Encounters and interaction of Law and morality with special reference to LGBT rights and right to abortion

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Abstract

Law and morality meant the same in the beginning of evolution of law but diverge at a point where law has many other contours of responsibility. The entire debate rests on the understanding of this divergence in a particular set of circumstances. Starting from Dean Pound's stages of law, Fuller's inner morality, Hart-Fuller debate, Wolfenden report, Hart – Devlin debate, John Finnis's basic goods, ladies diary case etc every scholar has interpreted the point of divergence differently.

LGBT Rights and Right to abortion are just two burning issues wherein the point of divergence has made U.K, U.S.A and India take different stance on what should be the law of the land.

KEYWORDS: law, morality, LGBT Rights, abortion, Pound, Fuller, Hart, Wolfenden Report, Devlin, Finnis.

Introduction: On 31st July'2015 the Ministry of Communication and IT, Department of Telecommunications, New Delhi issued an order to all the Internet service providers that the Department of electronics and Information Technology has requested DoT to notify Intermediaries (ISPs) to block 857 websites under the provision of section 79(3) of the Information Technology Act 2000 as the content hosted on these websites relate to morality, decency as given in Article 19(2) of the Constitution of India.[2]Senior telecom department officials told Economic Times, the government was compelled to disable access to the websites since the Supreme Court had made a strong observation regarding the central government on 8thJuly'2015.[3]

The orders like the abovementioned one, renew the debate on law and morality in India wherein we need an introspect into the requirement of law intervention in the dynamic forces of morality in society. The debate got accelerated even more when on

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[2]<http://cis-india.org/internet-governance/resources/dot-morality-block-order-2015-07-31/view>accessed 7August 2017.

[3]Writ Petition(Civil) No. 177/2013, *Kamlesh Vaswani v Union of India*,
Chief Justice HL Dattu observed:
Such interim orders cannot be passed by this court. Somebody can come to the court and say 'Look, I am an adult and how can you stop me from watching it within the four walls of my room? It is a violation of Article 21 [right to life and personal liberty] of the Constitution.' Yes the issue is serious and some steps need to be taken… the Centre has to take a stand… let us see what stand the Centre will take.<http://economictimes.indiatimes.com/news/politics-and-nation/government-says-followed-supreme-court-observation-rejects-charge-of-blocking-porn-sites/articleshow/48337543.cms>accessed 7August 2017.
<http://economictimes.indiatimes.com/news/politics-and-nation/government-says-followed-supreme-court-observation-rejects-charge-of-blocking-porn-sites/articleshow/48337543.cms> accessed 7 August 2017.

August 4th, the telecoms minister, Ravi Shankar Prasad, backed down, saying the sites should not be blocked, other than any proven to be showing child pornography.[4]

The fact remains that the encounters between law and morality have seen long insisted that they might mean the same in the beginning of evolution of law but diverge at a point where law has many other contours of responsibility. The entire debate rests on the understanding of this divergence in a particular set of circumstances. Since morality is essentially a subjective term, its subjectivity mystifies the debate on the point of divergence. The relationship between morality and law has become one of the more enduring problematic of jurisprudence. It has come to be the locus of the dispute between natural law and legal positivism and has generated a variety of controversies about the scope of legal enforcement. Like many perennial philosophical issues, moreover, it has endured because we are pulled in two opposing but equally plausible directions.[5]On a plausible interpretation of legal positivism, lawyers should reject it as inconsistent with positive law because positivist thesis about the relation of law to morality follows from the thesis about the identification of law. Moreover, nothing that is law according to the accepted criteria for identifying law is disqualified from being law merely because it is morally indefensible.[6]

But the fact remains that both law and morality serve to channel our behavior. Law accomplishes this primarily through threat of sanctions, in case we disobey the legal rules. Morality involves incentives. The push and pull of moral forces constitute an important influence in our conduct.[7]

Hence an attempt has been made in this article to understand various dimensions of this unique relationship of law and morality. This article has been divided into Part I which deals with philosophy of the relationship and Part II which deals with Law morality in current context followed by conclusion.

Part I: Philosophical evolution in west

A discourse of law and morality begins with Dean Roscoe Pound's opinion on the evolution of the relationship between the two. Sweeping through history he finds that in the earliest stage (preceding lawyer's law) law and morals were identified; when strict law (lawyer's law) became dominant, law and morals were sharply differentiated. In nineteenth century, often called an age of legal maturity, law and morals were usually contrasted. The dominant juristS of the time felt that morals were within the province of the legislator and outside the province of the jurist. According to Dean Pound, law and morals define a situation wherein morals are regarded as an evaluation of interests and

[4]<http://www.economist.com/blogs/economist-explains/2015/08/economist-explains-2>accessed24 September 17

[5] Jerome E. Bickenbach'Law and Morality'(1989) Law and Philosophy, Vol. 8, No. 3, Symposium on Legitimacy of Law 291

[6] Tony Honoré ' The Necessary Connection between Law and Morality'(2002) Oxford Journal of Legal Studies, Vol. 22, No. 3, 489-495.

[7]Steven Shavell, ' Law and morality as regulators of conduct' 2002 American Law and Economics Review V4N2 2002 (227-257), http://www.law.harvard.edu/faculty/shavell/pdf/4_Amer_Law_Econ_Rev_227.pdfaccessed 6 February 2017

law as a delimitation of interests in accordance with such a valuation. Pound's was unwilling to admit the complete identification of law with morals. According to him, it is a dangerous compromise.[8] The simple and lucid manner of the explanation of stages of encounters of law and morality makes it easy for us to understand the stage of divergence of law from morality.

To Fuller however, law as a particular way of achieving social order by 'subjecting human conduct to the governance of rules.' He believed that these rules and norms which are built into our legal procedures are intrinsically purposive, and thus, value-laden and containing a procedural inner morality. This proposition of inner morality has core principles of legality, which he argues are the necessary features of the 'inner morality' which he identifies. He states that these essential conditions must be present to some degree in a legal system, and the essence of this 'must' is a moral one.[9] According to Fuller, the degree to which a system meets these requirements is the degree to which it counts as a valid system of law.[10] Fuller's view's are very close to natural law and thus will always be a question of debate for the positivists.

Here, Hart- Fuller debate is of much importance.[11]It is considered as one of the greatest and the most fruitful encounters in the history of modern jurisprudence. Hart sets out a lucid account of the positivist position on the relation between law and morality, it defended positivism against the charge of silent complicity and oppressive legal regimes, and it provided the basis of a new understanding of what was at stake in issues of linguistic indeterminacy and legal interpretation. Fuller however insisted that "law" was not a neutral concept, but that it already embodied an inner morality of its own. Regimes that repudiated or persistently violated this inner morality were not really entitled to be called legal systems. Like the Nazi regime[12] in Germany from 1933-45, they made a

[8] Harold Gill Reuschlein, "Roscoe Pound –The Judge"(1942), <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9228&context=penn_law_review> accessed 27 May 2017.

[9]These are eight "principles of legality" or 'desiderata' - the degree to which a system meets these requirements is the degree to which it counts as a system of law. They are:
Generality; promulgation; prospectively; intelligibility; unself-contradictoriness; possibility of obedience; consistency through time, and congruence between official action and declared rules.
This inner morality is 'a precondition of good law'.
Dias, *Legal Theory*(5th Edition, Adity Book Pvt Ltd/ Butterworth 1994) 492.

[10]<http://www.gulawreview.org/entries/legal-theory/the-%E2%80%98inner-morality-of-law%E2%80%99-an-analysis-of-lon-l-fuller%E2%80%99s-theory> accessed on 27 May 2017

[11] The Hart–Fuller debate is an exchange of views on " Law and morality" between Lon Fuller and H. L. A. Hart published in the Harvard Law Review in 1958. Please see Hart, H. L. A., "Positivism and the Separation of Law and Morals". Harvard Law Review 71,593-629; Fuller, Lon L. "Positivism and Fidelity to Law — A Reply to Professor Hart". Harvard Law Review 71,630–672.
See also Hart's rejoinder in his book "The Concept of Law", Fuller replied in the first edition of his book "The Morality of Law". Hart gave his reply in 1965 in Harvard Law Review78, 1281-1296. Fuller replied in the Second (Revised) Edition of "The Morality of Law", published in 1969.
See also <http://scholar.princeton.edu/sites/default/files/tpavone/files/fuller-hart_debate_critical_review.pdf> 6 February 2017

[12] A typical example considered in the Hart-Fuller debate was of the wife of a German who reported her husband to the Gestapo for criticizing Hitler's conduct of the war. The husband was tried and sentenced to death, but his sentence was converted to service as a soldier on the Russian front. The husband survived the war, and after the war instituted legal proceedings against his wife. The wife's defence was that her husband

travesty of law, and jurisprudence needed to be in a position, Fuller said, to denounce that travesty for what it was. For this part, H.L.A. Hart replayed that people more likely to sustain the courage and moral clarity that this situation called for, he said, if we do not assume that nothing called law can be wicked or unjust.[13]

Now we reach the most discussed part of this debate which begins with Wolfenden report on prostitution and Homosexuality. The Committee took a serious note of the opinions of The Street

Offences Committee 1927, under the Chairmanship of Mr. Hugh Macmillan, K.C., which had stated: "As a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical sanctions. On the other hand, the law is plainly concerned with the outward conduct of citizens in so far as the conduct injuriously affects the rights of other citizens. Certain forms of conduct it has always been thought right to bring within the scope of the criminal law on account of the injury which they occasion to the public in general".[14]After its three-year long inquiry, the Committee on Homosexual Offences and Prostitution in Great Britain came to the conclusion that outlawing homosexuality impinged upon civil liberties and private morality or immorality was "not the law's business". Wolfenden report's recommended decriminalization of male homosexuality.[15]The committee also made recommendations to "clean up the streets" of London and other major cities of prostitutes by introducing much higher penalties for soliciting.[16]

The report's recommendations resulted into public debate, including a famous exchange of views in publications by Lord Devlin, a leading British judge, who argued against the report's philosophical basis, and H. L. A. Hart, who provided arguments in its support. Devlin maintains that “the criminal law as we know it is based on upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else.”Hart opined that Devlin’s view obscures the points at which thought is needed before we turn popular morality into criminal law.[17]

Here, views of John Finnis are also relevant. According to his theory, it our duty to obey unjust laws. Finnis's overall theory is founded on his moral assumptions. His theory of morality is based on what he calls seven[18] basic goods. The basic goods are our reasons for moral action. These basic goods are self evident to anyone after appropriate reflection on what is significant and worthwhile in human life. The basic goods are not

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had committed an offence under a Nazi statute of 1934. Post-war Germany, however, held the wife liable.Justice Markandey Katju “The Hart-Fuller Debate” > (2001) PL WebJour 1 available at <http://www.ebc-india.com/lawyer/articles/496_1.htm> (2001) PL accessed 29 May 2017

[13]<http://www.law.nyu.edu/conferences/hartfuller> accessed 29 May 2017.

[14]<http://sti.bmj.com/content/33/4/205.full.pdf> accessed 29 May 2017

[15] Since there was never a law against sex between women, the was no law to repeal.

[16]<http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid_3007000/3007686.stm>accessed 29 May 2017.

[17]<http://faculty.ycp.edu/~dweiss/phl347_philosophy_of_law/devlin%20and%20hart%20notes.pdf> accessed 29May 2017

[18] life, knowledge, friendship, play, aesthetic experience,spirituality and practical reasonableness.
Please see, Alex E Wallin, ‘John Finnis’s Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods,’2012 Campbell Law Review, 35(1),<http://law.campbell.edu/lawreview/articles/35-1-59.pdf> accessed 29 May 2017.

the whole of morality, but are pre moral. Full morality is achieved for Finnis after the basic goods are interwoven with Finnis's requirements of practical reasonableness.[19] These requirements or modes of responsibility are the methodological devices with which we implement the basic goods in our lives. Finnis believes that the number of basic goods and requirements of practical reasonableness are both open to addition with appropriate justifications.

Finnis believes that the central meaning of law is that of an act of practical reasonableness made by an appropriate authority for the common good. The secondary meaning of law is based on how close or removed a particular instance of law is to the primary meaning. An unjust law is a law that is very removed from the primary meaning and is therefore deficient, deformed, or defective in some respect. Finnis's basic classification of unjust laws is between intrinsically evil laws and extrinsically unjust laws. The former are laws that directly attack the basic goods and the latter are laws that do not advance, promote or protect the common good. We have no duty to obey intrinsically unjust laws but we usually do have a duty to obey extrinsically unjust laws.[20]

One case which deserves a special mention is *Shaw v DPP* [1962] AC 220[21]Shaw, the appellant, was successfully prosecuted for publishing 'ladies diary, 'under a number of provisions of the Sexual Offences Act 1956 and the Obscene Publications Act 1959. He was also convicted on a charge of "conspiracy to corrupt public morals" on the basis that, when he published the booklet, Shaw was conspiring with the prostitutes "... to debauch and corrupt the morals of youth and other subjects of the Queen. All five law lords upheld the conviction. Only Lord Reid maintained that the crime with which Shaw was charged was an existing common law misdemeanor. Theybuilt their argument upon the notion, put forward by Lord Mansfield almost two hundred years earlier, that the courts are "guardians of public morals" and that they ought to restrain and punish "... whatever is contra bonos mores et decorum".[22] Lord Viscount Simonds opinion is pearls of wisdom for us. According to him," the law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society."

Part II: Law, morality and current context

Law and morality debates have their own place of prideand permanence in any society. Two most common debates are LGBT rights and abortion. Some of these are also

[19]Each of these goods, whether in one's own life or that of others, should not be directly damaged in order to pursue any other good, basic or otherwise. This prohibition does not apply to the absorption in any one of the basic goods with the indirect consequence that other goods are not pursued. For details please see John Finnis '*Natural Law and the Natural Rights*'(Oxford: Clarendon Press, 1980)

[20] Thomas S Becker, "John Finnis on the obligation to follow unjust law" (2011). ETD Collection for Fordham University. Paper AAI3466692.
<http://fordham.bepress.com/dissertations/AAI3466692> accessed 29 May 2017

[21] *Shaw v Directorate of Public prosecutor* also called the 'ladies directory' case. The appellant published a 'ladies directory' which listed contact details of prostitutes, the services they offered and nude pictures. He would charge the prostitutes a fee for inclusion and sell the directory for a fee. The appellant appealed on the grounds that no such offence of conspiracy to corrupt public morals existed. <http://e-lawresources.co.uk/Shaw-v-DPP.php> accessed 27 May 2017.

[22]<http://cs.anu.edu.au/~./James.Popple/publications/articles/retroactive/6.html>accessed 2 November 2017

renewed in U.S.A during presidential election debates. This is reflection of the fact that morality issues are still very important for governance and society even in the developed nations. These debates are both new and old as they get renewed again and again. The author has studied the position in U.S.A, India and U.K only.

LGBT Rights have a place of pride in this debate[23]. LGBT people in many societies are subjected to discrimination, abuse, torture, and sometimes state-sponsored execution. LGBT people face discrimination in housing and jobs (affecting the ability to purchase food, shelter, and health care); lack of benefits (affecting the ability to pay for health care and financial security);

harassment and stress (affecting mental health and/or prompting substance abuse, smoking, overeating, or suicide)[24]. Even Political scientists are obliged to study LGBT groups and their claims because to ignore them is to overlook an important aspect of political reality.[25]Recent example of change in perceptions is the fact that when Apple CEO Tim Cook announced that he is gay, Wall Street analysts speculated that Cook's decision to announce that he is gay had the potential to impact the stock and many wondered if it would. But investors voted through a roughly unchanged stock price that Tim Cook is just as capable a CEO today as he was before the announcement.[26]

In sofar as LGBT rights are concerned U.S.A has been a witness of lot of change since1778, when Lieutenant Frederick Gotthold Enslin was brought to trial before a court-martial for attempting to commit sodomy and drummed out of Camp[27]. After years of litigation and different laws in different states, on 26th June, 2015, the U.S Supreme Court decided in *James Obergefell v. Richard Hodges, Director, Ohio Department of*

[23] LGBT advocates have engaged in two very different kinds of activities on the international human rights stage. First, they have engaged in traditional human rights activism, using the traditional human rights techniques of monitoring and reporting to apply existing human rights norms to LGBT lives, in particular: the right to privacy in the criminal law context; the right to equality; the right to family; the right to nondiscrimination; the right to freedom from torture (applicable in cases of "forcible cures" for homosexuality and psychiatric mistreatment generally); and the right of transsexuals to recognition of their new gender. Second, they have tapped into both
traditional monitoring techniques and human rights culture-building efforts to promote new international human rights that are important to LGBT lives, including "the right to sexuality."6 These two types of activism have occurred in two distinct time periods: (i) the period before the issue became a matter of concern to the main "gatekeeper" human rights nongovernmental organizations (NGOs), that is, Amnesty International (AI), Human Rights Watch (HRW), and other large NGOs that influence which human rights concerns make it through the gate of acceptable human rights advocacy (roughly pre-1995);7 and (ii) the period after LGBT concerns infiltrated mainstream human rights NGO advocacy (roughly 1995 onward).); Tony Honoré ' The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US'(2007) Human Rights Quarterly, Vol 29, 1036-1064

[24]Suzanne M. Marks 'Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People'(2006) Health and Human Rights, Vol. 9,33-42

[25] Gary Mucciaroni'The Study of LGBT Politics and Its Contributions to Political Science'(2011) Political Science and Politics, Vol. 44,17-21

[26]<http://www.cnbc.com/2014/10/31/investors-dont-care-that-tim-cook-is-gaycommentary.html> accessed 12 February 2017.

[27]<http://gayhistoryproject.epgn.com/historical-profiles/frederick-gotthold-enslin-an-obscure-military-life/> accessed 2 November 17

Health[28] that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[29].Obama is fundamentally supportive towards the LGBT community, but admits to internal conflicts in reconciling his social and religious beliefs.[30]Hillary Clinton had cleared her position before the judgement stating it 'marriage equality' and hoped that the Supreme Court will come down on the side of same-sex couples being guaranteed that constitutional right,".[31]

On the contrary, in India the Supreme Court decided in *Suresh Kumar Koushal v NAZ Foundation*[32]that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable.[33] On 2nd Feb'2016 the Hon'ble Apex Court has referred the matter to a five Judge Constitutional bench observing that it involves vary large and significant constitutional issues.[34]

Great Britain has law in varying nature across the four nations.[35]The history of legislation begins with The Buggery Act of 1533, formally "An Act for the punishment of the vice of Buggerie" (25 Hen. 8 c. 6), was an Act of the Parliament of England that was passed during the reign of Henry VIII. It was the country's first civil sodomy law, such offences having previously been dealt with by the ecclesiastical courts. The Act defined buggery as an unnatural sexual act against the will of God and man. This was later defined by the courts to include only anal penetration and bestiality. The Act remained in force until its repeal in 1828. Buggery remained a capital offence in England and Wales until the enactment of the Offences against the Person Act 1861; the last execution for the crime took place in 1836.[36] After a few more legislations[37], in modern era, The Marriage (Same Sex Couples) Act 2013, was passed on 17 July 2013, (for England and wales) and the first marriages of same sex couples took place on Saturday 29 March 2014. [38]Scotland has passed Marriage and Civil Partnership (Scotland) Act 2014.The first ceremonies took place on 31 December 2014..[39]Northern Ireland's assembly has voted narrowly in favour

[28]576 U.S. ___ (2015) These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, e.g., Mich. Const., Art. I, 25; Ky. Const. 233A; Ohio Rev. Code Ann. 3101.01 (Lexis 2008); Tenn. Const., Art. XI, 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. <https://supreme.justia.com/cases/federal/us/576/14-556/opinion3.html.> accessed 5 February17

[29]<http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf>accessed 5 November 2017

[30]<http://2012.presidential-candidates.org/Same-Sex.php> 5 November 2017

[31]http://edition.cnn.com/2015/04/15/politics/hillary-clinton-same-sex-marriage/ accessed 5 February 2017

[32]AIR 2014 SC 563.

[33]<http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> accessed 12 December 2017

[34] Indian Express, Frontpage 3rd Feb'2016

[35] England, Scotland, Wales and Northern Ireland.

[36]<http://www.banap.net/spip.php?article156> accessed 12 December 2017

[37]Offences Against the Person Act 1828, 1861; The Criminal Law Amendment Act 1885; Official Secrets Acts 1889<http://www.banap.net/spip.php?article156> accessed 12 December 2017

[38]<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306000/140423_M_SSC_Act_factsheet__web_version_.pdf >accessed 19 December 2017

[39]<http://www.gov.scot/Topics/Justice/law/17867/samesex>accessed 19 December 2017

of gay marriage equality in Nov 2015, but the largest party in the devolved parliament, the Democratic Unionists, have since vetoed any change in the law.[40]

One more contemporary issue is abortion[41] Abortion in the United States has been and remains one of the most controversial issues in United States culture and politics. The conflict over abortion is divided into two camps; the pro-life[42] and the pro-choice[43]. President Obama's stance on abortion in 2012 election was prochoice.[44] He also supports the famous decision of *Roe vs Wade*[45] wherein it was held that based on the Ninth and Fourteenth Amendment, a pregnant woman has the legitimate right to abort her pregnancy until viability. *Roe v Wade* was retained and reaffirmed in *Planned Parenthood v. Casey*[46]in three parts. The U.S Supreme Court applied the undue burden standard, rigid trimester framework is rejected, associated the legal timeframe with fetal viability.[47]

On 3rd October 2017, the U.S House of representatives passed the Pain Capable Unborn Child Protection Act (also called H.R. 36) which would criminalize abortions after 20 weeks of pregnancy, with exceptions for instances where the life of the mother is at risk and in cases involving rape or incest.The bill passed the House by a vote of 237 for and 189 against, largely on party lines.[48]

[40]<http://www.theguardian.com/uk-news/2015/nov/02/northern-ireland-assembly-votes-to-legalise-same-sex-marriage> accessed 19 December 2017

[41]According to WHO estimates, about 25% of all pregnancies worldwide end in an induced abortion. Of these abortions 20 million are being performed under dangerous conditions, either by untrained providers or using unsafe procedures or both which can lead to death. Death as a result of unsafe abortion in developing countries are estimated at 80,000 annually. Making abortion legal is a prerequisite to making it safe. M Berer, Making Abortions safe: a matter of good public health policy and practice. Bulletin of World Health Organisation 2000, 78(5) <http://www.who.int/bulletin/archives/78(5)580.pdf> accessed 11 February 2017.

[42]Pro-life supporters essentially reject the idea of abortion based on religious, moral and ethical grounds. They seek to overturn the landmark 1973 Supreme Court decision in the case of *Roe v. Wade*, which they blame for the approximately 53 million cases of abortions since.<http://2012.presidential-candidates.org/Abortion.php>accessed 16 December 2017

[43] Pro-choice proponents meanwhile are unequivocally against the idea of any government involvement or influence in what they consider as ultimately, a woman's choice to make. They reject attempts to narrow down the issue to a single factor, ignoring the numerous extenuating circumstances surrounding the issue. <http://2012.presidential-candidates.org/Abortion.php>accessed 16December 2017

[44]<http://2012.presidential-candidates.org/Abortion.php>accessed 16December 2016

[45] 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).<http://www.lawnix.com/cases/roe-wade.html>accessed 5 February 2017

[46]505 U.S. 833 (1992), the three parts are: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.
<https://www.law.cornell.edu/supct/html/91-744.ZS.html> accessed 6 February 2017

[47]<https://www.law.cornell.edu/supct/html/91-744.ZS.html> accessed 6 February 2016

[48]<http://edition.cnn.com/2017/10/03/politics/house-vote-abortion-after-20-week-ban/index.html> accessed 7October 7, 2017.

In India the position is settled due toThe Medical Termination Of Pregnancy Act, 1971 which allows abortion till twelve weeks or twenty weeks if there is risk of life or grave injury to mother or there is risk of serious handicap of child.[49] The debate continues due to cases wherein woman approach the portals of justice after 20 weeks to seek the permission of the court for abortion. Moreover, in India there is a debate in favour of or against allowing the Ayurvedic or Unani practitioners to carry out abortion only by medical means.

In United Kingdom under the Abortion Act 1967 (applicable to the UK with the exception of Northern Ireland) an abortion can usually only be carried out during the first 24 weeks of pregnancy as long as certain criteria are met. According o the 1967 Act, a pregnancy can be terminated legally only when two doctors agree 'in good faith' that the pregnant woman fulfils one of the grounds for abortion specified in the Act. Much feminist analysis of the statute examines the way that legal debate has constructed women, to show why the law empowers doctors, rather than women, to judge whether an abortion should be performed.[50]There are also a number of rarer situations when the law states an abortion may be carried out after 24 weeks.[51] What makes the UK law a very liberal one is the fact that abortion can be done in case the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.[52] In northern Island, the Criminal Justice (Northern Ireland) Act1945[53]allows the abortion of a “child capable of being born alive” only where the mother’s life would otherwise be put at risk. They also follow the judgement in *R vs Bourne*[54] which allows abortion if the continuance of the pregnancy will be to make the woman a physical or mental wreck.The

[49] Sec 3. The Medical Termination Of Pregnancy Act, 1971

[50] This brief account of the 1967 Act and associated parliamentary debates about it highlights two main points. First, according to the assumptions of the Act, it is women's poor state of mental health when pregnant that often justifies their access to abortion. Abortion can be performed legally when a woman's state of mind may be worsened if her pregnancy continues. Second, it is doctors not women who are in a position to judge whether this is likely to be the case; their responsibility is to decide whether the effect of mcontinuing a pregnancy will be such that abortion becomes a better option for a female patient. Women themselves are too psychologically vulnerable
when pregnant to make the decision to have an abortion or continue the pregnancy;
Ellie Lee ‘Tensions in the Regulation of Abortion in Britain’ (2003) Journal of Law and Society, Vol. 30, 532-553

[51] Between 1967 and 1990, the upper limit became more and more a source of debate, within and without the British Parliament. Bills put forward by Parliamentary opponents of legal abortion sought to reduce the upper limit. In specifying an upper time limit for abortion, the 1990 Human Fertilisation and Embryology Act modified existing abortion law in important ways. Recent public debate has tended to focus almost exclusively upon the "ethical" issues associated with "late abortion".): Roger Ingham, Ellie Lee, Steve Joanne Clements and Nicole Stone ‘Reasons for Second Trimester Abortions in England and Wales’ (2008) Reproductive Health Matters, Vol. 16, No. 31, Supplement: Second Trimester Abortion:Women's Health and Public Policy 18-29

[52] Sec 1(1)The Abortion Act 1967

[53] Sec 25 The Criminal Justice (Northern Ireland) Act 1945

[54] [1938] 3 All ER 615. See<http://www.e-lawresources.co.uk/cases/R-v-Bourne.php> accessed 17 December 2017

current law on abortion in Northern Ireland has been declared as "incompatible" with human rights law by High Court in Dec 2015.[55]

The fact remains that due to advancement in technology we are able to understand well certain abnormalities which show up only after 18 weeks. This means even in the case of 20 weeks there is a very small window of two weeks for the parents to go for tests and take decision for abortion.

Also, must take take note of the fact that lack of approval can always result into risky and unsafe abortions.

Thus the disagreements on the point of divergence remain.

Conclusion

Law and morality may have the same origin, but they diverge at point. This point of diversion will always be debated, since different people do and will always think differently. The fact that a country like Britain has different norms justifies the opinion that there is lot of subjectivity attached to this discussion. Across the continents in same time law differs in U.K, U.S.A and India and so does the social mores. Whether we call it ethical debate as in U.S.A and U.K or a debate about cultural as in India, the fact remains we are always discussing the point of divergence of law and morality. Hence we will always see two sides of a coin and between white and black- different shades of grey.

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