



LEGAL ETHICS: A LOGICAL APPROACH TO DECISION MAKING PROCESS

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ABSTRACT

Legal Ethics, which many a time, is also named as Legal Philosophy or Jurisprudence. This particular discipline can be traced to the oldest of disciplines, i.e., Philosophy. Philosophy is such an activity that tries to explain the very foundations of knowledge and learning. In this way, it has caused the emergence of many applied disciplines in which Applied Ethics can be mentioned at length. It is because; Legal Ethics is considered as the sub-branch of Applied Ethics. Since its conception, the skeptics have always raised many questions about the very existence of Legal Ethics as a separate discipline. In this paper, an attempt has been made by me to answer the questions raised against the very existence of Legal Ethics as a separate discipline. Along with this, an attempt has also been made by me to discuss as to how Legal Ethics can be said to be the sub-branch of Applied Ethics and how it affects the very legal processes of decision-making. The paper will conclude by explaining how Legal Ethics is a rational approach to decision-making in the resolution of ethico-legal dilemmas.



KEYWORDS: *Ethics; applied ethics; legal ethics; decision-making process; legal ethical dilemmas; abortion.*

INTRODUCTION

Governing the societies under the state is one of the most important functions of any government in the world. In India, for this purpose we follow the model of constitutional democratic decision making process, where Constitution and the codes, statutes, directives, and rules and regulations coherent with it play a crucial role for the governance, administration and management of our society. The preamble of our constitution provides for the ideal of social, economic and political justice to the citizens, which is to be achieved through securing of freedom of thought, expression, belief, faith and worship and equality of status and of opportunity and promoting of fraternity assuring the dignity of the individual and the unity and the integrity of the Nation. To achieve these ideals, Constitution has provided three organs of the government, i.e., legislative, executive and judiciary. These organs function at three levels of the governance, i.e., at the union, state, and local levels. Sets of functions have been provided for each organ and government at every level. The executive has been made responsible to the legislature, and an independent and integrated judiciary has been provided. Institutional machinery has been provided for the assistance of the government. It is expected that these organs function in a proper way to achieve the ideals enshrined in our constitution.

However, it has been observed that there are a lot of issues in the organs and at the different levels of the government. In legislative arena election of incapable representatives, absence of proper debate and discussion, abysmal productivity etc., in executive arena issues such as 'bureausis', delay in implementation of the schemes, lack of sensitivity towards the common people etc., in judicial arena issues such as shortage of the judicial functionaries, procedural delays, corruption and so on. Most of these issues arise due to the ignoring of ethical consciousness, the foundation of human as well as societal behavior. Some other contentious issues like abortion, capital punishment and euthanasia invite our attention towards legal ethical dimension. Since these issues are related to the field of law, hence the proper understanding of Legal Ethics is essential in order to resolve the value loaded legal problems. Skepticism in this regard cannot be an option because Imanuel Kant, one of the prominent philosophers described the problem of skepticism when he wrote that Skepticism is a resting place for human reason, where it can reflect upon its dogmatic wanderings but it is no dwelling place for permanent settlement. Simply to acquiesce in skepticism, Kant wrote, can never suffice to overcome the restlessness of the reason. ¹The aim of the paper is to awaken the restless of the reason and to see where it might lead us. For this purpose, in the upcoming sections, the proper understanding of Legal Ethics will be provided and the methods of the resolution of the value loaded legal problems will also be discussed in detail through the instance of abortion debate that how it should be discussed in a proper way.

WHAT IS ETHICS?

Ethics can be defined as "the study of Ethical evaluation of voluntary actions of human beings, their groups, organizations and institutions based on standards of evaluation, it justifies those standards and analyses meaning of moral language, it is also a study of value and virtues and aims at resolving practical problems of life. Moreover it broadens the path towards liberation." On the basis of its definition, Ethics is classified into some specific branches i.e. Normative Ethics, Meta-Ethics, Value and Virtue Studies, Practical Ethics and Descriptive Ethics.

Normative Ethics is the first order of primary aspect of Ethics because in Ethics we first of all and most importantly discuss about the moral value of human voluntary actions and behaviors. For this we need some ethical standards or ethical norms. Therefore in normative Ethics, we discuss about voluntary human actions and the end and means of those voluntary actions. In Indian normative ethics, we discuss preya or desired, shreya or desirable and nihshreyas or the ultimate desirable in this context. While we discuss about voluntary human actions we elaborate on the matter that what are the norms/standards to evaluate the moral value of our actions. In this regard, we come to know about a number of ethical standards or theories. ²Most popular are the theories based on consequentialism and deontology. These normative theories tell us what should be the highest ethical ideal of our life. Normative Ethics also elaborates on the nature of ethical or unethical actions as well as non-ethical or non-moral. In Indian Normative Ethics, we also study about karma, karmaphala, karmabandhana, moksha and mokshamarg. In this regard, we also discuss prize and punishment related to our ethical and unethical actions. The descriptive aspect of normative Ethics discusses those ethical issues related to our mind and our psychological state. It tries to describe the different factors related to our mind and consciousness which are extremely important in ethical discussions. For example, in Descriptive Ethics, we try to know about ethical consciousness, its nature and development in man. In this field, we also discuss about motives of action or the causes of action as well as the intention and purpose of action. In descriptive Ethics, we also come to know about ethical feelings, emotions and many other internal factors important in discussing about morality.

The meaning of Meta-Ethics is a study that comes after the primary study that is normative study. In fact after normative study, we discuss about the meaning and truth of Ethical language. The ordinary language for ethical discussion such as normative, value and virtue related, practical and

descriptive discussions should be meaningful and true and in Meta-Ethics we analyze in what ways ethical language is true and meaningful for example if we say that, 'Honesty is good', then we have told about the value of honesty as good in ethical language. Now this ethical statement we know is meaningful and true. Meta-Ethics discusses how and why statements like these are true and meaningful. It also analyzes the meaning of ethical concepts like good-bad, right-wrong, just-unjust etc.³

Ethics also studies about human character and the moral value of our actions and behaviors. It tries to know the values of the actions we do in life and the kind of character good or bad that we have. Therefore the scope of Ethics is to discuss about the human values and virtues. While we discuss about these things, we need some standards or theories that tell us about the value of human conduct and character. Value and Virtue studies also discuss the development of values and virtues in our character. It also discusses about the methods and scenarios in which we can develop human conduct, behavior and character.⁴

Practical or Applied Ethics discusses about the nature of a number of important practical problems in life which are also ethical problems for us because these problems put us in a situation of ethical dilemma. Practical Ethics discusses about the methods of applying the normative theories that we know to solve ethical dilemmas and thereby the practical problems in life which are also ethically problematic for example the problem of abortion, capital punishment and euthanasia etc.⁵

WHAT IS LEGAL ETHICS?

Two terms 'legal' and 'ethics' are constituent parts of 'Legal Ethics'. 'Legal' is related to law whereas 'Ethics' is related to moral philosophy. Hence Legal Ethics can be defined as a branch of Applied Ethics in which legal problems which have ethical implications are understood, analyzed and resolved using the ethical insights of the participants. It goes deep into legal ethical dilemmas and tries to see where legality and ethicality coincide with each other. For this purpose, the first step is to analyze a legal ethical dilemma under consideration on linguistic basis that is on meta-ethical perspective. The second step should be dedicated to the analysis of the aspects of the problems in order to reveal the hidden intricacies regarding it. Thereafter, in the third step, we should try to analyze and evaluate the arguments of both the sides applying our normative ethical insights in this regard. In fourth step, we should derive the conclusive judgments with respect to the problem under consideration and include these in our governance, administration and management arena to regulate the behavior of our society in this regard.

ABORTION:

An abortion is a procedure to terminate a pregnancy due to various reasons. Either medicine or surgery can be used to remove the embryo or fetus and placenta from the uterus of the mother. Authorised health care professionals execute this procedure in the countries where it is permissible. In India, abortion is legal in some specific circumstances under an act which is named as Medical Termination of Pregnancy Act, 1971. It can be performed on various grounds until 24-weeks of pregnancy. We perceived an instance where the Delhi High Court gave the permission to a woman to terminate her 28-week pregnancy after the All India Medical Sciences' Medical Board said her fetus could be aborted as it suffered from anencephaly, a condition where the skull bone is not formed. Under the Medical Termination of Pregnancy Act, 1971, following grounds have been provided in this regard:

- For the termination of a pregnancy may be up to 12 weeks the opinion of one doctor is required whereas the termination of pregnancy up to 20 weeks requires the opinion of two doctors.
- The permission of abortion is given only when the continuance of the pregnancy would involve a risk to the pregnant woman's life, cause grave injury to her mental or physical health (including rape and failure of birth control measures), or in the case of fetal abnormalities.

- If there is any danger to the life of woman then to save her life abortion is allowed at any point during the pregnancy.

Beyond the realm of the technicalities of the abortion as a medical process, there are important questions in this regard such as-What is the proper description of abortion? Is the choice to perform or to help procure an abortion ethically right or wrong? If it is ethically right then what are the arguments on the basis of which abortion can be approved and if it is wrong, what are the arguments on the basis of which abortion can be disapproved? Have the proper analysis of the arguments of both the sides been done appropriately? Is conclusion derived from the analysis applicable to the intended societies? Answers of these deep questions are not easy. Here Legal Ethics matters a lot. It is the discipline in which all the questions which have been and can be raised are dealt thoroughly. For the sake of conciseness, here, one aspect of the debate that “does personhood begin at birth?” would be considered to propose the methodological framework under which this issue can be thoroughly discussed in legal ethical sphere.

ARE PERSONS DIFFERENT FROM MERE HUMANS?

Mary Anne Warren, a well known American scholar, in her articles “The Personhood Argument in Favor of Abortion” and “On the Moral and Legal Status of Abortion,” draws a distinction between “human beings” and “persons.” According to her, 'human beings' cannot be regarded as 'persons'. Persons are those human beings who are in moral sense the owners of various rights and privileges and central in our consideration and respect. She provides some specific criteria on the basis of which the difference between two classes of beings can be made. According to her it is not necessary that one person will have all these qualities but any human being who lacks all of these qualities can't be regarded as a “person.” These are following-

- a) Awareness of external or internal objects.
- b) Rational capacity to solve the complex problems of life.
- c) Capability of performing the activities by self motivation.
- d) The capacity to communicate the messages to larger entities and on variety of topics.
- e) The capacity to form self concepts, and self-awareness, either individual or racial, or both⁶.

For Warren persons are those types of human beings who have these qualities in them and therefore their right to life should be respected whereas these qualities are absent in human beings other than persons and hence, it should not be obligatory to respect the life of them. These five criteria would exclude not just all human beings prior to birth but also those who are severely handicapped and those who have lost their conscious fiction prior to or after the process of birth. If a conflict arise between human beings and persons with respect to health, happiness and freedom, the rights of persons should be prevailed. Hence, the right of a woman to abortion must be accepted as of greater value in comparison with the right to life of a mere human being.⁷

It may be said that the human fetus is not an actual person however it is at least a potential person and the rights of a potential person must be counted for something. We have seen that in certain circumstances the rights of a potential person prevails over the rights of actual persons. She rejects such considerations by means of an analogy of a space explorer. According to her, if a space explorer which has the capacity of creating a lot of human beings who can be developed as persons through its body parts and it reaches in an alien planet where the civilization has progressed much. The parts have the potential to be developed as persons but when the question of respect and rights arise, no sincere scholar will be interested in accepting those parts as the bearer of rights and respects. From this analogy, it can be said that potentiality and actuality are two different things and if the respect and rights are to be considered, the actual persons would be taken into consideration instead of potential persons.

ABORTION AND INFANTICIDE:

For Warren, the main difference between abortion and infanticide is that in case of abortion the human fetus resides within the woman and so violates her rights to freedom, happiness and self-determination and in case of abortion she values infanticide as wrong. She gives two reasons in support of her position. The first one is, even if biological parents don't want the child, other people do. The second, she notes that most people don't want infants destroyed⁸. H. T. Engelhardt in his article, "Sanctity of Life and the concept of a Person," provides social concept of person to the newborns. He offers several reasons: first, the infant is a biologically human being hence deserves respect. Second, infants are also able to engage in a minimum of social interaction. Third, an infant cannot survive without social recognition. Fourth, not practicing infanticide helps in maintaining trust in families, nurtures empathy towards weak, and assures the healthy development of children. Fifth, he notes that there is value in protecting whatever looks and acts in human fashion. Finally human infants will become persons later in their life and actions taken against infants injure the persons they will become at their later stage of life. A question can be put here that why not potential persons in utero be regarded as persons in this social sense? He gives various reasons for exclusion of potential persons from the category of persons in this regard. According to him abortion helps women and their families, restricts procreation of the child's who may have any genetic disorder, helps in controlling population growth, secures a woman's right to allow her body for a child, as well as in determining for becoming a mother. Thus, for both Warren and Engelhardt, although neither a human fetus nor a newborn is strictly speaking persons, newborns should not be killed, but the human being in utero may be aborted.⁹

CRITIQUING THE VIEWS:

Warren asserts that the word "person" in contemporary English simply means a being with consciousness, reasoning, self-motivated activity, the capacity to communicate, and self-concepts. However, people use the term "person" to refer to babies, elderly human beings who lack these 5 characteristics. Even if Warren were correct about how the word "person" is used, it is not clear why this is morally relevant. Why should this linguistic convention be taken as an ethical given? We can easily imagine communities in the past in which "person" was used only and consistently to make reference to privileged classes of human beings. However, the moral judgment can still be made that whatever the current use of this word "person," we should expand its use to include others. From the opposite perspective, derogatory words (or concepts) are used widely in some communities precisely to exclude minorities from full personhood. It would not be legitimate to argue from this linguistic point of view to the conclusion that such minorities lack the fullness of personhood. Hence it can be said that meaning analysis cannot be proper grounds for acceptance of abortion.

If a strict interpretation is done of her first criterion, it will exclude many adult human beings from personhood and basic rights. Requiring actual consciousness renders us non-persons whenever we sleep. Requiring immediately attainable consciousness excludes those in surgery. Requiring the basic neural brain structures for consciousness (but not consciousness itself) excludes those whose brains are temporarily damaged. On the other hand, if potentiality for consciousness makes a being a person, then those sleeping, in surgery, or temporarily comatose are persons, but so also would be the normal human embryo, fetus, and newborn.

On her second criterion it can be said that real problem solving does not begin until sometime after the age of two or even more than two. Hence, young children cannot be regarded as persons. Moreover the persons with dementia, the disabled, those with Alzheimer's, cannot be counted as persons. In the attempt of excluding the preborn from personhood, the handicapped, and disabled, are also stripped of basic rights and fundamental protections. In her further analysis, she argues that

empathy for the disabled and those who care and love them require that mentally handicapped human beings should be regarded as persons. The objection here is that why personhood rests on such emotional aspects of the society and it should also be claimed here that empathy for the potential persons and those that care for and love them should also be required too that the potential persons should have full moral status.

Scientific research has explored that her third criterion that i.e. “self-motivated activity” is present in some way in humans in utero at a very early stage. Self-initiated activity is already present at eight to ten weeks when human beings in utero begin to such their thumbs and move about (though unfelt by their mothers). But if the interpretation of self-motivated activity is done in a more demanding way, then once again, a whole range of human beings almost universally recognized as enjoying dignity and rights will be excluded from their personhood.

The fourth criterion for distinguishing persons from human beings which is “the capacity to communicate, by whatever means, messages of an indefinite variety of types, that is, not just with an indefinite number of possible contents, but on indefinitely many topics,” will also exclude those human beings who are not able to communicate. Ability to communicate depends on several non physical and physical factors. This external manifestation which depends on so many conditions cannot be proper ground on the basis of which the difference can be made between human beings and persons.

The senile elderly, newborns and the mentally ill cannot be regarded as persons on the basis of her fifth criteria that is the presence of self-concepts, and self-awareness, either individual or racial, or both”. On Warren’s account, it would follow then that any person would be justified in killing any “potential person” whenever the existence of the potential person got in the way of an actual person’s perception of his or her health, happiness, or freedom.

Regarding abortion and infanticide, when Warren gives two reasons to conclude that abortion is not acceptable whereas infanticide can be accepted. Both the reasons can be applied in the case of abortion too. Our sociological observation proves that in the case of abortion, if biological parents don’t want the child, others do and most of us don’t want the destruction of the fetuses. Moreover, Engelhardt’s acceptance of the abortion on the basis of the social concept of newborns is also not satisfactory. All the reasons provided by him to differentiate fetuses from newborns can be applied to the fetuses too. The main difference lies in the degree of manifestation. Hence neither rejection of infanticide can be proved nor acceptance of abortion, can be sustained on the basis of the arguments provided by him.

The above discussion is focused on only one aspect of abortion that is ‘Does personhood begin at birth?’ and tries to explore the arguments provided in the supportive instance of this question. We have also seen that if we critically examine these arguments, we can conclude that the arguments provided in this respect are not so powerful to accept the abortion categorically. This is a very complex issue and we can see it from different ethical outlooks. We should consider the concept of personhood at other levels like during pregnancy, conception or after birth. Examination of hard cases for critics and defenders should also be done in a proper framework. It should also be examined that “Could artificial wombs end the abortion debate?” This type of in depth legal ethical inquiry should also be applied in cases like capital punishment, euthanasia etc. to resolve them in an ethical manner.

CONCLUSION:

From the above discussion, it can be concluded that Legal Ethics is a novel logical approach to the decision-making process in the case of legal ethical dilemmas. In this branch of Applied Ethics, the discussions regarding the core philosophical ideas are held in order to explore the significant hidden aspects in the cases under consideration. The application of legal ethical insight resolves the contrast between ethicality and legality and gives the nations direction to legislate, execute, and interpret not just the laws but just laws to make the lives of its citizens more peaceful, more coherent and more just. Hence, Legal Ethics when it is applied in the contextual phenomenon, it can be a very important logical instrument for resolving our day-to-day legal ethical dilemmas .

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