system for not providing justice to all. Indian Criminal Justice System is Acquisitorial Justice System which provides that prosecution will have to prove its case beyond reasonable doubt. There must be chain of the evidences leading to the guilt of the accused for getting an order of conviction. Any room in evidences or any doubt may benefit the accused in form of acquittal and this is reason that conviction rate is very low whereas In civil proceedings, dismissing the suit merely on technical grounds leads to injustice with the other party but this defect can be cured in most of the situations and that’s how it differs from criminal matters.
No. of critics have given their opinion on the separation of law and morality. Morality is inner conscience of an individual and in such situation; legislations have to take much precaution while making law, keeping in view the interest of the whole society, which even therein, may differ from individual to individual. There are instances wherein law has not confirmed the expected standards of the morality. According to traditional approach, a law must be obeyed under all circumstances until changed by the authorities but there are many illustrations where breaking a bad law was more preferred than to obey it. It shows that bad laws have been made by the legislatures which were not followed by the people of the society. Today, law is avoiding the moral principle for decisions by courts. Law believes in evidences rather than morals. If something is opposed to moral policy and evidences are leading to conclude it, court concludes it on the basis of evidences except where the situation of grave immorality exist.

I believe that earlier morality was the sole basis of law and now it is one of the bases for incorporating law. Law sometimes claims moral aims and if it succeeds in such aims and claims, it can be termed as morally justified law. Former concept has taken paradigm shift in modern time. If a person already believes in one act and later on, state comes with a law making it binding, that law will become morally justified law for that person because he was already a follower of that behaviour but it will be difficult for those, who will acknowledge it, only after came into being as binding. It may prove burdensome for those people but they will have to follow the rules. Such sort of situation should be curtailed from the society, because it equates the law and morality at same footing, which in reality are different.

Some scholars have argued that nothing is legal unless it passes a test of morality. I do not agree with such proposition because it is not necessary that every law should be backed by morality, every law has its own pros and cons and even in order to have beneficial
implication on society, law need not to pass the test of morality except under exceptional circumstances.

**Conclusion:**

In the end, I would like to conclude and support the contention of H.L.A. Hart that law and morality is separate. The title of this manuscript, “Morality is Backbone of law: Myth or Reality”, is partially myth and partially reality. Myth means the former concept of incorporating law has changed. Today, legislations have to take care of the other aspects touching the need of the society and which are beneficial for the society in some way. Reality, on the other hand, conveys that still the culture of creating law on the basis of morality prevails but only at the places, where law expressly accepts the moral criteria for its making and nowhere else. Morality remained no more backbone of law in its strict sense. A hard jacket formula cannot be applied by the law to enforce the morality and the degree of enforcement of moral principles depends upon the cases and circumstances. If morality is giving rise to injurious effect on the society, such sort of morality should not be legislated. An example is Valentine’s Day is considered immoral under Indian Society as can be seen from the acts of Shiv Sena, such acts should not be legislated in any circumstances as argued by scholars that Morality cannot be legislated. Changed life style, freedom, liberty has its place in law and in such situation; dependence of law on morality is not possible. The novel India must reflect in the law of the land or statutes and it is taking place as can be seen from permitting of homosexuality, permitting euthanasia etc. Further, restrictions imposed on the laws of obscenity must be exercised liberally as morals differ from person to person. In 1980’s, Sensor Board exercised its power in strict sense, meaning thereby, there were no chances of vulgar scenes in the movies but the change can be seen in contemporary movies, which need not to be discussed. People are getting open in terms of their thinking, morals and
perceiving, the need of the day. Every system of law must be created to bring some positive changes in the life of people and should not restrict itself to the morals so as to have negative impacts for many.

Indeed, in the form of justice, good faith, equity and conscience, morality has entered into law and legislature has to be careful at the time of incorporating law because an act or stipulation cannot be inserted into statutes, which is completely against the morals of the society but in the court of law, when it comes to technicalities, often morals disappear. Some scholars propose that law governs each and every activity of human being but in my opinion, it is not possible. Large no. of activities of human beings are governed by morality. Further, law and morality can be same when morality and public notion is same and law and morality cannot be same when morality and public notion is in engagement. Morality and public opinion cannot be same if seen in terms of each and every individual.

Modern age has emphasized on the morals rather than law because ultimately, law is like last resort in which people live with the apprehension in their mind and due to which they follow the same but according to me, if you have intention to obey something due to morals, then you will do that with your own will and that is better than living under apprehension.

Law sets the rules and regulations keeping in mind the relation of an individual with the state and each other but in reality, it does not maintain the wishes of each and every individual of the state. Everyone has its own different morals and they want to be governed by those morals. One argument which comes to my mind is that law cannot maintain the wishes of each and every individual because then everyone will be governed by separate laws or so called their morals but if law is not able to treat wishes of each and every individual, then it can be taken as infringement of rights of a person. Everyone has right to life according to his will not amounting to any evil conduct.
Notes:

1 14 QBD 273
2 supra
3 Mr. X v. Hospital Z (1998) 8 SCC 296
4 ‘Law and Morals’
5 1989 Cri.L.J. 729.
9 (1970) 2 SCC 780
10 Bobby Art International v. Om Pal Singh Hoon (1996) 4 SCC 1
11 Decided on 7 March, 2011
12 Decided on 24 November, 2010
13 2009 (160) DLT 27
14 (2010) 10 SCC 469
15 It follows from Kant’s sharp distinction between morality and law that compulsion is essential to law, and the right is characterized by power to compel’. W Friedman, _Legal Theory._

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