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Law as a Means of upholding Morality: ‘Right to Religion’

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In contemporary times, the law is perhaps the most important facet that separates us from our chaotic and feudal past. As a catalyst for social control and social change, the law has been successful in establishing a civilized society around us. For this, the law has taken inspiration from the principles of morality that humans have come to believe in over the years. Within this realm of ‘law as a means of upholding morality, the postulation of the right to religion is fairly a new concept. As time has progressed, society has come to a denouement that the right to a religion shall form part of the morality of the land. This is the result of a ‘social change’. Furthermore, a wide array of discourse has developed on three paradigms as far as correlation between law and right to religion is concerned. These are (i) Management of Religious Affairs (ii) ‘Morality’ as a restriction right to religion, and (iii) Right to Conversion. All three strands are important if we are to further evolve ‘right to religion’ as a morally and legally enforceable concept.

Keywords: *law, morality, right to religion, right to propagate, religious affairs.*

INTRODUCTION

Law, as a word has been in discourse for centuries. And yet we haven’t been able to figure out a standard definition of law. Not only this, the purpose, and objectives that law aims at are also subjective. From a sociological perspective, one of the most timeless definitions of law is “An order will be called law if it entails coercion that aims at moralizing public behavior and

avenging if there is a violation".¹ The word law conjures up different meanings to different people. We can say that law in contemporary times is a set of rules and regulations that are created and sanctioned by the institutions of the state and enforced by the state. For some it is a compulsion, it is an order and for some, it is a necessity. The fact is law is a mixture of all these three vital elements. Law is a compulsion and an order because it forces an individual to act in a certain manner, but it also constrains the free will of an individual depending upon the morals of society. And lastly, the law is a necessity. Why? Law's main objective is to control chaos and establish order in a civilized society. Without law and order, we would find ourselves in the stone age because the law is one of the main distinguishing factors that separates us from animals. Roman political theorist Cicero said that man is between God and animals and hence, we can reason and speak and according to Cicero, man should use this reasoning and speaking ability to establish a just and fair state.² Hence, the core objective of the law is to control chaos and then establish a civilized society. There are two broad objectives of law by which it seeks to establish a civilized society. These two objectives are Social Control and Social Change.³ Social Control: Social norms have existed in our society since humans began to speak. Social norms are those acceptable forms of behaviors upon which there is consensus and is normally supported by tradition. Even in a diversified country like India, there are social norms followed by all the individuals. But as there is always the case with us humans, there always exist some deviants who do not follow the shared norms and act on certain circumstances and/or psychological aspects of other humans and become a cog in the social machine. Those individuals become a threat to the order of society. This is where the law comes into the picture. Law is used as a weapon to control the behavior of such deviants using order and if necessary, by coercive forces.

Social Change: Another objective of the law, especially in modern society is social change. Law is not a mere weapon for social control but if used correctly, the law can also gradually

¹ Steven Vago & Steven E. Barkan, *Law and Society* (12th edition, Routledge Taylor and Francis Group, 2021)

² Paul Meany, 'Cicero's Natural Law and Political Philosophy' (*Libertarian.org*, 31 August 2018)

<<https://www.libertarianism.org/columns/ciceros-natural-law-political-philosophy>> accessed 17 November 2021

³ Steven Vago & Steven E. Barkan (n 1)

facilitate a social change in society.⁴ This is the positive aspect of law while the other was coercive. The very original purpose of the law is to establish a civilized society. The paradigm of such a civilized society suggests that there needs to be a positive change from time to time. Law subtly does this. What social changes need to be brought in a society depends on the society and it varies from time to time. Think from the perspective of India. Homosexuality was a criminal offense in India. But the society felt the need to change it and hence, today homosexuality is not only decriminalized but also celebrated. This is what law does. When there is a need for a change, the law simply recognizes it and brings it into effect.

LAW AS A MEANS OF UPHOLDING MORALITY

Before diving into the topic in any manner, let's first analyze what is the meaning of morality. Why? Because though we may think about what law and morality are, it is so misunderstood and taken in the general sense that we never actually imbibe its true meaning. There is conventional meaning attached to it and this is true for any other word, phrase, and sentence.⁵ This makes it extremely imperative to understand the real definition of morality. As mentioned in the above content, we can say that law in contemporary times is a set of rules and regulations that are created and sanctioned by the institutions of the state and enforced by the state. On the other hand, morality is a very subjective word. The word morality means those rules and principles that we follow in our life that helps us in differentiating between what is right and wrong. There is a dilemma here because what may be the right behavior for me may not be the right behavior for you. Who defines what is right and what is wrong? We can say the society. Our society and our culture define what is right and wrong though it varies in different variations from person to person.

HOW IS LAW RELATED TO MORALITY?

We already know that morality stems from our conscience of what is right and wrong. What law does here is that law tries to protect that morality by virtue of (law) being a command of the sovereign. Law tries to understand what is morally correct and morally wrong and then it

⁴ Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press 1959)

⁵ Michael L Geis, *The Meaning of Meaning in the Law* (Ohio State University 1995) 73

gives out its command and enforces it so that morally correct behavior is followed. In essence, morality comes first, and then the law is a tool that is used to uphold that morality. But here comes a catch.

What is law or not a law from the perspective of morality is a matter of social fact and prejudices.⁶ This is because though we can say that law and morality are mutually inclusive, there are times when law and morality seem mutually exclusive. There is also the added element of there being no consensus on what is morally good and hence a good law. Let's understand the role of morality in law-making in detail by understanding it point by point. The relation between law and morality can be better understood by delving into the two theories: positivism law theory and natural law theory. The ancient Greeks were the first ones to equate philosophical morality with the doctrine of natural law. Thinkers like Plato and Zeno of stoic are well known for their theories in the domain of natural law wherein they espoused "what is moral will become the law". But there was one shortcoming here. The understanding of natural law was very vague. The Romans evolved the theory. They tried to codify this natural law by discovering the content of the natural law and declaring it as a fully-fledged law of the land. This concept of rational moral foundation became very popular in England as well where, the introduction of the court of chancery and ideals of justice, equity, and good conscience ended up making moral duty as the legal duty clearly showing that morality that is developed by society's existence leads to morality becoming a principle and eventually becoming law. In another word, we can say that natural law originates out of human nature. If we want to look at our own country, especially in our ancient past, the concept of 'Dharma' existed that mirrored like a godly command. Dharma allowed the administrative class (Kshatriya) to create laws that were based on morality that was propounded by the Vedic scriptures.⁷

Later in the eighteenth century, theorist Kant introduced the concept of positive law according to which there needn't be a moral foundational base for laws to stand upon. Instead, he

⁶ Joseph Raz, *The authority of law: Essays on law and morality* (Oxford Scholarship Online 1979)

⁷ J.P. Suda, 'Dharma: Its Nature and Role in Ancient India' (1970) 31(4) *Indian Journal of Political Science*, 356

propounded that because those morals owe their origin to the desires of organized groups⁸, a law does not need any foundation to stand upon. The state shall consider its law-making powers as an obligation. An obligation that arises out of social justice which means man-made equality. But here as well, the law is essentially trying to be moral by advocating for social justice. In the end, it is a matter of debate whether morality and hence the moral obligation that comes with it needs legal recognition⁹so that that morality may convene itself in society. In the end, law and morality are intimately connected to one other. Yes, sometimes law and morality can be mutually exclusive and subjective, e.g., euthanasia or right to die but there is no denying that once morality has a law supporting it and tries to enforce it, that moral obligation becomes effective in society and leads to a well-established civilized society. Without morality, lawmakers will not have any direction towards which they can direct their law and without legal back-up, morality will not have any substance and will remain morality only in theory. To conclude this content, the law is a powerful weapon in a society that can be used to uphold the morality that is needed in a civilized society. Morality perception changes from time to time but we should also remember that law is an ever-growing term. And that is exactly why the law is a means to uphold morality.

LAW AS A MEANS OF UPHOLDING RIGHT TO RELIGION

Now that we have understood that law is a tool to uphold morality in a society, let's understand the connection between religion and morality briefly. There is a unique connection between morality and religion for they both work in a cycle. Morality in a society comes from the very existence of humans, i.e., morality started developing when humans started interacting with one other. Then came religion which provided supreme sanction on these moral values in the name of God. In the words of Mathew Arnold, "Religion is morality touched with emotion." Though there is no doubt that as time has progressed, society decided whether the right to a religion shall form part of the morality of the society and by its extent, whether law shall enforce this right to religion. It is mainly in democratic countries that the

⁸ BF Skinner, *Beyond Freedom and Dignity* (1971)

⁹ Tony Honoré, 'The Necessary Connection between Law and Morality' (2002) 22 (3) Oxford Journal of Legal Studies, 489-495

right to religion has been established as a moral value that is to be cherished, though there is no doubt that the right to religion manifests in different intensities in different democracies.¹⁰ But since democratic and tolerant ideals have been imbibed by most countries, we can confidently say that law is a tool that protects the morality of the right to religion in society. It should also be noted that the right to freedom of religion was also recognized as a human right on the international level. This can be found under Article 18 of the Universal Declaration of Human Rights.¹¹ This is paramount evidence that morality has led to humans recognizing the right to religion as an unnegotiable human right and law is a means that is used to uphold this moral value of the right to religion.

Furthermore, I will talk about three areas that pertain to the correlation between law and the right to religion. These are:

- Management of Religious Affairs.
- 'Morality' as a restriction right to religion,
- Right to Conversion.

MANAGEMENT OF RELIGIOUS AFFAIRS

The development of freedom of right to religion as a recognized moral human right is a complex one.¹² Constitution makers treated the right to religion with caution because we were still in the shadows of partition. And they felt it was necessary to provide provision for allowing all the religions the right to manage their religious affairs. This provision can be found under Article 26 and Article 27 of our constitution which talks about establishing and managing religious affairs (institution, property, belief, rituals, ceremonies, and so on). Those two articles are mainly concerned with the rights of religious denominations. The purpose of adding this clause was to allow all religions to feel a sense of autonomy from the state as far as

¹⁰ M.N. Rao, 'Freedom of Religion and Right to Conversion' (*SCC Online Blog*, 29 November 2020) <<https://www.sconline.com/blog/post/2020/11/29/freedom-of-religion-and-right-to-conversion/>> accessed 17 January 2022

¹¹ Universal Declaration of Human Rights Act, 1948, art 18

¹² Malcolm D Evans, *Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict* (Springer Netherlands 2004)

their religious affairs are concerned. India is a diverse country with different religions and sects and castes. The right to manage religious affairs acts as a safety valve wherein it legally allows all the religions to manage their secular affairs so that there exists no commotion of any kind. This results from the fact that the purpose of such constitutional articles is to find a middle ground between autonomy of religious affairs and the extremist form that it can take. And to handle those extremist elements. The restrictions and judicial interpretation come into the picture. To begin, the SC explicitly said in the *Arya Vyasa Sabha*¹³ case and in *Hindu Religious Endowment, Madras v Sri Lakshmindra Thirtha Swamiar*¹⁴ that the provision of the religious denomination is not limited to religion but also can be utilized by individual communities, sects, and caste to manage their interpretation of religious affairs. This was done to communicate to minority groups that the law is protecting their religious morality. To further enforce this, the provision of Article 27 also states that such religious denominations will have autonomy from taxes as well.¹⁵ This can be interpreted to further enforce the idea that the State will have minimal interference in your religious beliefs. Again, I would like to stress the point that this sort of autonomy was essential, especially after the partition.

However, there have been instances that the State institutions had to intervene in this provided autonomy to make sure no individual harm is being violated and that morality stays intact. The most famous case was the *Haji Ali Durgah*¹⁶ case in which the judiciary played an activist role and held that the exclusion of women from the inner area of the sanctum was a gross violation of equality. On a similar line, the famous **Sabarimala case** gave an interesting insight as to how difficult it is to create the middle path as far secular affairs are concerned. In the case, SC decided to allow women entry into the Sabarimala temple clearly articulating violation of religious autonomy, but the dissenting view given by Justice Indu Malhotra was an interesting read for it said “It is not for the court to interfere in matters of religion and those

¹³ *Arya Vyasa Sabha and Others v Commissioner of Hindu Charitable and Religious Institutions And Endowments, Hyderabad and Others* AIR 1976 SC 475

¹⁴ *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar* (1954), AIR 282, SCR 1005

¹⁵ Constitution of India, 1950, art 27

¹⁶ *Durgah Committee, Ajmer v Syed Hussain Ali* (1961), AIR 1402, SCR (1) 383

practicing the religion"¹⁷ clearly implying the autonomy in right to manage religious affairs. Hence, we cannot deny that Article 26 and Article 27, which can be summed up as the Right to manage religious affairs has helped India become a secular state and, in the process, introduce a major social change post-1947 which upholds morality.

MORALITY AS A RESTRICTION ON THE RIGHT TO RELIGION

Swami Vivekananda said "religion as it is generally taught all over the world, is said to be based upon faith and belief and in most cases consists only of different sets of theories and that is the reason why we find all religions quarreling with one another. These theories are again based upon faith and belief".¹⁸ The purpose of quoting Swami Vivekananda is that though religion is personal to each individual and that religion and morality go hand in hand, there is no denying that religion can also become a tool for certain imbeciles to constitute disorder in the society. That is exactly why our constitution-makers decided to include certain restrictions in the content of the right to religion in our constitution. I will be talking about the restriction imposed by the word 'morality' under Article 25.¹⁹ It is quite interesting from the point of view of this research paper that law is used to uphold morality and on the other hand, morality is also used as a restriction to uphold law and order. This type of restriction is also given under Article 18.3 of the Universal Declaration of Human Rights 1948.²⁰ This clearly states that the right to freedom of religion is not unconditional.

Now coming to the restrictions imposed on the right to religion under morality, it is perfect to feel strange that morality is used here to restrict because it is our general understanding that what is religious is also moral. I have stated in the above contents that religion and morality go hand in hand but there are certain areas where man's animal instincts kick in and sometimes make religion and morality poles apart. Observations around the world will show that this is

¹⁷ Krishnadas Rajagopal, 'Sabarimala case: Supreme Court upholds referring religious questions to larger Bench, frames 7 questions of law' (*The Hindu*, 10 February 2020)

<<https://www.thehindu.com/news/national/sabarimala-case-supreme-court-upholds-referring-religious-questions-to-larger-bench-frames-7-questions-of-law/article30780943.ece>> accessed 12 December 2021

¹⁸ Swami Vivekananda, *The Complete Works of Swami Vivekananda* (18th Edition, Volume 2, Advaita Ashrama 2016)

¹⁹ Constitution of India, 1950, art 25(1)

²⁰ Universal Declaration of Human Rights Act, 1948, art 18.3

true. Also, I would like to stress the fact certain religious practices of almost all religions go against what humans shall consider moral. Take for example the sati practice in India, untouchability practice in India, triple-talaq, etc. simply cannot be sanctioned in the name of religion. It is therefore imperative to differentiate the essential and good practices of a religion and the customs that are counterproductive and disintegrate the morality in the land.²¹ The state to fulfill this purpose of allowing all religious practices, except those that contravene our morality uses restrictions such as ‘mortality. Of course, the state can also use this very provision to camp down upon religious activities, especially minorities but we may hope that the evolution of our legal system will keep this in check as well which was already seen when Article 19 was amended in 1951 which said restrictions shall be ‘reasonable’ (which is also subjective) and by its implications, it also applies on right to religion. As always, morality is subjective, even when it is a restriction and law tries its best to uphold this. This was visible in the *Commissioner of Police And Others v Acharya Jagdishwarananda*²² case, otherwise famously known as the ‘Tandava Case’ in which the judiciary had to interpret the restriction on right to religion. In it, the police had refused a religious group named ‘Ananda Marga’ to take a procession of a Tandava dance in public while wearing/using skull, knife, and Trishul under sec 144 of Cr.P.C. The group approached the judiciary, who not only recognized ‘Ananda Marga’ as a religious group/denomination under Article 26 but also held that their fundamental rights had been violated. This was a landmark case as the judiciary interpreted the constitution in a liberal manner which allowed an individual to exercise his autonomy in religious affairs. To conclude, though it may seem strange at first glance, morality as a restriction on right to religion has helped to uphold morality in society.

RIGHT TO PROPAGATE

The word ‘propagate’ is a unique feature in our constitution (which can be found under Article 21 of the Indian constitution) because this word does not find mention in any other country’s

²¹ J. Partrocino de Souza, ‘The Freedom of Religion under the Indian Constitution’ (1952) 13 (3) Indian Journal of Political Science, 62-78

²² *Commissioner of Police And Others v Acharya Jagdishwarananda* (1984), AIR 512, SCR (1) 447

constitution.²³ The word propagation in our constitution means that an individual has the right to propagate his/her religion; meaning popularizing his/her religion by spreading the tenets and ideals of the religion. This was reaffirmed by the SC in *Ratilal v State of Bombay*²⁴. However, if we look at our constituent assembly debates alone, we will understand why the word 'propagate' is controversial and if not dealt with properly, what it can do to the social order of the land. In the constituent assembly debates, there were members such as RK Diwakar and SW Krishnamoorthy who opposed the idea of inserting the word 'propagate' as it can lead to social disorder. On the other hand, there were members such as K Santhanam and KM Munshi who supported the idea of inserting the word 'propagation' as they believed it read along with Article 21's provision of freedom of expression. Not only this, but Gandhiji also gave certain remarks: "If I had power and could legislate, I should certainly stop all proselytizing".²⁵ This idea of propagation is controversial and important from our research point of view because the right to propagation leads to the right to conversion. This is where the law must find the right balance between the right of an individual who wants to propagate his/her religious tenets and the right of an individual who wants to convert voluntarily because this is important for upholding the social order and morality of the state.

Right to conversion is the right of a person to quit one's religion and adopt another religion voluntarily, with voluntarily being the all-important word. The reason for converting is personal (e.g., losing faith in one's religion, attraction towards another religious tenet, etc.) but it should be voluntary. This is important because the right to propagate does not imply a right to convert others forcibly which was stated in *Stanislaus v State of Madhya Pradesh*²⁶. This can be interpreted in the sense that when an individual or individuals are converted to another religion based on fear or some allurements, then this means that the individual (or individuals) is not converting out of free will which harms the individual's freedom. But also, this does not mean one cannot stop propagating one's religion and stop converting others to one's religion,

²³ Nirmalendu Bikash Rakshit, 'Right to Propagate Religion: Constitutional Provisions' (2000) 35 (40) Economic and Political Weekly <<https://www.epw.in/journal/2000/40/commentary/right-propagate-religion.html>> accessed 01 February 2022

²⁴ *Ratilal Panachand Gandhi v the State of Bombay* (1954), AIR 388, SCR 1035

²⁵ Sandhya Mehta, *Gandhiji on Religious Conversion* (Mani Bhavan Gandhi Sangrahalaya Mumbai 2002)

²⁶ *Stanislaus v State of Madhya Pradesh* (1977), AIR 908, SCC (1) 677

but this conversion should happen within the confinements of law. The conversion should be peaceful and based on religious tenets rather than on fear and allurements. But even going beyond the individual aspect, converting people out of fear and allurements can give rise to religious clashes and lead to the downfall of morality which is exactly the opposite of what a law is supposed to do. It was correctly stated in *AK Gopalan v The State of Madras* that there cannot be uncontrolled liberty for that will lead to anarchy and disorder. To conclude this segment, I would once again bring the two core objectives of law: social control and social change to build a civilized and moral state. Right to Propagation and by its extension Right to Conversion is part of the social change that India is experiencing and on the other hand, there also needs to be social control so that the law can make sure the rights of individuals are protected from fear and allurements.

CONCLUSION

With understanding, we can observe that both law and morality are two sides of the same coin. This is because cause on one side affects the other in one way or the other. Also, both law and morality are not static, meaning both law and morality change from time to time. We can confidently say that law is a powerful tool to not only uphold morality but also to channel it in a positive direction by controlling and changing it as and when required. As for the “right to religion”, the conflicts, and differences that history has thrown at us in the name of religion will take some time to rectify itself, especially since the right to religion is a new doctrine though we cannot deny the wonderful effects that it has had on society. India is an example since the right to religion has contributed towards India being a liberal and a secular state. However, it is still evolving. But again, this evolving nature allows it to fit itself into the morality of the day. The State institutions, especially the Judiciary will play an important part in channeling this evolution in a positive direction by finding the middle ground between the religious rights of a person/group and the individual rights of a person/group. This is a tough task, but it is imperative because, at the end of the day, the laws of the land interpret what is moral and uphold it.