

**MODERN VIEW ON LAW AND MORALITY DISPUTE BY INDIAN
JUDICIARY - WITH REFERENCE TO LEGAL POSITIVISM**

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Introduction:

India is a Cultural pot. The term "Cultural Pluralism," which defines our Indian society as a "melting pot of different races, religions, and cultures," By raising law above multiple customs and traditions that occasionally may conflict with one another, legal pluralism becomes pertinent in this setting. A Jurisprudential school of thought known as "legal positivism" aims to interpret the law in a constructive manner. It aims to detach law from its moral and contemporary issues and places a greater emphasis on its structure and genesis. Legal positivism is one of the most significant schools of thought to come out of the West, especially Britain. One of the main tenets of legal positivism is the notion of the separation of law and morality. As Justice Krishna Iyar used to highlight the saying of "law as king of all the king" and he further says it is so strong and strict that nothing is more powerful than law with its help, even the weak may defeat the strong.

Law is seen by positivists as a "social fact" that is distinct from morality. They believe that morality and legislation shouldn't be related in any way. Legal rules are based on specific rules of law, whereas moral rules are based on their substance. On the other hand, if a legislation is created in accordance with the established method, it will still be seen to be morally objectionable. On the other hand, morality refers to a loose framework of standards, precepts, convictions, traditions, and ways of life. Although morality cannot be enforced by law, there is social pressure to do so.

Positive Theory that emphasizes on the facticity of law seems to add nothing to our understanding that law plays significant roles in ensuring that human life runs smoothly, that upholding the rule of law is a treasured goal, and that both the language and practise of law

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are highly moralized. Because of this, opponents of positivism contend that the most significant characteristics of law are not its source-based nature but rather its ability to serve the common good, protect human rights, or uphold the integrity of government.

Law and Morality:

One of the more persistent topics in law is how morality and the law interact. It is not incorrect to claim that morality and law are two facets of the same concept. The other cannot exist without the first. While we must obey the rules because they are universally binding, morality affects how we behave and how we act.

Positivists contend that "law as it is" and "law as it should be" are two distinct concepts. Positivists concur that morality has no bearing on the rule of law. They recognize the superiority of law and legal rights above morality, yet it ultimately feels insufficient to address social issues².

Morality is universal and it's a characteristic element of all human activity. The moral sense is that natural feeling that depends on age, custom, religion, gender and its very subjective. Morality will guide us to approve and disapprove certain actions. Morality is the guiding principle which aids the humans to know what is right and good. Morality is an integral force which works with Human Conscience. Sanction for the morality is internal and it's different for each person.

Natural Law School on Morality:

The natural law view holds that morality and the law are intertwined. A proponent of natural law claims that morality, not any rules created by humans, is the foundation of human law. Natural law is the phrase. According to the natural theory, the status of law depends not only on deeds but also on religion, custom, and ethics. This theory discusses what should be. Natural law is preexisting and does not need to be enforced by a third party.

Positive School on Morality:

²Dr.Kamal Ahmad Khan, Law Morality And justice,[202004032240236358Kamal Ahmad Khan Law and Morality.pdf](https://www.ijalr.in/202004032240236358Kamal_Ahmad_Khan_Law_and_Morality.pdf), accessed on April 11, 2023

The political theories of Hobbes and Hume are the primary sources of positive school, and Jeremy Bentham (1748–1832) provided its first comprehensive explanation, which Austin later embraced, refined, and popularized. An amalgam of their ideas, according to which law is the command of a sovereign supported by power, dominated English intellectual thinking on law throughout the majority of the next century. But by the middle of the 20th century, this view had lost favour among active legal philosophers. Its emphasis on legislative institutions was replaced with a focus on institutions that apply the law, such courts, and its concentration on the use of coercive power gave way to ideas that emphasized the systematic and normative nature of law. The Austrian lawyer Hans Kelsen (1881–1973) and the two leading scholars in analytic philosophy of law, H.L.A. Hart (1909–92) and Joseph Raz (1902–2003), who have distinct lines of influence but also significant differences, are the most significant builders of current legal positivism. The influencers of analytical school can be divided as one supports the combination of law and morality and other talks about distinction between them.

Morality is different from law:

According to John Austin, positive law is "the collection of laws established by men as political superiors to men who are political inferior subjects." He claims that the four fundamental components of positive law are authority, sanction, obligation, and sovereignty. He viewed jurisprudence as a branch of law that deals with the explanation and scientific investigation of legal principles in order to ascertain their applicability. His primary reliance was only on the separation of the law from morality and ethics.

According to John Stuart Mill, the only reason for which the community may legitimately wield authority over any person against that individual's choice is to avoid harm to others. Private immorality does not negatively impact society as a whole, hence there is no reason to outlaw prostitution or restrict homosexual behaviour. Prof. Hart agrees with Stuart Mill that private morality and immorality should be maintained separate from legal issues and his arguments bases on Mill's "On Liberty" article³. He emphasized that he was in favour of the British Parliament's adoption of the anti-homosexuality statute and that judges cannot

³Hart H.L.A, Positivism and The Separation of Law and Morals, 1965, p.12, <http://www.jstor.org/stable/1338225>, accessed on April 11, 2023

invalidate it on the basis of its reasonableness or unreasonableness. According to Prof. Hart⁴, the rule of law does not need a test of the bare minimum of morality in a given legal system. However Prof. Hart also stated that ,for any community to thrive, there must be some sort of universal morality.

Morality is part of law:

Lord Devlin argued that the law should continue to uphold a minimal level of morality in opposition to Prof. Hart and Mills philosophies. He asserts that many moral institutions have developed over history and are now an integral element of every community⁵.

Prof. Fuller, in contrast to Prof. Hart, is of the opinion that society is founded on a high moral concept. The society expects its members to adhere to a set of moral standards, and when they don't, the society's culture is put in risk⁶. As a result, Fuller emphasises the junction between the law as it is and the law as it should be and argues for the inherent morality of the law.

But H.L.A. Hart, also rejected Austin's idea of positivism and developed a legal philosophy based on the interaction between the law and society, In order to better comprehend the legislation, he preferred an analytical approach. He therefore had a fundamentally different perspective on the law than his forebears since he thought that morality, compulsion, and the law were all connected social phenomena with ramifications for society. So its clear that he had mixed contention on law and morality. He perceived the morality as social phenomena.

Development of morality:

There was a time when morality and law were one and the same. Morals that were also the law regulated society. Later, a difference between mandatory and regulatory requirements was developed. Legal and moral injunctions were distinguished by Privy Council and our

⁴William C. Starr, Law and Morality in H.L.A. Hart's Legal Philosophy, 67 Marq. L. Rev. 673 (1984).

⁵Dworkin, Ronald. "Lord Devlin and the Enforcement of Morals." *The Yale Law Journal*, vol. 75, no. 6, 1966, pp. 986–1005. *JSTOR*, <https://doi.org/10.2307/794893>. Accessed 11 Apr. 2023.

⁶FULLER, LON L. *The Morality of Law: Revised Edition*. Yale University Press, 1969.p. 33,*JSTOR*, <http://www.jstor.org/stable/j.ctt1cc2mds>. Accessed 11 Apr. 2023.

Supreme Court. Greeks and Romans acknowledged natural law as the cornerstone of law in Europe. Christian values were seen as the cornerstone of law during the Middle Ages. After the Reformation, the state became the basis for or the source of law. Another reversal of trends occurred in the 17th and 18th centuries, when doctrines of natural law were established. When Austin stated that the law is the command of the sovereign in the nineteenth century, law and morality were completely separated. Only the legal norm is found to be the topic of jurisprudence according to Kelsen, who excludes morals from the legal system.- Though morality can be distinguished from law, both are essential components of the latter. The legal system cannot exist without morality, which is "secreted in the interstices" of it. Positivists maintain that once a rule is established, it remains in force.

Concept of Morality in Indian Background:

The sages and saints in India's Vedic and Epic eras had the authority to declare moral standards for the general populace, and the monarch was required to defend justice when passing judgement on a conduct that was being contested using established social norms. The institution of monarch was established to maintain public morality or the Dharma so that the strong might not oppress the weak by their passions, according to the Smiriti of Manu, the first lawmaker on Earth, the Mahabharata, and the Arthshashtra of Kautilya. The ancient dharma principle of India is not widely applicable as a sovereign in contemporary culture.

Modern Perspective on Morality:

Accordingly in the modern world, Moral enters the legal system disguised as equity and good conscience. The influence of morality limits the legislative branch's authority. Law alone cannot control and guide all human behaviour and social interactions. Many relationships are left to be controlled and guided by morality, and the law doesn't get in the way of those relationships. Law is made flawless by morality. Paton uses marriage as an illustration⁷. As long as love exists, there is little need for the law to govern the relationship between a husband and wife. However, when love ends, the solicitor knocks on the door.

Nowadays, sovereignty is dispersed among the entire society. However, it is clear that the danda concept of the past ie.the concept of punishment if people don't act according to

⁷Paton G. W. A., Text- Book of Jurisprudence, 3rd Edition .p.69.

dharma is still existing today. Danda in modern form would be is a practise that can result in penalties, jail, mutilation, exile, property seizure, and even death.

Modern perspective of morality:

According to Jeremy Bentham's theory of utilitarianism, every legislation should aim to maximise the happiness of the largest number of people. Utility, according to him, is "a thing's property (or tendency) to prevent some evil (or) procure some good." He claims that the results of doing good and doing evil are, respectively, "pleasure" and "pain." This philosophy held that the role of government was to advance the pursuit of pleasure and provide protection from suffering in order to advance society's happiness. Law and morality are in conflict in the current world, and there are many situations when these two ideas should not be combined. The ultimate moral principles or standards of the universe, however, are not followed by society. The majority of individuals in society follow the laws of popular approval and disapproval, which are sometimes referred to as positive laws. Positive morality is that which a society has determined to be obligatory on the public conscience at a specific time and place because it is easy, expedient, or reasonable to do so.

New laws must totally be based on the existing legal system. Enacting legislation that will secure justice necessitates a progressive viewpoint, which may not be totally consistent with morals. However, positivism's philosophy had evolved with time, and the idea of morality was not subject to the law. This may be observed in a number of judgments handed down by the Indian judiciary over the years, including ones on the status of live-in relationships, the recognition of LGPTQ+ rights, and abortion and other contemporary legislation.

The rights of the LGBTQ+ community are often not accepted by our culture. People always contend that its against the morale of the society. Being transgender or in a same-sex marriage are not universally seen as ethically right. Live-in Despite being legal, it nonetheless draws a lot of moral criticism. Live-in relationships are legally recognized as "domestic relationships" and are thus protected under the Protection of Women from Domestic Violence Act, 2005, according to the Hon. Supreme Court's ruling in the case of S. Khushboo v. Kanniammal⁸ (2010). This was based on the positivist idea that, you cannot however, deny the reality that forbidding marriages of equal sex or live-in relationships

⁸ Arising out of SLP (Crl.) No. 4010 of 2008]

would not result in the denial of the communal rights that every citizen enjoys. Even though by morale of the society its not right, law should treat all humans equally. If you do it out of moral obligation, you are going against fundamental tenets of the Indian Constitution, such the right to equality and the right to live in dignity, which are inscribed in Articles 14 and 21, respectively. Therefore, in these judgments, the Court adhered to the positivist perspective by giving value to constitutional morality.

However in all those cases mentioned previously we can't affirm that Courts of India only relies on the Positivism and neither we cant say that judiciary ignores the Morality of the society. Even the court had mentioned about the control on positivism for the benefit and welfare of the society. Courts are clear with the idea that we cant ignore the morality completely and stuck to the law. A blend of it is required and sometimes the positivist approach should also bend towards the welfare of the people. In *Deena v. Union of India*⁹, the Supreme Court underlined that the law is dynamic and that its social value comes from its capacity to keep up with changing societal trends and its readiness to alter its precepts to take such changes into account. These insights serve as a crucial reminder that the law is a living, changing text, much like our constitution, and that it evolves with time. Due to the aforementioned, courts should be governed by constitutional morality along with the just morality. This case emphasis in stating that law should change according to modern needs of the society.

Can Morality can be ignored completely:

Although law has its limitations and is not intended to make people moral by physical force, it may be argued that it is required for the upkeep of morality at a respectable level. Though the relationship between law and morality is very intimate and close, and without such a close relationship we cannot have the solidarity of the state or the safety of the populace, it must be remembered that not all that is morality can be enjoined by law; if the society is such that its members do not possess high moral standards, moral laws become distant for the common people in that society. Law shouldn't aim to accomplish too much; instead, it should defer to other values, such as societal culture and the art of life, in many cases. The multicultural society is tied together in a single thread by morality that is rooted in culture. The entirety of

⁹(1983) 4 SCC 645

a man's existence, however, cannot be governed by the law. The same may be said about morals or ethics. It is stated that morality deals with a person's inner conscience, whereas law deals with their outward conduct. The goal of law is typically to compel people to follow the dictates of organized society, but the goal of morality is to compel people to follow their own conscience. Law is based on social behavior, whereas morality establishes what is intrinsically right and wrong in human behaviour.

Conclusion:

Law must be utilized as a correct instrument rather than a tool to oppose morality since it has great potential to alter how people perceive the world. It is crucial to recognize that law and morality should not compete in order to determine which is more beneficial for society as a whole, but rather should work together to advance the legal system in the most advantageous way possible. Most of the laws in India is based on the religious law or the customs which is based on the moral principle. So we cant completely ignore the fact of morality in law as the morale forms the basics of the society. So it can be deducted that morality can be the underlying principle of law. If law is to remain closure to the life of the people, it cannot ignore morals. When law fails, society and nations surrender to the morals¹⁰.

¹⁰Dr.Kamal Ahmad Khan, Law

MoralityAndjustice,[202004032240236358Kamal Ahmad Khan Law and Morality.pdf](https://www.ijalr.in/202004032240236358Kamal_Ahmad_Khan_Law_and_Morality.pdf), accessed on April 11, 2023

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