



# **THE RELEVANCE OF POSITIVISM IN CULTURALLY PLURAL INDIA SOCIETY**

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**Abstract--** Legal positivism is one of the most influential schools of thought in jurisprudence which developed in the West, especially Britain. Their basic aim is to understand law as it actually is and how it is found in actual practices or in the institution of society. Positivists regard law as a 'social fact' and separate it from morals. In other words, we can say positivists are not concerned how law is 'ought to be' but how it is in practice.

Though, most laws are based on morals, positivist says that there should be no necessary relation or connection between morals and laws. A moral rule is a rule because of its content. In contrast, the legal rule is legal not owing to its content but only because it has been constituted in a particular fashion, born of definite procedure and definite rule of law. Conversely, a morally repugnant rule will be a law if it has been made according to the established procedure or the criteria for validity.<sup>1</sup>

## **I. INTRODUCTION**

Some positivist consider that a law to be called a law must emanate from or must be recognized by an established authority, whereas some consider customary rules which are followed from ages as laws as well. However, they create a distinction between these customary laws and the laws developed by the given legal system. It also states that laws are the creation of human and does not flow from some divine entity. Thus, we can say that positivist undertake an empirical perspective of looking at laws by leaving behind subjectivities related with morals.

Cultural pluralism is one the main features of Indian society. India is home to different races, religious groups, tribes etc. and each of these groups have their unique characteristics. In such a context, legal pluralism plays a relevant role in India by putting law above the various customs and traditions that are at times contradictory to one another. In this research work, the researcher discusses the basic characteristics of pluralism and attempts to find the relevance of positivism in culturally plural Indian society.

## **II. WHAT IS POSITIVISM?**

Legal positivism is one of the most influential schools of thought in jurisprudence. The start of the nineteenth century might be taken as marking the beginning of the positivist movement. Legal positivism at birth was part of the wider 18th century intellectual movement known as the enlightenment, which turned away traditions, superstitions and irrationality to embrace empiricism and science.<sup>2</sup> It was developed largely by Jeremy Bentham and John Austin and was subsequently taken forward by eminent jurist such as H.L.A Hart and Joseph Raz. The above jurists have significant differences in their views but the common idea that all of the above jurists have is that they analyze law as it is.<sup>3</sup>

There is division among different positivist based on the weightage they give to morals. The division is between soft positive positivist and negative positivist. Positivist such as Hart are regarded as positive positivist or 'soft positivist' as they give recognition to moral principles whereas positivist like Austin are negative positivist as they completely negate the existence of moral principles. Therefore, legal positivism doesn't completely negate the existence of morality by rather attempts to separate law and morality.

The term positivism has different meanings, which were tabulated by professor Hart as follows:

(1) Law is commands. This meaning is associated with the founders of positivism Bentham and his disciple Austin.

(2) The analysis of legal concept is:

(a) Worth pursuing,

<sup>1</sup>SuriRatnapala, Jurisprudence, Cambridge University Press India Pvt. Ltd., Delhi, 2018

<sup>2</sup>SuriRatnapala, Jurisprudence, Cambridge University Press India Pvt. Ltd., Delhi, 2018

<sup>3</sup>H.L.A. Hart, The Concept of Law, Clarendon Law Series, 1961



(b) Free from sociological and historical enquiries,

(c) Distinct from critical evaluation.

(3) Decision can be deduced logically from pre-determined rules without recourse to social aims, policy or morality.

(4) Moral judgment cannot be established or defended by rational arguments, evidence or proof.

(5) The law as it is actually laid down, positum, has to be kept separate from the law that ought to be.<sup>4</sup> It is the first meaning given by Hart that is presently associated with positivism. It may spring from love to order, which aims at the clarification of legal conception and their orderly presentation.<sup>5</sup>

Legal positivism is the child of utilitarian moral theory and strives to advance the public good. The main contention is that law can be made better if it is not confused with morality. Their main objective is to make people understand law 'as it is' and not as law 'ought to be'. The common theme among the entire jurist from school of legal positivism is to create clear distinction between law and moral principles as well as legal duty and moral duty. The legal positivist propound that there is no relation between law and morality. However, they were of the view that law might reflect the morality of the person or body that controls it; and therefore there was no necessary connection between law and morality but is what is laid down by the superior authority.

### III. RELEVANCE OF POSITIVISM IN CULTURALLY PLURAL INDIAN SOCIETY

The Merriam Webster dictionary defines pluralism or cultural pluralism as: 'a situation in which people of different social classes, religion, races, etc., are together in a society but continue to have their different traditions and interest.' It refers to a situation where multiple smaller groups within a larger society have distinct cultural identities. In a culturally plural society, there is the existence of a dominant culture, unlike in multiculturalism, where there is no dominant culture.

Every civilization has certain unique characteristics or features of its own. India is distinct from other civilizations of the world in respect to its continuity and heterogeneity. India is the host of different cultural groups. Since the middle of the second millennium BC, Indian civilization has played host to several streams of migrant groups and communities from different parts of the world. The advent of the Aryans, the Tibeto-Burman speaking Mongoloid groups, the Kushans, the Sakas, the Greeks, the Huns, the Arabs, the Persians, the Turks and the Mongols at different points of time testifies to the pervasiveness of the migration process during the successive periods of Indian history. The migrant groups and communities brought their respective traditions and behavior patterns from their native lands. In the course of time they lost contact with their places of origin and underwent an extensive process of indigenization. The process of adaptation and interaction among the various groups brought about, on the one hand, India's characteristic diversity and, on the other, a composite cultural tradition.<sup>6</sup>

In a culturally plural society, the separation of law and morality becomes even more essential. Morality is a subjective term and differs from one culture to another, i.e. what maybe moral for one cultural community may not be so for the other. It is not possible for the state or the sovereign to concede with the meaning of morality of all the groups in a culturally plural society and conceding with only one form of morality will go against the others. The same applies for culturally plural India. Positivism is characterized as making clear distinction between law and morality. According to Austin and Bentham law and morality are completely different entities, and Hart holds that law and morality need not have any necessary connection. This character of positivism becomes relevant in India, as for different groups 'what ought to be law' differs, therefore, with positivism the law which is established is accepted as it is without any moral qualification. Positive law is the product of empiricism and scientific thinking and takes a stand free from morality. The law, by authoritatively stating the rule to follow, relieves people of the interminable discussion about right conduct.<sup>7</sup> However, a law maybe against the interest of certain sections. To this, we can apply Hartian perspective of law to this problem. Hart states that law requires minimum content of natural law. A legal system that is effective may produce laws that

<sup>4</sup>R.W.M Dias, Jurisprudence, Lexis Nexis, Haryana, 2018

<sup>5</sup>R.W.M Dias, Jurisprudence, Lexis Nexis, Haryana, 2018

<sup>6</sup>[http://ignca.nic.in/ls\\_03016.htm](http://ignca.nic.in/ls_03016.htm), accessed on 27th October, 2018

<sup>7</sup>SuriRatnapala, Jurisprudence, Cambridge University Press India Pvt. Ltd., Delhi, 2018



many consider to be morally repugnant. Yet it will be valid laws if they if they satisfy the criteria set by the rule of recognition.<sup>8</sup> Hart saw many ways in which law and morality can be linked. But these were, for Hart, not necessary but contingent connections.<sup>9</sup> Morality constantly influences law making by legislators and judges. In some countries the constitution lays down moral test in form of fundamental rights and freedoms that every law must pass in order to be valid. This test, hart and other positivist argue, are enforceable not because of their morality but because they constitute an established rule of recognition.<sup>10</sup>

Norberto Bobbio has singled out three main conceptions of legal positivism: methodological positivism, theoretical positivism, ideological positivism.<sup>11</sup> Methodological" positivism is a peculiar way to conceive of the function of legal knowledge and, at the same time, of the object of legal knowledge itself. The legal positivist is characterized by commitment to a value-free, scientific approach in studying actual law. From this important methodological tenet it thus follows that there is a sharp distinction between "actual" law and "ideal" or "natural" law: between law as a fact and law as a value; a distinction which aims to point to the former as the proper (indeed only) object of legal knowledge.<sup>12</sup> In a culturally plural society, every section has different interests, which maybe contradictory to each other. Therefore, it is essential for the legal authority to be value neutral.

Bentham laid down the utilitarian principle which states that law should create 'greatest happiness of the greatest number', thus positivism in a culturally plural society ensures that the interest if the maximum population is served rather than taking moral stand based on interest of one community over other.

A culturally plural society has different groups with its own religion and practices. In addition, each of this religion comes with a set of laws. If each of these groups were to prescribe to their religious laws, each of the groups will come into contradiction with the other. The will of the sovereign as stated by Bentham and Austin is the law in actual and it would avoid such contradictions. Furthermore, it would be a serious problem for a theory of law that it made the nature of law dependent on the will of God, since we have neither good reason to think God exists (and much reason to think he does not), nor reliable epistemic access to his will (if he did exist). It is a virtue of legal positivism that its picture of the world is metaphysically austere: it requires only persons and their psychological states to explain the social phenomenon of law. Theoretical virtue of legal positivism is that it has no need for such an ontology.<sup>13</sup>

In a culturally plural society like India, there are many customs and practices practice of which may hamper another section. Therefore following law from one single source will prevent conflict. According to Hans Kelson, the constitution of a nation represents the 'basic norm' of the nation and the only legitimate source of law. It is the constitution on which the law of the land is based upon and everyone must act in accordance to it. The above discussion showing relevance of 'Legal positivism' in culturally plural India society can be elaborated by the case: *Suresh Kachhadia v. Union of India*

In this case, Mr. Kachhadia had filed a PIL seeking direction to Central and State government to make it mandatory for manufacturers to print details of goods like price, ingredients and date of manufacture in Hindi, contending that it should be done so as Hindi is the national language. He contended it on the basis that Hindi is the national language as it is understood and spoken by a large number of people.

The Gujarat High Court has observed in this case that though majority of people in India spoke Hindi and considered it as the national language but there was nothing on record to establish the position of Hindi as the national language. The observation made by S.J Mukhopadhyaya C.J, and A.S Dave J. observed that "Normally, in India, majority of the people have accepted Hindi as a national language and many people speak Hindi and write in Devanagari script but there is nothing on record to suggest that any provision has been made or order

<sup>8</sup> IBID

<sup>9</sup> IBID

<sup>10</sup> IBID

<sup>11</sup> GIORGIO PINO, THE PLACE OF LEGAL POSITIVISM IN CONTEMPORARY CONSTITUTIONAL STATES, Kluwer Academic Publishers, Netherlands, February 28, 1999

<sup>12</sup> IBID

<sup>13</sup> [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1386&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1386&context=public_law_and_legal_theory), accessed on 27th October, 2018



issued declaring Hindi as a national language of the country.”<sup>14</sup> The court further exalted that “no mandamus can be issued on any manufacturer or others for giving details or particulars of package in Hindi in Devnagari script.”<sup>15</sup>

The court took this position the basis that Hindi was declared as an official language and not a national language. The court in its order said Part XVII of the Constitution deals with Official Language. Under Art.343, official language of the Union has been prescribed, which includes Hindi in Devnagari script and English.<sup>16</sup>

This case acts as an example that shows the separation of law from morality and in this case the interest of the majority and decides the case on basis. In this case, Constitution of India or the basic norm of India was upheld over the majority view, opinion or interest. The court decided on the basis of what is laid down in the constitution, i.e., Art. 343. Positivism is based on scientism and social facts and the court in this case took account of the lingual diversity in India. Looking at the case from the Austinian sense, the law of sovereign is the ultimate law and the court as the delegate of the sovereign held that the Hindi is not the national language of India.

This given case shows the relevance of positivism in culturally plural society. Law devoid of moral consideration and ‘as it is’ ensures uniformity and prevent cumbersome problems that may arise while taking into consideration morality represented by one group while ignoring the other.

#### IV. CONCLUSION

Positivism or legal pluralism is a school of thought that see law ‘as it is’ and not as it ‘ought to be’. It is based on empirical and scientific outlook on social facts. Positivism doesn’t consider the source of law to be some unknown transcendental authority but rather the will of the sovereign. The main objective of positivists is to make a clear distinction between law and morality.

India is a culturally plural society with diversity in race, language, food habits, religion, lifestyle etc. Indian society is characterized with the existence of different groups with distinct identities. Positivism in culturally plural society prevents conflict between cultural or religious rules of different groups by putting the law of the sovereign and the constitution above all. It maintains value neutrality and thus ensures the benefits of the greater number are taken into account rather than a particular section of the society. Positivism separates law and morality. Though, at times law and morality maybe connected but such connection is not necessary. Positive law by not prescribing to some eternal law but rather to the will of the sovereign ensure uniformity of law as well as a proper singular source of law. Positivism from Kelsen’s perspective makes the Constitution the ‘basic norm’ or ‘grundnorm’, i.e., the sole legitimate source from which all rules and laws follows and the case and conflicts are resolved on the basis of the Constitution and thus the question of discrimination of the interest of one section and exclusion of the other does not arise.

<sup>14</sup>Suresh BhaiKachhadia v. Union of India, 2010 SCC OnLineGuj 187

<sup>15</sup> IBID

<sup>16</sup><http://factsfootprint.blogspot.in/2012/09/real-foot-print-of-fact-hindi-not.html>, accessed on 27th October, 2018