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Place of Legal Positivism in 21st Century

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The law and the legal system are very important in any civilization. In modern times, no one can imagine a society without law and a legal system. Law is not only important for an orderly social life but also essential for the very existence of mankind. Therefore, it is important for everyone to understand the meaning of law. In a layman's language, law can be described as' a system of rules and regulations which a country or society recognizes as binding on its citizens, which the authorities may enforce, and violation of which attracts punitive action. These laws are generally contained in the constitutions, legislations, judicial decisions etc. Jurists and legal scholars have not arrived at a unanimous definition of law. The problem of defining law is not new as it goes back centuries. Some jurists consider law as a 'divinely ordered rule' or as 'a reflection of divine reasons'. Law has also been defined from philosophical, theological, historical, social and realistic angles. It is because of these different approaches that different concepts of law and consequently various schools of law have emerged. Jurists hold different perceptions and understanding of what constitutes the law and legal systems.[1]

The key to legal positivism is in understanding the way positivists answer the fundamental question of jurisprudence: "What is law?" The word "positivism" itself derives from the Latin root "positus", which means to posit, postulate, or firmly affix the existence of something. Legal positivism attempts to define law by firmly affixing its meaning to written decisions made by governmental bodies that are endowed with the legal power to regulate particular areas of society and human conduct. If a principle, rule, regulation, decision, judgment, or other law is recognized by a duly authorized governmental body or official, then it will qualify as law, according to legal positivists.

It is important at the outset to recognise that positivism is not exclusively jurisprudential. Its central claim is the view that only empirically confirmed knowledge discovered by the application of a rigid scientific methodology is genuine knowledge. The idea behind positivist legal philosophy is that law is 'posited' or imposed by people.[2]

Positivist law is a posited system of norms, as Hans Kelsen described it.[3] As Hart explained, the definition of law does not include a position on morality, although morals may inform law.[4] Thus, the validity of law is independent of its content. Legal positivism attempts to explain law as it is rather than, as it ought to be. This is the positivist's claim to scientificity; to focus the conceptual analysis of law on what it 'is' rather than what it should be.[5]

1 "The Nature and Meaning of Law." Available at http://cbseacademic.in/web_material/doc/Legal_Studies/XI_U2_Legal_Studies.pdf (visited on July 12, 2015).

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3 Hans Kelsen, General Theory of Law and State (Russell, New York, 1961) 110-111

4 HLA Hart, Law, Liberty and Morality (Oxford University Press, Oxford 1963).

5 Peter Boulot and Helen Sungallia, New Legal Paradigm: Towards A Jurisprudence Based On

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Many times jurists have made their efforts to define law, its sources and nature. For the purpose of understanding their points of view, the jurists are divided on the basis of their approaches to law. This division has been helpful in understanding the evolution of legal philosophy.

Positivism was the philosophy propounded by the French thinker, Auguste Comte (1798-1875) who rejected theological and metaphysical approaches to the study of social phenomena and insisted on the scientific method of careful observation and logical inferences. In the field of jurisprudence, **classical** positivism is largely associated with the names of English jurists Bentham (1748-1832) and Austin (1790-1859). The Austianian analytical school is widely regarded as the classical positivist theory. After Austin, positivism was sought to be developed by (1) Kelson's pure theory, (2) neo-positivism also known as logical positivism. And the Hart concept. (4) Dynamic positivism sees law not only as it is, but also as it is likely to be examines the origin of the law, its trend and direction and possibly of guiding its progress smoothly.[6]

Legal positivists argue that in each of the above situations, moral standards attain legal status only through some form of official promulgation. In general, legal positivists separate the law from the materials from which the law is built, including morals, customs, folkways and policy.[7]

Legal Positivism and Indian Constitution

The post- independence era in India necessitated a fresh approach to the existing laws which were hardly suited to the changed socio-economic and political conditions of the country. The independence of the Country heralded a new era. The Constitution laid down the goals which the nation committed to achieve. The socio economic goal and the founding faiths of our nation were incorporated in the Constitution. It enjoined the law the function to make environmental adaptations of the existing legal system, feeling the needs and the mores of the people, evolving principles of the law and legislative formulations and statutory institutions which will harmonize with the urgencies or our times, and translating into action the mission of the Constitution. Thus, the goals set by the Constitutions made it imperative to bring about socio- economic changes.[8]

Let us to the cases involving legal positivism. This was first evidence in 1951 in *the State of Madras vs. Srimathi Champakam Dorairajan and State of Madras vs. C.R. Srinivasan*[9] wherein the Supreme Court struck down a Madras G. O. regulating admission to an educational institution supported by the state. The court rejected the contention of the Advocate General that the said order was necessary to serve the cause of social justice, namely, to promote educational and economic interests of the Scheduled Castes and Scheduled Tribes and other weaker sections – an objective clearly enshrined in the Directive Principles of the state policy. The court refused to give a sociological interpretation to the order of the government which was meant to serve the interest of the underprivileged. This led to the Constitution (first Amendment)[10] Act, 1951. The Supreme Court guided by the logic of

Ecological Sovereignty,. MqJICEL (2012) Vol 8(1).

6 Justice Markandey Katju, the Theory of Dynamic Positivism, 24-25 available at http://www.bhu.ac.in/mmak/resent_article/JusticeKatjusLec.pdf

7 Suri Ratanpala, Jurisprudence at 25-26

8 P. K. Tripathi, An Introduction to Jurisprudence, 328-329 (Pioneer Publications, Delhi)

9 1951 SCR 525. vol. 2

10 The Constitution(1st Amendment) Act, 1951 added clause (4) to Article 15, to permit special provisions for the advancement of socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

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legal positivism observed that since this was a conflict between the fundamental rights and the directive principles of state policy and since the former were non-enforceable, the order should be declared void.

In **A. K. Gopalan v. state of Madras**[11] the petitioner had been detained under the Preventive Detention Act, 1950 the court was asked to pronounce upon the true meaning of Article 21 of the Constitution concerning the personal liberty. The majority of judges held that in respect to fundamental rights to life and personal liberty no person in India had any remedy against legislative action. As to Article 21 it held that the words 'according to procedure established by law' in the article meant 'according to substantive and procedural provisions of any enacted law'. If, therefore, a person was deprived of his life or personal liberty by law enacted by the legislature, however, drastic and unreasonable the law, he would be rightly deprived of his life and liberty. The Supreme Court interpreted the term law in the positivist sense of the state – made law and not as equivalent of law in the abstract or general sense. Thus Gopalan has rightly characterized as the 'high – water mark of legal positivism'. The approach of the court was too rigid, strict; liberal was dominated by the positivist or imperative theory of law.

In 1967, However, in **Golak Nath v. State of Punjab**[12] the validity of the Constitution (17th Amendment) Act, 1964[13] which inserted certain States Acts in Ninth Schedule was again challenged. the supreme court made history by reaffirming its faith in the logic of legal positivism in The Supreme Court by a decision of 6:5 declared that Parliament had no power to amend part III of the Constitution with the effect from February 27, 1967 and held the Constitution 17th Amendment Act 1964 void. However, by following the rule of prospective overruling, the court allowed the said Amendment Act to continue to remain valid.

The previous Amendment Act such as the Constitution (first Amendment) Act or the Constitution (fourth Amendment) Act were also invalid (enacted after decision of **Shankari Prasad's case**[14] and **Sajjan Singh v. State of Rajasthan**[15] case) and held that Parliament had no power from the date of the decision to amend part-(iii) of the Constitution so as to take away or abridge the fundamental rights. In Golaknath's, the court held that an amendment of the Constitution is legislative process.[16]

While in the **Champakam case 1951** and **Qureshi's case 1958** the Supreme Court had laid down the supremacy of the fundamental rights over the directive principles, the **Golak Nath** decision in 1967 enunciated the doctrine of a free liberal society with a grim remainder to the Parliament and the executive not tamper with fundamental rights in the name of socio -economic reforms.

It was in the **Kesvananda Bharati**[17] case. The Supreme Court reviewed the decision in the Golaknath's case and went into the validity

11 1950 SCR 88

12 AIR 1967 SC 1643

13 The Constitution (17th Amendment) Act, 1964, modified the definition of the term 'estate' in Article 31(A) and also assed 44 Acts enacted by states in the Ninth Shedule.

14 AIR 1951SC 455 at p. 458. in this case the 1st Amendment was challenged, the question before the court was whether on amendment of the Constitution under Article 368 was included in the term "law" in Article 13.

15 AIR 1965 SC 845.

16 Dipakashi Joshi Bisht, Basic structure Theory-Boon or Bane ,Indian Bar Review, Vol. XL(3) 107 -118 at 110 2013.

17 AIR 1973 SC 1461

of the 24th,[18] 25th[19], 26th[20] and 29th[21] Constitution Amendments. The case was heard by the largest ever Constitution Bench of 13 judges. The majority of full bench upheld the validity of the Constitution (24th Amendment) Act and overruled the decision of Golaknath's case. The court held that the expression 'amendment' of this Constitution in Article 368 means any addition, or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble, and Directive Principles. Applied to Fundamental Rights cannot be abrogated, reasonable abridgement of Fundamental Rights could be effected in the public interest. The true position is that every provision of the Constitution can be amended provided the basic foundation and structure of the Constitution remains the same.

In the case of *Smt. Indira Nehru Gandhi v. Sri Raj Narain*[22] popularly known as Election case. In this case, the 39th Amendment Act, 1975 inserted a new Article 329A in the Constitution, to nullify the effect of the High Court judgment and also withdrawing the jurisdiction of all courts, including the Supreme Court, over disputes relating to elections involving the speaker and Prime Minister including the present appeal pending before the Supreme Court. The Supreme Court unanimously struck down clause (4) of Article 329A. A Constitution Bench of the Supreme Court held that it was subversive of the principle of free and fair election postulate and basic structure of the Constitution.

Subsequently, upholding the concept of 'basic structure' as propounded by the court in Keshavananda Bharati, the Supreme Court in *Minerva Mills Ltd. V. Union of India*[23] declared section 55 of the Constitution (42nd Amendment Act), 1976 as unconstitutional and void. Since the Constitution had conferred a limited amendment power on the Parliament. Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power.

Starting on positivist note in 1950[24], it subscribed to natural law school of thought by 1967,[25] only return to positivism by 1976,[26] and then again adopted the natural law approach by 1978.[27]

The SC was also interpreted that the right to life i.e. Art. 21 as inclusive of right to life was also recognized **in Kapila Hingorani v. Union of India[28],** it was clearly stated that it is the duty of the state to provide adequate means of livelihood in the situations where are people unable to afford food.

In Centre for Environment Law v. Union of India[29] on the ground that protecting the environment is a part of Article 21. In Ramlila

18 The Constitution (24th Amendment) Act, 1971- it added clause 4 to Article 13 and a clause to Article 368 clarifying that an amendment did not include in the term law under Article 13. it also rewrote Article 368 for conferring constituent power on Parliament.

19 The Constitution (25th Amendment) Act, 1971- this amendment substituted the word amount for the word of compensation in Article 31(2). It added a new clauses (2-A) to Article 31. it also inserted a new Article 31C.

20 The Constitution (26th Amendment) Act, 1971- This amendment omitted Articles 291 and 362 and inserted a new Article 363A for abolishing the right of Privy Purse and all rights, liabilities and obligations in respect of Privy Purses.

21 The Constitution (29th Amendment) Act, 1972- it inserted two Kerala Land Reforms in the Ninth Schedule.

22 AIR 1975 SC 2299

23 AIR 1980 SC 1789

24 A.K.Gopalan v. State of Madras, AIR 1950 SC 27

25 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

26 A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

27 Maneka Gandhi v. Union of India, AIR 1978 SC 597, Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.

28 (2003) 6 SCC 1

29 (2013) 5SCC

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Maidian[30] the right to sleep was held to be part Article 21.

In the case of **M. C. Mehta vs. Union of India,**[31] where a writ was filed with regard to the vehicular pollution in Delhi, the Supreme Court had passed directions for the phasing out of diesel buses and for the conversion to CNG. When these directions were not complied with due to shortage in supply of CNG, the Court held that orders and directions of the Court could not be nullified or modified by State or Central governments.

In **University of Kerala v. councils of Principals of Colleges**[32] the SC could have directed the concerned authority to consider these recommendations, and could not have directed that they be implemented.

In case of **Aruna Ramchandra Shanbugh v. Union of India**[33] in landmark judgment the SC allowed passive euthanasia i.e. withdrawal of life support to a person permanently vegetative state, subject to the High Court of state.

In **Re Networking Rivers case**[34] the SC directed the interlinks between the rivers of India. In another case **Dayas Ram v. Suhi Balham**[35] the SC saying that they were meant to fill legal vacuum. **In Ajay Bansal v. Union of India**[36] the SC directed that helicopter be provided for stranded person in Uttarakhand.

Thus we see plethora of rights have been held to be emanating from Article 21 because of the judicial activism shown by the Supreme Court of India.

30 AIR 2012 SC11
31 (2001) 3 SCC 763
32 (2010)1 SCC 353
33 JT(2011) SC 300
34 (2012)4 SCC 51
35 (2012)1 SCC 333
36 AIR 2013 SC

The progressive contours are boon for the transformative jurisprudence in India that has indeed strengthened the dimensions of new jurisprudential thoughts of 'affirmative action'[37], 'human dignity'[38], 'legal aid'[39] etc.

The modren judicial system have been founded on the British pattern the fine principles of equality, justice and good conscience and natural justice occupy an important place in Indian law.

The legal administrative tribunals, family courts, Lok Adalats etc. has been introduced by the Indian legal system to provide social and speedy relief to aggrieved persons against injustice. Today, legislations have to take care of the other aspects touching the need of the society and which are beneficial for the society in some way.

Conclusion: Positivism only studied the form, structure, concepts etc. in a legal system. It was of the view that study of the social and economic conditions and the historical background which gave rise to the law was outside the scope of jurisprudence, and belonged to the field of sociology. However, unless we

37 Article 15 (3), (4), (5); Article 16 (4), (4A), (4B) , (5); Whatsoever the narrower and broader approach to affirmative action may be, but the Supreme Court's acknowledgement to affirmative action in the forms of 'compensatory justice', 'permissible discrimination', 'compatible discrimination', 'positive discrimination', 'preferential treatment' has been sensitizing positive steps for improving the competitive ability of the underserved sections of the society by giving some weightage in right perspective; see in particular Indra Sawhney v Union of India, (1992) Supp. (3) SCC 217; Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1.

38 Article 21; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; I.R. Coelho v. State of T.N., (2007) 2 SCC 1; Bandhua Mukti Morcha v. Union of India, (1991) 4 SCC 177; Bodhisattava Gautam v. Subhra, (1996) 1SCC 490.

39 Article 39-A and Article 21; Khatri (II) v. State of Bihar, (1981) 1 SCC 627.

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see the historical background and social and economic circumstances which give rise to a law it is not possible to correctly understand it. Every law has a certain historical background and it is heavily conditioned by the social and economic system prevailing in the country. The great defect in positivism therefore was that it reduced jurisprudence to a merely descriptive science of a low theoretical order. There was no attempt by the positivist jurists, like in sociological jurisprudence, to study the historical and socio-economic factors which gave rise to the law. Positivism reduced the jurisprudence to a very narrow and dry subject which was cut-off from the historical and social realities. Thus it deprived the subject of jurisprudence of flesh and blood. This defect in positivism was sought to be overcome by sociological jurisprudence, which became an important trend in the twentieth century. Sociological jurisprudence studies the legal system not in isolation but as part of the social reality. This was definitely a great advance over positivism since, as already mentioned above; the law cannot be properly understood without knowing its historical and social background. Thus, sociological jurisprudence considerably broadened scope of jurisprudence.[40]

40 Justice Markandey Katju, Supreme Court of India, Ancient Indian Jurisprudence. Available at http://www.bhu.ac.in/mmak/resent_article/JusticeKatjusLec.pdf (accessed on 20 jan. 2015)