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THE PHILOSOPHICAL SCHOOL OF JURISPRUDENCE WITH SPECIAL REFERENCES TO KANT, KOHLER AND DEL VECCHIO.

Author –

Raunak Chaturvedi

Student, BBA. LL.B. (HONS.)

Amity University, Kolkata

ABSTRACT

This research paper is going to thoroughly deal with the philosophical or ethical school of jurisprudence and also talk about the three most important philosophers in this regard, viz., Immanuel Kant, Josef Kohler and Giorgio Del Vecchio. The scheme of the paper may be stated as follows- first we shall have an introduction to the philosophical school of jurisprudence, with special reference to the two most important Hindu mythological characters, Ram and Krishna. Then, we shall move on to discuss about the theory of Kant, where we shall see about Kant's early life, the main essentials of his theory, the applications of the same and also the criticisms of the same. Henceforth, we shall move on to discuss about the theory of Kohler, where we shall have a small introduction about Kohler's personal life, then move on to the essentials of Kohler's jurisprudence, see its applications and also its criticisms. Finally, we shall delve into the theory of Del Vecchio, where we shall have a glimpse of his early days, analyse the essentials of his theory, look at the various applications and finally conclude with the criticisms for the same. Throughout the paper, colourful pictures have been included to give the author a better reading experience and opportunity to quench his curiosity.

Keywords - *Philosophical School of Jurisprudence, Immanuel Kant, Josef Kohler, Giorgio Del Vecchio.*

INTRODUCTION-

The philosophical school or ethical school of jurisprudence turns out to be one of the seven major schools of jurisprudence. The main development of this school took place in the 18th to 19th centuries, particularly the latter and it was done by eminent jurists of the time, such as Immanuel Kant, Del Vecchio, Rousseau, Locke, etc. These people thought of jurisprudence and laws, in particular, to be the results of human needs, conscience and morality. Thus, this particular school of jurisprudence, we may see, was the bridge between the inculcation of morality and ethics within the law. If the reader is finding this to be a bit difficult to understand, then we may explain the same with help of a practical example. Suppose, you are an ethical jurist. You see someone stealing something in front of you. You would say,

'Stealing other people's property is unethical. The person who stole had not earned that object which he took away by the means of cov from the victim. Had he earned it, or been gifted it, or inherited, then it would have been something else. But stealing is not moral, as it is against the general code of conduct of maintaining peace and discipline in the society'.

This would have been your statement if you too would have seen something like this happening in front of you. The reason is that you look at the world not from the point of view of logic all the time. You rather look at the world, particularly law, through the sole aim of maintaining order, removing chaos and ensuring that societal discipline and righteousness is established.

However, what is moral doesn't mean for you to be legal as well. Yes, it means for you that all the laws have been derived from morals and ethics. For example, the laws against adultery are derived from the moral that, 'One is not supposed to sleep with another man's wife'. Or, the law against spreading communicable diseases negligently is derived from the moral that, 'One ought to take care of the society and the people living within it, at all times.'

If we look into Hindu mythology, the biggest moralist is *Krishna*. Yes, that is true. Not *Ram*. People may confuse *Ram* to be a rather moralist sometimes but the truth is that he was an analytical jurist. He truly believed in the fact that the command of the sovereign was supreme and maintaining the word and reputation of the Sovereign (**Raghu Kul?**) was the main motto of any officer of the Sovereign. An example of the same may be found in the story of **Shamhhuka**. There is this story of a Shudra outcaste called **Shambhuka** in the **Ramayana**. The *Ramayana* has been set in the backdrop of *Treta Yug* (the second quarter of the world's life). As per the norms, only the Brahmins and the Kshatriyas were allowed to take renunciation (*sanyas*) from the world in this quarter. *Vaishyas* would be allowed in the *Dwapara Yug* and *Shudras* too in the *Kali Yug* (in which we are now). However, *Shamhhuka*, ignoring all these norms, began praying to the formless divine for salvation. As a result, there was a great imbalance in the Kingdom. On knowing the root of it, *Ram* took to kill him. On encountering *Shamhhuka*, the Shudra asked,

'But I am worshipping the divine. Why am I being killed for something so pure?'.

To this *Ram* replied,

'But you have disrupted the balance of my Kingdom. You are a threat to its stability which has to be maintained at all times (Ram Rajya?)'.

Saying this, he beheaded the *Shudra*.



Ram beheading Shambuka. Image Source¹

This is a classic example of an analytical jurist. Always upholding the Sovereign command. Always considering it to be supreme and the source of all laws, even though it may be of no logic whatsoever. Krishna, on the other hand, was an ethical jurist. The first and foremost proof of the same is depicted during the *Gita* when he discourses,

स्वधर्ममपि चावेक्ष्य न विकम्पितुमर्हसि ।

धर्माद्विषयुद्धाच्छ्रेयोऽन्यत्कात्रियस्य न विद्यते ॥ 31॥²

The above line, if translated, says that *Krishna* told *Arjun* that as a warrior, it was his duty to uphold righteousness or *dharma*. Hence, we may say that this is one of the earliest examples of valuing moral justice over the rules of society.

¹ https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.quora.com%2FWhy-did-Lord-Rama-kill-Shambuka&psig=AOvVaw28aQRWTIM8d2eMTf7O_ZnH&ust=1615048224666000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCLjIgNbJme8CFQAAAAAdAAAAABAS

² Shrimad Bhagwat Gita, Verse 31, Chapter 2.

This line clearly states that for *Krishna*, all that mattered was to maintain the morality (*dharma*) of the situation. He didn't care if the rules of the Sovereign were broken in this process or not. Thus, these two examples not only help us to understand the true nature of these two stalwarts of Hindu jurisprudence but also the difference between the philosophical approach and the scientific or analytical approach.

Hence, now that we have understood the main essence of the philosophical school and the counterparts of the same within Indian mythology, let us delve into our main discussion, that is, discussing the three luminaries whose names are a must to be quoted when talking about philosophical jurisprudence. The three names are-

- 1. Immanuel Kant (22nd April 1724- 12 February 1804)**
- 2. Josef Kohler (9th March 1849- 3rd August 1919)**
- 3. Giorgio Del Vecchio (26th August, 1878-28th November 1970)**

Upon looking at the lifespans of these three jurists, we may see that the three were existent during completely different eras. Kant was prominent during the 18th century, Kohler during the 19th and Del Vecchio during the 20th. These facts indicate that although they never met, still they saw something which caused them to believe in the philosophical approach towards the subject. We shall have an elaborate discussion upon this in our coming sections. Let's move on to our first jurist, that is, Immanuel Kant.

IMMANUEL KANT AND HIS APPROACH

Immanuel Kant was born in Konigsberg, which is currently known to the world as Kaliningrad of Russia. Kant was born into an ordinary artisan family and went on to attend the Pietistic school, which was one of the major reasons to incline his interests towards religious morality and moral jurisprudence.



Immanuel Kant. Image Source³

Immanuel Kant was a strong critique of legal positivism. Legal positivism meant that the morality of any particular situation, act, custom, etc., derived its moral character completely from the will of the sovereign. For example, if the sovereign would want, then stealing would be moral, killing would be moral (this was seen in the Nazi regime, where killing Jews was moral). Hence, he believed that the moral sanctity of a particular legal principle was derived not from the sovereign's authority, but the natural laws, i.e., the human reason which made them ethical or unethical. Natural law thus stated that any particular principle shall be considered to be just or not, depending upon the power of human reason. Thus they stated that if mankind inherently considered a particular action to be wrong, then it shall be deemed so. The sovereign had got nothing really to decide the morality of a particular action or concept.

Kant discussed the concept of the Categorical Imperative. He included two main principles to explain this-

³https://www.google.com/url?sa=i&url=https%3A%2F%2Fen.wikipedia.org%2Fwiki%2FImmanuel_Kant&psig=AQVwAv0w8QlznALE8MZhKs1dL43L&ust=1615048638242000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCKjBvZjLme8CFQAAAAAdAAAAABAD

1. A particular moral should be universal in nature, meaning that everyone should be subjected to the same type and extent of a particular moral, to truly call it a moral.
2. Any rational being (be it human or not) has the inherent right to enjoy his life in his way, without coercive interference.

The first principle was although not that effective, but the second principle shaped the basics of modern-day Constitutional philosophies. The biggest example may be the inclusion of the Right to Life in our Constitution as a separate Fundamental Right and its subsequent interpretations by our Supreme Court to expand its scope.

Kant's theories of justice showed, however, a distinction between the idea of justice and the idea of virtues. The main reason for the same might have been the explanation of those human actions for which the application of coercive human force was justified (arresting a person) from those where it wasn't (battery).

Interesting is the fact that Kant was formulating these philosophies at the time when Russia was under the reign of Catherine the Great. She was considered to be one of the most powerful rulers of her time. However, it is seen that Catherine's reign had given sufficient amount of concession upon the thinking of the people within the Empire, where people like Kant were openly stating that the Sovereign had limited powers to determine the morality of any custom or action.



Catherine the Great (2nd May 1729- 17 November 1796). Image Source⁴

⁴https://upload.wikimedia.org/wikipedia/commons/f/f1/Catherine_II_by_J.B.Lampi_%281780s%2C_Kunsthistorisches_Museum%29.jpg

However, the biggest digression between the philosophies of Catherine and Kant are seen when Catherine, in a conversation with the French philosopher and scholar Denis Diderot, said the following-

*The sovereign is autocratic; for no other power save
that which is united in his person can act in a manner
commensurable with the extent of so great a state.⁵*



Denis Diderot (5 October 1713- 31 July 1784). Image Source⁶

This clearly shows the autocratic and authoritarian dispute between the two most influential people of their times, with regards to their philosophies. Another very interesting point to note is that Catherine used the suffix ‘Great’ after her name. This indeed showed the value of autocracy that was given during her time.

⁵ See Lettres de Catherine II à et à Diderot, quoted in the publication Antiquité russe. Also Voltaire and Catherine the Great. Selected Correspondences. Trans. Antony Lentin. London UK: 1974.

⁶https://www.google.com/url?sa=i&url=https%3A%2F%2Fen.wikipedia.org%2Fwiki%2FDenis_Diderot&psig=AOvVaw2rMBwRcmhbtyaAlpXDbmVh&ust=1615049235941000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCIjPsLvNme8CFQAAAAAdAAAABAD

Thus, these were the details about the philosophical theory towards jurisprudence, as propounded by Immanuel Kant.

Application of Kant's Theory-

The biggest application of Kant's theories of ethical jurisprudence may be found in the fact that Kant was a stronger supporter of the Doctrine of *Lex Taliionis*, that is, 'An eye for an eye', when it came to giving penalties for crimes, particularly the more severe ones, like a murder. It may be seen that although capital punishment has now been abolished in most of the countries of the world today, still there are quite a few, like ours, who still believe in the concepts of capital punishments. The recent case of *Mukesh and Anr. V. State for N.C.T. of Delhi and Ors.*⁷ is a pristine example for explaining Kant's moral theories and love for retributive justice. In the above case, the death sentence that was given to the four rape convicts had not been a punishment, but a moral precedent for the whole country that such crimes shall and will be met with severe penal actions and the convicts won't be spared at any cost. Many examples are there to show that Kant's emphasis upon morals being above everything else is reiterated. However, we may also see that Kant's proposal that the sovereign has no power in determining whether anything is moral or not, has many contradictions as well. To list a few-

1. Declaration of the practice of *Sati* as immoral and illegal by Lord Bentinck.
2. Declaration of the practice of *Devadasis* as immoral by the British Indian Government.
3. Declaration of Section 377 and 309 to be void by the Supreme Court.
4. Declaration of the age-old customs of restricting the entry of women in the *Shani Shingnapur* and Sabarimala Temples as void by the Supreme Court.

The very fact that the Constitutional Courts of our great nation have the power to determine, to interpret the Constitution as they deem fit and declare the validity of any particular law, including a custom or a usage, contradicts the very basic foundation of Kant's theory that the sovereign has nothing to do with the morality of a particular act or situation, etc.

Taking Kant's proposition in the light of psychology, then we may say that he was correct. Even after the declaration of Section 377 as void by the Supreme Court, there are still innumerable people

⁷ CRIMINAL APPEAL NOS. 607-608 OF 2017, Supreme Court of India.

in India, in fact, the majority, who feel that same-sex relationships are immoral. Thus, even though the State declared it to be immoral, it had little or no effect on the people whatsoever.

To date, dowries are considered to be moral in many families, even though there is an Act prohibiting the same. Bigamy is illegal, even though many communities in the country still follow it. Thus, we may say that Kant's theory is right, as well as wrong. Nothing else may be pointed out.

Criticism of Kant's Approach-

The main criticism that we may see with regards to Kant's approach is the fact the Kant's theories apply only to rational beings. Now, at first, this may seem to be quite logical and sensible, but what about the unsound people, people in a vegetative state, children, etc.? They too are humans and have rights but as per Kant, they are excluded. Hence, this is a serious drawback with Kant's philosophy.

Another important problem is the fact that Kant never really distinguished between 'perfect duty' and 'imperfect duty'. For example, not to tell a lie and whether to tell a lie to not hurt someone. The classic example of the same is found in a story from *Mahabharata*. During their conspicuous exile, the *Pandavas* had disguised themselves and were living in the Court of King *Viraat*. However, one day the *Kauravas* attacked the kingdom. *Arjun*, who had disguised himself as a eunuch dancer, immediately sprang upon a chariot with the crown prince as the charioteer and single-handedly defeated the *Kauravas*. Later, King *Viraat* boasted in front of *Yudhishthira*, who had disguised himself as the King's advisor, about how bravely his son, the crown prince, had defeated the *Kauravas*. *Yudhishthira* immediately said that it was *Brihannala* (*Arjun*) who accomplished the feat. Again *Viraat* said that it was the prince, again *Yudhishthira* said that it was *Brihannala*. The third time when *Yudhishthira* said that it was *Brihannala*, *Viraat* slapped him and said that he knew that it was the eunuch, but didn't want to accept that his son had to be helped by a eunuch to win the war. Thus, *Viraat* was hurt by the truth. *Yudhishthira* kept on doing his 'perfect duty' to not tell a lie but forgot that too much of anything is also wrong.

Another problem of the approach of Kant was that in the process of universalizing the maxims, people would interpret them in any way and do whatever they would want to. For example, Hitler found some of his ideas from the *Bhagwat Gita*, as is said. We don't know what it was, but he surely interpreted them to the detriment of the whole world.

JOSEF KOHLER AND HIS APPROACH

Kohler was a representative of the sociological school of jurisprudence, which was mainly focussed on the social purpose of the law. In 1873, he had received his qualifications from the University of Heidelberg and Freiberg. Later, in the following year, he was appointed as a Judge at Mannheim. Later in 1888, he had received the post of Professor at the University of Berlin. In 1909, his major work, "Philosophy of Law", was based on the study of the Theories of Justice of Georg Wilhelm and Friedrich Hegel. Additionally, he had written about German patent and copyright laws. He had authored several volumes of poetry, a novel, and essays on art history.⁸



Josef Kohler (March 9, 1849 – August 3, 1919). Image Source⁹

The Description of Kohler's “Philosophy of Law”-

In his book, he has postulated that "promotion" and "vitalising of cultures" has been achieved through the instrumentality of the law. According to his words, "culture" means the totality of the achievements of humanity. In the book, Kohler has mentioned that law has to develop itself according to the developments in civilisation and advancing culture. Every culture should have its postulates of law to be utilised by society according to the requirements. As such, there's no

⁸ Josef Kohler, Britannica (Mar. 14, 2021, 4:08 P.M.), <https://www.britannica.com/biography/Josef-Kohler>.

⁹ https://upload.wikimedia.org/wikipedia/commons/8/88/Josef_Kohler_-_ZVglRWiss_37.jpg.

particular law or universal body of legislations that can fit all types of civilisations, as what might be good for one stage of culture, may not be the same for the other.¹⁰

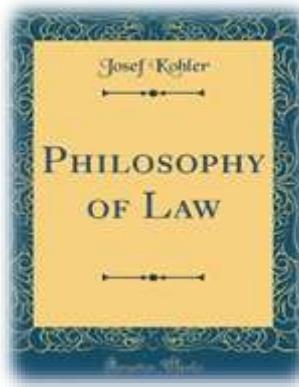


Image Source¹¹

Kohler's Theory-

According to Kohler, all the activities of a human are cultural activities and that the task of a man is to create and develop a new abundance of forms which shall be considered as a second creation in juxtaposition to divine creation. He had pointed out that,

"The law plays an important part in the evolution of the cultural life of mankind by taking care that existing values are protected and new ones furthered. Each form of civilisation must find a law that best suits its purpose and aims. There exists no eternal law; the law that is adequate for one period is not so for another."

Kohler was highly influenced by the Hegelian legal theory. He had conceded the idea of universal civilisation but, didn't believe that there exists an eternal law of a universal body of legal institutions uniformly suited to all the societies.

¹⁰ V.D. Mahajan, Jurisprudence and Legal Theory 518-519 (5th, 2021).

¹¹ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.amazon.com%2FPhilosophy-Classical-Reprint-Josef-Kohler%2Fd%2F0331805316&psig=AOvVaw3UuMiRVQDcGzg3E8u1t1fB&ust=1615803679534000&source=i&cd=vfe&ved=0CAIQjRxqFwoTCJDorPbHr-8CFQAAAAAdAAAAABAN>.

Dean Roscoe Pound had written that Kohler's "*formation of the jural postulates of the time and place is one of the most important achievements of the recent legal science.*"¹²

Application of Kohler's Theory-

1. The biggest and foremost application of Kohler's theory is the fact that each country has its own Constitution, has its own criminal and civil laws and its own jurisprudence, particularly speaking.
2. In the case of India, we may see that Kohler's theories have been implemented extensively, the most quotable example being the existence of separate person laws for the Hindus and the Muslims.
3. However, Kohler's point that law is never constant and keeps on changing is very similar to what we will see in Del Vecchio's theory at length. There we shall discuss upon a variety of examples to prove this point. This postulate is completely true and can't be challenged at all costs.

Criticism of Kohler's Approach-



Dean Roscoe Pound (October 27, 1870 – June 30, 1964). Image Source¹³

¹² Anjali Dixit, Jurisprudence, Rama University (Mar. 14, 2021, 4:19 P.M.) PDF,
<https://www.ramauniversity.ac.in/online-study-material/law/l1b/iisemester/jurisprudence/lecture-1.pdf>.

¹³https://www.google.com/url?sa=i&url=http%3A%2F%2Fwww.freemasonry.bcy.ca%2Fbiography%2Fpound_r%2Fpound_r.html&psig=AOvVaw3xezV4pHk2c87WDvaXYsvr&ust=1615805486235000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCNiX6dPOr-8CFQAAAAAdAAAAABD.

Eminent American Jurist, Dean Roscoe Pound had mentioned that Kohler's "formation of the jural postulates of the time and place is one of the most important achievements of recent legal science". The natural law which is of the philosophical school loses the rigidity and thus becomes charged with a changing or growing content being conceived as something relative and not as something that shall stand forever.¹⁴ Some important drawbacks maybe noted as follows-

1. Kohler's theory falls short when we talk about the current international laws, like the Universal Declaration of Human Rights, the various conventions of which various countries have been a part, etc., which are same for all the nations and tend to 'universalise' the law, much to Kohler's disdain.

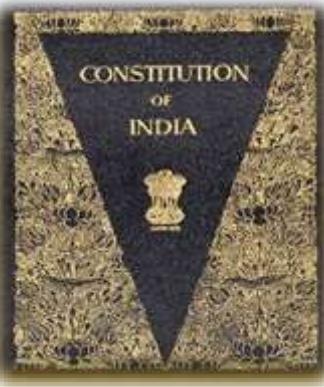


Universal Declaration of Human Rights. Image Source¹⁵

2. In India, although we may have separate civil codes for Hindus and Muslims, but the thing is that still we have the Constitution as the apex law, which is the same for all. Hence, that example is defeated here once again.

¹⁴ *Supra* note 5.

¹⁵ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.un.org%2Funiversal-declaration-human-rights%2F&psig=AOvVaw3IYU8GA60PB6iG2WRL4ipS&ust=1615805535617000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCKCCx-zOr-8CFQAAAAAdAAAABAD>

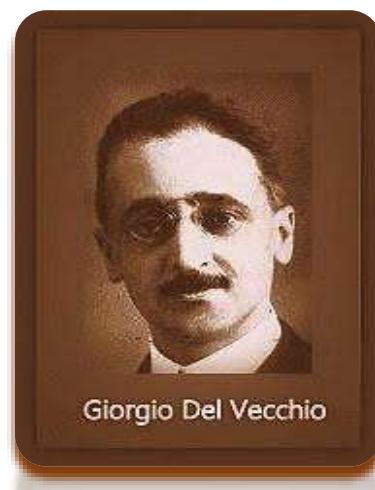


Constitution of India. Image Source¹⁶

GIORGIO DEL VECCHIO AND HIS APPROACH

Giorgio Del Vecchio was an Italian Legal Philosopher in the era of early 20th century. He was born on the 26th of August, 1878, at Bologna, Italy & died on the 28th of November, 1970 at Genoa, Italy. He was the son of the famous economist Giulio Salvatore Del Vecchio.

He is famous for his book titled "***JUSTICE***". He was the Founder & Director of the International Journal of Philosophy of Law.



¹⁶ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fnationalinterest.in%2Flaw-101-the-constitution-of-india-f787e7c0c881&psig=AOvVaw1QGaIfnyr1T93XM3n6TTMn&ust=1615805656054000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCPj-1aXPr-8CFQAAAAAdAAAAABAD>



Image Source¹⁷

If we start to talk about the Philosophical School of Jurisprudence, it mainly talks about the perfection of human personality as the ultimate objective of the Law. It is mainly depending upon ethics rather than Law. So it is because of this that so many jurists had given their different points of view on that. But at the end of the story, the basic principle is the same or the basic thoughts are the same.

Del Vecchio was influential in transforming Italian legal thought from nineteenth-century positivism. He belonged to Neo-Kantian Idealism and Humanist Ethical Idealism schools.

According to Del-Vecchio, the human mind can establish rules of justice unaided by positive law. So, he showed and tried to make people believe that positive law is an obstacle in the process of legal reforms.

In his point of view, the logical form of law is more comprehensive than the sum of the judicial propositions. He simply wanted to say that in the positive law (*jus positivum*) worldview, if the Government of the country came up with a new policy, the subjects (the citizens, normally) were asked to consider the Govt. to be supreme, follow all the orders of Govt., be obedient towards the Govt., etc. But it may happen that it cannot bring any legal reform in the country. But before binding them to follow those orders, rules, etc., if the Government can establish the principles of

¹⁷https://www.google.com/url?sa=i&url=https%3A%2F%2Fen.wikipedia.org%2Fwiki%2FGiorgio_Del_Vecchio&sig=AQvVaw2_HxY_XhGz5gDNY2cnGYyW&ust=1615901812843000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCLiLhcG1su8CFQAAAAAdAAAAABAD

those rules or orders before reasoning starts, then it may bring the legal reform in the country. If the Govt. makes the citizens understand the reason behind the same, then may the citizens follow those rules judiciously.



Secondly, we can trace the point which he wanted to clear in his theory of Philosophical School of Law that, nothing can be permanently labelled as a good or bad law and just or unjust law.

It's all about human personality, human psychology, that how the society is taking those particular laws and it also depends on the level of advancements in the thinking at that time. Like in the early 19th century, according to the deterrent theory of punishment, if any crime was committed, then there were several types of punishments to be given like public hanging, not only that but also people were immersed in hot oil or water. In that period, it was "just" but with the advancement of time, thinking processes changed and now this concept is no more valid.

Essentials of Del Vecchio's Theory of Jurisprudence-

Quest for Equal Freedom of All Mankind-

Del Vecchio treated Law as a phenomenon of nature and an expression of human liberty towards a definite purpose. In his point of view, justice is based on respect for personality. This means the law should be equal for all the people.

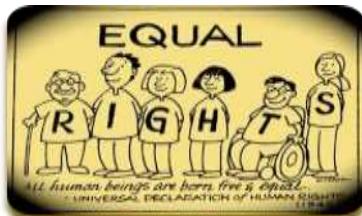


Image Source¹⁸

Law is inspired by human values-

That means every human being has a right to lead their life peacefully. Every law should be based on human nature, not by a custom, culture. Law should not be inhuman in nature. Law should be such where everyone gets a fair & reasonable justice. Justice D. Y. Chandrachud is of the same opinion. He openly declared that, '*Law should have a human face*'.¹⁹ We may see that his opinion is in accordance with that of Del Vecchio.

Applications of Del Vecchio's Theory-

If we thoroughly research upon the applications of Del Vecchio's theory, we can see so many incidents, cases where it was applied transparently. Now let's have a look at some of these interesting matters, with respect to the various essentials of his theory-

▪ Nothing is Good or Bad and Just or Unjust-

- i. **Killing Jews in Nazi Germany:** If we go back into Adolf Hitler's period, we can see when Hitler came into power in Germany, it used to happen that Jews were killed in Nazi Germany. Jewish people were excluded from public life when the Nuremberg Laws were

¹⁸https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.indiaassignmenthelp.com%2Fhuman-rights-law-assignment-help-india&psig=AOvVaw03foPoZkr8ozMLR_0cxxWR&ust=1615901945836000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCLCJgIS2su8CFQAAAAAdAAAAABAD

¹⁹ Swati Deshpande, 'He taught me that law needs to have a human face', The Times of India (Mar. 11, 2021, 8:36 P.M.), <https://timesofindia.indiatimes.com/home/sunday-times/he-taught-me-that-law-needs-to-have-a-human-face/articleshow/52273469.cms>.

issued. These laws also stripped German Jews of their citizenship and their right to marry Germans. So at that time, society had taken this as a "just" practice but with the growth of time and after the downfall of the Hitler's tyranny in the country, they started to think that was not the right thing so it started to change.



Auschwitz Concentration Camp. Image Source²⁰

- ii. **Apartheid in South Africa:** One of the major examples, when we talk about this aspect of Del Vecchio's theory, is the practice of Apartheid in South Africa. We may remember that in the case of Apartheid, it was seen that the colonial rulers, that is, the British had made a separate set of laws for themselves and a separate set for the African natives. They were being discriminated based on the colour of their skin. This indeed shows that this practice was, at one time, considered to be valid and moral, but with the march of time, the trumpets of equality scared it away.

²⁰ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fworld-europe-50743973&psig=AOvVaw3xdwD-RKCZDrvKngKQzioC&ust=1615568352058000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCICW6KDbqO8CFQAAAAAdAAAAABAD>



Separate area demarcated for the White People. Image Source²¹

- iii. **Section 377 of IPC:** A very Indian example would be Section 377 of the Indian Penal Code. Till the time the Judgment²² decriminalising this practice was pronounced, the Section was considered to be moral and good and homosexuality was considered to be criminal in nature. However, the moment the Judgement decriminalising homosexuality was passed, it made the act valid and not void or criminal.



Image Source²³

²¹ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.dw.com%2Fen%2Fa-brief-chronicle-of-apartheid%2Fa-17584649&psig=AOvVaw3Eb-M7lMrSXqHRzTAAJ1IN&ust=1615568458238000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCPChPbqO8CFQAAAAAdAAAABAI>

²² *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016 (Supreme Court of India).*

²³ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fscroll.in%2Farticle%2F893406%2Fsection-377-verdict-what-you-need-to-know-about-scs-decision-to-decriminalise->

▪ ***Quest for Equal Freedom of All Mankind-***

Here Jurist Del Vecchio talked about the efforts to maintain freedom by which Law is influenced.

- i. **Case of Triple Talaq**²⁴: The Muslim Women (Protection of Rights on Marriage) Act, 2019, was passed by both Houses of the Parliament. This Act, in substance, declared the triple Talaq, i.e. Talaq-e-Biddat or any other similar form of Talaq, illegal. Any Muslim husband who pronounces such Talaq to his wife can suffer imprisonment for a term of three years and also be liable for a fine. But it took to pass such a Law in the Parliament more than 70 years of gestation, since Independence. But before passing this Act, there was very little freedom in terms of marital rights available to Muslim women, when compared to Hindu women. Because Hindu women didn't have to face these types of practices in the name of religion.



Shayara Bano. Image Source²⁵

homosexuality&psig=A0Vaw39xlbPIVpsmlXMfAVBsPx1&ust=1615568551498000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCJiRxP_bqO8CFQAAAAAdAAAABAD

²⁴ *Shayara Bano V. Union of India and Ors.*, (2017) 9 SCC 1.

²⁵ <https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.thehindu.com%2Fnews%2Fnational%2Fother-states%2Fanti-triple-talaq-crusader-shayara-bano-gets-minister-rank-in-uttarakhand%2Farticle32906809.ece&psig=A0Vaw22jUYs1AN3ORmnJoA9pjuB&ust=1615568622052000&source=images&cd=vfe&ved=0CAIQjRxqFwoTCOCU0qHcqO8CFQAAAAAdAAAABAI>

▪ ***Law is Inspired by Human Values-***

Here the main concept is that everyone has a Fundamental Right to lead their life. The Law should not be based on religion or custom or culture. In fact, we may see that Justice D. Y. Chandrachud himself reiterated this point, by saying, ‘Law should have a human face’.²⁶ The biggest example of the same is the Universal Declaration of Human Rights. We may see that this particular Declaration had been clearly influenced like human values and needs, like security of employment, protection in the case of disasters, enjoyment of basic facilities, freedom to express oneself, etc.

i. ***SC, ST people:*** Article 46 of the Constitution provides that,

‘The State shall promote with special care the educational and economic interests of the weaker sections of the society and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitation’.

We may see that a specific legislation, that is, the Protection of Civil Rights Act is one such step in this regard. This Act categorically provided that the Scheduled Tribes and Castes too have all the Rights to lead and enjoy a good life, hence they should too be entitled and protected through various human rights.

ii. ***Dowry Prohibition Act:***

Another great example to show this aspect of Del Vecchio’s theory is the enactment of the Dowry Prohibition Act. This Act was clearly influenced by the human values of preventing injustice, ensuring equal say to the bride’s family and aborting their exploitation, etc.

Criticism of Del Vecchio’s Approach-

- ✓ The first and foremost criticism of Del Vecchio’s theory lies in the fact that he stated that law is inspired by human values, that is, morals and ethics. However, we may see that there are so many laws in a modern State, which are purely technical in nature and have nothing to do with human rights and values, for example, Securities’ Laws, Banking Laws, Investment

²⁶ Swati Deshpande, ‘He taught me that law needs to have a human face’, The Times of India (Mar. 11, 2021, 10:11 P.M.), <https://timesofindia.indiatimes.com/home/sunday-times/he-taught-me-that-law-needs-to-have-a-human-face/articleshow/52273469.cms>.

Laws, Army Laws, *etc.* Hence, Del Vecchio's postulate that law has to be 'humane' can't fit in such cases.

- ✓ The second drawback of Mr. Del Vecchio's theory is the fact that he stated that 'positive law' can never bring in a legal reform. However, we may see that in so many cases, positive laws indeed are the sources of legal reforms. For example, in the case of Triple Talaq, it was clearly seen that the Supreme Court declared that the practice of Triple Talaq was unconstitutional and ordered the citizens of the country to follow its order. Now, as per Del Vecchio's approach, this can never be the source of a legal reform, but, in reality it was.

CONCLUSION-

We had a detailed discussion about the philosophical school of jurisprudence and also the three very important thinkers of the same, that is, Kant, Kohler and Del Vecchio. We may see that the philosophical or ethical school, although may have its drawbacks, is quite important as many-a-times the morals are taken as a basis to deliver justice.