DISCERNING THE OPTIMAL SCHOOL OF THOUGHT FOR ADJUDICATORY PROCEEDINGS

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ABSTRACT*:*

Judges have to be bold and sometimes cautious. But how? Driven by the laws formulated by the legislature. Which jurisprudential school of thought should a judge apply when laws become redundant. This paper explores the question of how judges should approach laws that have become outdated or redundant. Specifically, it examines two schools of thought in jurisprudence: positivism and naturalism, and their respective views on capital punishment. The paper considers whether judges should have discretion in choosing which school of thought to apply, even if doing so means defying codified laws, in order to apply an innovative legal structure that delivers justice. To accomplish this, the paper analyses judicial pronouncements over time to gain insight into the evolving mindsets of judges and how they are influenced by the social and political landscape of their country. The study aims to broaden the understanding of natural law and the role of morality in judicial decision-making. Ultimately, the paper seeks to provide a nuanced understanding of how judges can balance the need to be bold and cautious, driven by laws formulated by the legislature, while also accounting for the changing circumstances and societal values. By examining the intersection of legal theory, social context, and judicial decision-making, this paper aims to contribute to ongoing discussions about the role of judges in society and how they can best serve the needs of justice.

Keywords: Positivists, Naturalist, Judicial Discretion, Jurisprudence, Constitution, Capital Punishment.

CONTEMPORARY CATECHIZE?

A question that still questions the judges or the judiciary is the reliance over which compatible school of thought should be followed to decide a particular case. For an instance one thought says capital punishment as cruel in nature and while other approves of this sanction. This debate within the analytical jurisprudential still prevails that is- positivists and anti-positivist or the natural law. A rule is said to be law not merely because of the Judge's judgment but rather on the validity of the positivist or the anti-positivists. Now it is platitudinous considering it is judge's legal or professional duty to follow a rule and upheld it as a rule if it is in fact a law.[1] Afterwards what ought to be done legally by a judge is more of the aspect of philosophical debate. Are the Judges obliged to follow the laws? When the judge incumbent the office there is firm practice of adjudication though much discretion in his hand, but the cases are disposed through the laws established[2].

This paper would attempt to answer whether judges should apply the 'law as it is' or there is any scope for 'law ought' to be and if such deviation exists then do judges got any discretion in their hands to judge the intrinsic character of the act and pass decree by not being obliged to the legal system?

JURISPRUDENCE AND ITS SCHOOL OF THOUGHT

The branch jurisprudence or the philosophy of law is the attempt to study law in logical fashion. The word jurisprudence comes from a Latin word *'juris'* which comes from the word *'jus'* meaning law and *'prudentia'* meaning rationality, prudence, or discretion.[3] Due to this branch, it help in getting in-sight why a society needs law, role of law in a society, in-depth knowledge of the law. It delas with all sorts of legal reasoning, legal framework, and setup such as institutions and system.

As per some notable jurists such as Ulpian said it is the knowledge of just and unjust. According to Fitzgerald it is referred as a type of investigation of law of the abstract, uniform system of legal framework.

[1] HLA Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, 158-59 (Clarendon Press 1982).
[2] Emad H. Atiq, *Legal Obligation and its Limits*, Vol. 38, Law and Philosophy, 109-122, 109 (2019).
[3] Legal Information Institute, https://www.law.cornell.edu/wex/jurisprudence (last visited on April, 5th, 2023).

As per Schumpeter the uniform principles coupled with technical legal reasoning for each case. The focus is not on the formation of new laws but rather on the examination of the existing laws. As said by Jolowicz a standardized discourse of principles of law different from the actual set of rules.

From certain definitions stated above jurisprudence possess certain characteristics of science and be a part of social science- as it is based on societal and individual relationships.[4] But as science is based on experimentation and questions occurring in jurisprudence could not answered by the scientific disciplines. Those all questions of nature or life which are unanswered belong to the arena of philosophy and jurisprudence philosophizes the law. The most significant question in science is asking '*How it occurred?'* Loevinger writes that merely adopting scientific methods of reasoning cannot convert philosophy into science. The term philosophy in wider sense means an attempt to understand the principles of universe and for a man to understand his position in it. Depths of Philosophy should be studied for understanding the concept of law.[5]

Hence jurisprudence provides for systematic, classification and critic over law or rules, furthermore study of legal concepts encompassing moral, ethical, historical, and regional basis and most importantly it is an approach to answer metaphysical questions such *as 'What is law'? 'What is the scope of statue'? 'How should a judge deliver justice'?* It was written by Dias what Jurisprudence is? Is nothing but simply what anyone wants it to mean.[6]

One of form of jurisprudential school aims at what law actually is than what law ought to be, it attempts to separate morality from this thought.[7] This jurisprudential school of thought is known as Analytical Positivism. This is also known as Austinian School. This school of thought is considered to be counter to the thinking and principled of the natural law. Natural prevailed during the 18th century it was more and less the divine law, and it was do predominated that it could supersede the human formulated laws. In relation to it in the 19th century positivist movement began to emerge and started to interrogate the principles of natural law which were formulated with essence of morals and ethics into it due to which laws lost its path from the reality of the true law, discovering the essence for uniform validity. Hence this

[4] *Id*.
[5] L.B Curzon, Jurisprudence - Lecture Notes Series, 4-8 (Cavendish Publishing Ltd 1995).
[6] R. W. M. Dias, Jurisprudence, 1 (Butterworths Publishers 1976).
[7] Roscoe Pound, *Mechanical Jurisprudence,* Columbia Law Review, 605-23 (1908).

school of thought was counter to such assumption. The real or the actual law is something that furnished by the sovereign. The principle of the law is examined by the jurist as it is in the legal system. This thought states that laws originate from state thus defining and establishing a relation between the state and law. Classical positivism was developed by the exponents: Jeremy Bentham and John Austin, Bentham is also considered as the founder of this school. [8] The same jurist of this school H.L.A. Hart tried to mitigate the shortcomings of the classical positivism approach.[9] But this classical approach gave a starting point, and four principles were enumerated by Bentham and Austin:

First postulate they quoted separated thesis that there exist no connection or intertwining of law and morality, no ethical evaluation of the positive law, also quotes that positive law is the only temporal law, a law which is rigid and strict originated by a political superior being oven another inferior being.[10]

Second postulate was the command theory. Law was the command of the sovereign or to the will of the human. *" A command is separated from other kinds of desire, no by its way in which it is seek but rather by a party who has the power to inflict pain or sanction if any moment the desire is neglected."*[11] According to Jeremy Bentham law could be reduced to a command given by a sovereign. Austin though differed slightly, for him commands accompanied by sanctions could be general in nature and might address the public as a whole.[12]

Third postulate was formulation of the law. Every norm or rule has to formulated by a legal sovereign and it is only the sovereign that authorises the credibility of that norms or rules. The authenticity of a particular norm could be made out by knowing in what manner and by whom this norm was made to definite it as law.[13] It was also argued that the system of sovereign of will prevail throughout including a setup of democracy also, hence all the norms and rules should emanate from the sovereign.[14]

[8] Anthony Sebok, *Misunderstanding Positivism*, Michigan Law Review, 93, no.7, 2061-2062 (1995).
[9] Lon L. Fuller, *Positivism and Fidelity to law: A Reply to Professor Hart*, HLR, 71, no.4, 630-72 (1958).
[10] John Austin, The Province of Jurisprudence Determined, (Cambridge University Press 1995).
[11] *Id*.
[12] Murphy James Bernard, The Philosophy of Positive Law: Foundations of Jurisprudence, 169 (Yale University Press 2008).
[13] Gerald J. Postema, Bentham and the Common Law Tradition (Clarendon Press 1986).
[14] 10, Jeremy Bentham, The Works of Jeremy Bentham (Memoirs Part I & Correspondence), (William Tait 1843).

Fourth postulate was characteristics of the sovereign. According to Austin a sovereign should be getting habitual obedience from the masses and non-compliance and non-obedience to any other human superior.[15] For an instance a new traffic rule formulated by the police chief the rule will only be valid when such regulation is authorised by the Commissioner. And such happens only when it is embedded in law- a statute authorizing the entity to formulate laws. In nutshell the ambit of the government to operate is within the scope of law. For to say Hitler's 'will' acted as command or the law because the German constitution provided that he had supreme power to make laws. Justice Douglas quoted the government has to act within the confine of pre-established and certain laws.[16] Such laws are called as Rechsstaat, having said laws are based on the constitution of a nation whether written or unwritten, monarch or democracy.[17]

The thought of positivism evolved many folds in the 19th century according to Comte, his sociological positivism was on the convention that the society and social life could be analysed by technical and measurement techniques. The term 'positivism' by Pound in 1912 was contrast from the classical positivism, he discarded all the four postulates of Bentham and Austin. Another Hans Kelson who propounded the 'Pure Theory of Law' and tried to redefine positivism. In his theory the law should be pure and should not be interpreted by any branch of social science like history, sociology, psychology. In this way the 'law will stand on its own'. Another initiate by Kelson was introduction of the Grundnorm, it is an anchor through which other legal system are derived. This Grundnorm or basic norm is static for an example Indian Constitution. The masses wilfully agree to follow this Grundnorm. The derivation of one legal norm is based on another and so the process continues. The question that is put up now what is the credibility of the concept of Grundnorm?

To sum certain postulates to be remembered about Positivism:[18]

I. It is the human's will that formulates the law. {will of the sovereign}

II. No involvement of ethics and morals.

[15] *Supra* note 8.
[16] Yanish v. Barber, 73 S. Ct. 1105.
[17] Reginald Parker, Legal Positivism, 32 Notre Dame Law. 31 (1956).
[18] Analytical School/ Positivism Theory of Law, www.lawdessertation.blogspot.in (visited on April 4th, 2023).

III. What is law in pure state.

RELEVANCE IN INDIAN AND IN INDIAN JUDICIARY

In Indian context the ideals of this school of thought is prevalent and could be traced from the Indian case laws. India is a diverse country with its main feature as cultural pluralism due to different races, ethnic groups, caste, tribes, religion etc.[19] Due to unique characteristics of these groups it gives rise to numerous traditions and customs which could be contradictory, hence legal pluralism keeps the law above customs and traditions. The distinction between the morality and law thus becomes of utmost importance in a plural setup. As morality is subjective and could differ for one group to another. A moral deed for one community may not be moral for another. Even the state or the sovereign cannot grantthe morality for all the groups as it would go against one community. The question of what law ought to be will differ in the case of India as it would be different for different communities. This concludes the desire to adopt analytical school of thought prevailing law rules or 'Rule of law'. Following law emerging from one Grundnorm will avoid conflicts as well as communal riots. The constitution will be considered as the law of the land and state has to be in accordance with it.

It is constitution that carries out political changes along with socio-economic measures and rights of the individual.[20] Dr. Ambedkar said, *"I feel that constitution could withhold the country during the times of danger as well as in peacetime as it is flexible and working. If I to put it in even after implementation of constitution and anything goes wrong it would be because of the man that went vile and not because the constitution was bad."*[21]

Constitution is the guiding principle to meet the expectations of the community and even the development of the law requires certain guiding rules passing through diverse levels of generic to specific rule in concentre form.[22] Constitution is the body not only concerned with the relation between the organs of state but also confers natural rights to the citizen of that nation. It not wrong to assert that constitution of every nation has a chapter that deals with the fundamental right of citizens, in India it is Part-III. Following the case of ***Keshav Singh v.***

[19] Deepali S., Legal Positivism in India, https://legalraj.com/articles-details/legal-positivism-in-india, (visited on 4th April 2023).
[20] Rajeev Dhawan and Alice Jacob, *Indian Constitution trends and issues*, 56 (N. M Tripathi Pvt. Ltd 1978).
[21] Gopal Sankaranaripn, The Constitution of India, (Eastern Book Company, 2017).
[22] 1, L. Oppenheium, International Law Treaties, 736-742(Longmans Green & co. 1955).

Speaker Legislative Assembly, 1965[23] the constitution in a democratic nation was said to be absolute and sovereign. All the other government officials take oath alleging to the constitution. All the powers and authority are derived from the constitution. Moreover, apex court held that laws made by the legislature in lieu of powers and immunities should complement Article-13. And any law made violating the fundamental rights, the law should be void till that extend.[24]

POSITIVISM AS BASIS FOR JUDGEMENT

The application of positivism could be traced back to the year 1951, in the case of ***State of Madras v. C.R Srinivasan***[25] and ***State of Madras v. Champakam Dorairajan***[26], the court applied the logic of legal positivism for resolving the dispute between Fundamental Rights and Directive Principles of State Policy, as DPSP are non-enforceable hence the order was void.

Golaknath and Ors. v. State of Punjab[27]

With 6:5 decision the Supreme Court ruled that Parliament cannot amend the Part-III of the constitution and held 17th Constitutional Amendment to be void.

A.K. Gopalan v. State of Madras[28]

The petitioner got detained under the Preventive Detention Act. The said prevention was challenged on the grounds that it is the violation of fundamental rights, violating Article-19 and Article-21 of the Indian Constitution. It was contented by the petitioner that the real of meaning of law is not only bundle of rules but rather implies fairness-'jus'. But still the Supreme Court validated the Act and considered the detention to be lawful. As what is written by the legislature is the law and must regarded as it is irrespective of the fact whether justice is served or not.

R. K. Garg v. Union of India[29]

A law was passed by the law-making organ legislature that if black money was founded to be

[23] Keshav Singh v. Speaker Legislative Assembly AIR 1965 All. 349.
[24] Dr. Jai Mala & Seema Rani, *Role of Legal Positivism in Democratic Governance in India,* International Journal of Humanities and Social Science, 15-19, (2017).
[25] Madras v. C.R Srinivasan 1951 SCR 525.
[26] State of Madras v. Champakam Dorairajan 1951 SCR 525.
[27] Golaknath and Ors. v. State of Punjab AIR 1967 SC 1643.
[28] A.K.Gopalan v. State of Madras, AIR 1950 SC 27.
[29] R.K.Garg v. Union of India, AIR 1976 SC 1559.

invested in any government bonds for a specific period of time, after which the government would not question the source and exempt the person fully in order to channel it for productive work. This law was challenged as it was arbitrary and in derogation with Article-14 of the Indian Constitution and it might encourage tax-evasion. The court upheld the validity of the law and applied intelligible differentia those investing in bons and those who are not, even the doctrine of pith and substance was applied in order to clarify the intention of the legislature.

Jolly George Verghese v. The Bank of Cochin[30]

The Apex Court upheld a law that stipulates that anyone who doesn't pay back a loan will be imprisoned. Notably, the aforementioned legitimacy was against the United Nations Convention. As a result, the Supreme Court evaluated this legislation created by the lawmakers and rendered a decision.

In the aforementioned instances, we can see that despite the laws not meeting the requirements of a reasonable law, the courts nonetheless made their decisions based on what the law says. The Legal Positivism was taken into consideration while making decisions and had a significant impact on earlier rulings.

INADEQUACY IN RENDERING JUSTICE BY POSITIVISM

Due to certain hitches in Indian Judicial Cases for an instance the Habeas Corpus case which was considered to be the Black judgement, and many considered it to be a trash judgement. Justice Khanna in his minority judgement stated that no individual shall be expelled of his life and liberty even not the constitution could waive away that. Hence a need for reform was required as justice was no done in fair light. As it is the Preamble that incorporates the abstract ideas of justice, freedom, liberty, equality and fraternity assuring the dignity of each individual. It was during the world War era when disastrous results of positivism was visible such as persecution of Jews, bombing on the Japan all such laws though were laws of the nation, but the intrinsic character of these laws was greatly inhuman. The connection between positivism and legal realism gives rise to totalitarianism and no dictator abhors the tenets of this equation.[31]

[30] Jolly George Verghese v. The Bank of Cochin AIR 1980 SC 470.
[31] *Supra* note 9, 2060 at 3.

Hence there was requirement of certain norms which helps in restoring the dignity of a person. The need for Human Rights was finally incorporated in the U.N Declaration of Human Rights.

REASONS FOR SHIFT OF APPROACH

As the positivists lawyers proposes separating law from morality, ethics, or any kind reasoning, hence the corollary that could be established is that they are treating laws of one nation to be same to another nation as they are fostering amorality.[32] Natural law is ideal law and considered to be above positive law. It is processed through reasons, essence of morality in legal norms.[33] This theory envisages that an individual possess inbuilt sense to differentiate between good and evil. Natural law is considered to be universal in nature and applicability throughout the globe as it is based on human nature rather than any tradition or custom. For an example: Aristotle the founder stated what is perceived by just might not be same as what being just by norms. He emphasized that natural justice is available to every person anywhere, natural justice does not depend on any laws by any group of people.[34] Another example is Mahatma Gandhi argued that humanity is endangered because of the seven sins: wealth without labour, politics without ideals, commerce without ethics, science without society, faith without selflessness, wisdom without character. In all such case the solution is derived from natural law.[35]

The right of Americans to life, liberty, and the pursuit of happiness is enshrined in the U.S. Constitution as a maxim based on natural law. Murder and rape are two crimes that are virtually unanimously recognised as deserving of punishment under the penal law. These kinds of crimes are considered to be harmful to both the victim's humanity and the social fabric of society.

In the case of Indian judiciary tends to approach more of a constricted interpretation of natural principles merely equating it with the 'laws as it is'. As the codification of laws does not guarantee to support normative equalities of law. Natural Justice provides for moral dimension to positive law. Though the Indian Constitution provides for the same, but it is illusory as the Indian judiciary does not check for the credibility of these procedures but rather, they are followed or not. The courts do no mean to adopt more expansive notions of natural justice against to judge the statutory efficiency.[36] As stated in the case of ***ADM Jabalpur v. SS Shukla***:

[32] *Supra* note 18.
[33] A.G. Chloros*, What Is Natural Law?,* Mod Law Rev 21, no. 6, 609–22, 609, (1958).
[34] Tony Burns, *'Aristotle and Natural Law'* History of Political Thought, 19, no. 2, 217 (1998).
[35] Stephen R. Covey, Principle Centred Leadership, 87-93, (Free Press 1992).
[36] K Rahima v. State of Tamil Nadu, HCP No 1133 of 2004.

"*The principles of natural justice…must always hang. The principles of natural justice are closely tied to statutory provisions or are derived from them, and do not exist independently. The Constitution recognizes certain rights as Fundamental Rights, which are elevated to a higher level of significance. Any other rights that overlap with or are equivalent to Fundamental Rights are considered excluded by their recognition as such."*[37]

It was for the first time in the judgement of ***Maneka Gandhi v. Union of India***[38] the court applied principles of natural justice in the matters concerning administrative affairs. In this passport case the scope of Article 21 was widened and also it is important for making India a welfare state. Also, in the case of ***Hussainara Khatoon v. Home Secretary State of Bihar***[39] it widened the scope of Article 21 and said state cannot deny the right for speedy trial and justice should not be denied on any ground.

Once again in the case of ***Anuradha Basin v. Union of India***[40] the court gave its ruling on the basis of Natural principles of Law. A writ petition was filed for the violation of the Fundamental Right Article 19(1) freedom of speech and expression. The internet service was suspended in Jammu and Kashmir. The Supreme court ruled that arbitrary closure of internet access will be considered to be unconstitutional and in order to shut down the internet services it has to be passed down through checks and balances. However, the court kept to impose the limits and directed the government to revisit the criteria for shutting down the internet services and lift certain restrictions which were not time bound. By reaffirming that constitution does protect online freedom of speech and expression but restrictions could be imposed by the government if matters concern the national security. The government does have the power to completely shut down the internet services, but such restrictions have to made official and is open for judicial review.

ANALYSIS OF CAPITAL PUNISHMENT FROM THE EYES OF POSITIVIST AND NATURALIST

Starting with the basic concept of capital punishment or death penalty- the idea behind it is eye for an eye, consequence of a crime. It is for reparative justice. This punishment is for people who have committed heinous offences. Though the topic of death penalty has always been

[37] ADM Jabalpur v. SS Shukla AIR 1976 SC 1207.
[38] Maneka Gandhi v. Union of India AIR 1978 SC 597.
[39] Hussainara Khatoon v. Home Secretary State of Bihar AIR 1979 SC 136.
[40] Anuradha Basin v. Union of India (2020) 3 SCC 637.

debated. The position of death penalty holds a very uncertain position in Indian legal framework. With this, it should be noted that this punishment could only be decreed in the rarest of the rare cases and in India only 11 offences such as murder, dacoity, rape and other are considered to be serious offences. Where the brutality of the crime shocks society and society seeks certain reforms.[41] For the records the number of countries is 55 which includes India, China, USA still has the provision for death penalty, on the other hand many European countries do not permit such harsh punishment.[42] The grounds for abolishing death penalty could be attributed to two things a.) Morality.

b.) People tend to believe more on reformative justice system.

EVOLUTION

The provision for death penalty is in Code of Criminal Procedure and decreed only in rarest of the rare case, it was said in the case of ***Bacchan Singh v. State of Punjab***[43] by 4:1. Later in the case of ***Machhi Singh v. State of Punjab***[44] the court laid down certain rules to consider a particular case to be a rarest of the rare case: way of commission, cruelty, excess wrongdoing-numerous homicides etc.

During the colonial rule India tried to abolish this death penalty due to certain religious purposes but colonial rulers were firm on their ground that capital punishment is must for having peace in a society.[45] During independence movement the need for death penalty arose to curtail India from revolting against the Britishers. But now, after the independence it is awarded only for heinous offences. In the case of ***EdigaAnamma v. State of Andhra Pradesh***[46] the court reiterated that capital punishment could only be awarded for murder in few exceptional cases. In the shocking case of ***Union of India v. Vinay Sharma***[47], the court awarded death penalty due to macabre offence of rape and as society needs restructuring. So, in the case of ***Rafiq v. State of U.P.***[48] said:

[41] Machhi Singh v. State of Punjab AIR 1983 SC 957
[42] World Population Review, https://worldpopulationreview.com/country-rankings/countries-with-death-penalty, (visited on April 4th 2023).
[43] Bacchan Singh v. State of Punjab AIR 1980 SC 898.
[44] *Supra* note 41.
[45] A.R. Blackshield, *Capital Punishment in India,* Journal of the Indian Law Institute, 137-226 (1979).
[46] EdigaAnamma v. State of Andhra Pradesh AIR 1974 SC 799.
[47] Union of India v. Vinay Sharma (2020) SCC Del 459.
[48] Rafiq v. State of U.P AIR 1981 SC 96.

"A rape is a rape,

Yes, you have ravished justice".

The naturalistic perspective is different it states that certain the system of law has to be based on the goods of life, such goods of life could be ethics, knowledge etc. according to the naturalist law is considered to be extension of morality.[49] All these are required for smooth functioning of the society. Hence in naturalistic perspective granting death penalty is contested. If A kills B the A should not be hanged and deprived of his life as life is an essential 'good' and also one does not have the authority take away anyone's life. As it is curtailing morality. As said by Emmanuel Kant who proposed Categorical Moral Reasoning, he stated that an act carried out has its own intrinsic character. The commission of an act is either wrong or right a priori hence consequences are immaterial. Therefore, before commission a person should consider whether the act is ethically, morally sound, or not. But the question is if an immoral act is committed without proper sanction how the society will be restructured?

According to positivist, morality and law should always be separated for adequate function of a society. [50] Any act which is moral does not deem it to be legal and vice versa. This analysis would be through HLA Hart's theory. In his theory laws are made on the basis of two rules primary and secondary rules. Primary rule are considered in base form and created certain kind of obligation and secondary rules are basis to keep the primary rule stable. For an example a primary rule could be not to hurt others, the secondary rule that could be formulated would be one should not destroy, main, harm a person or body. Hence as per Hart a primary rule states if there is a chance of death penalty to be conferred for grievous hurt, then implementation will be by secondary rules. They are followed as they are norms, laws, obligations, statutes. This concludes that positivism is in favour of death penalty if any statutes prescribes. But the question is what if any innocent is decreed death penalty? Till what extent the saying by Benjamin Franklin is true- better 100 guilty escapes but 1 innocent person should not suffer.

THE WAY FORWARD

The aim of this paper was to highlight how court applies different jurisprudential thoughts to

[49] Dheekshanya A, *An Analysis of Capital Punishment from a Positivist and Naturalist Legal Perspective,* Jus Corpus Law Journal, (2020).
[50] H. L. Hart, *Positivism and the separation of law and morals*, Harvard Law Review, 71, no.4, 593-628 (1958).

render justice through fair, just and reasonable means. But the question is which school of thought should be applied? Is there any threshold? Or if any provision to classify cases to apply different school of thought.

But one thing is undisputed that is Legislators, both legislative and judicial, tend to disregard the necessity to align the rules with the requirements of reason and the necessities of human behaviour because they subscribe to the imperative theory of law, which views law as nothing more than a deliberate product of human will. Said in the case of ***Satyawati Sharma v. Union of India***[51] legislation with lapse of time and due to change in the society becomes arbitrary and redundant and violative of individual rights. This put forth the question how judges should apply such laws? Do they make new laws? Making new laws will not be admissible in the eyes of Positivist. Case of ***McCulloch v. Maryland***[52] it was held that constitution is not a rigid document that has to be followed in verbatim but rather a guiding document to set up norms and rules, mainly for the future to come.

In conclusion it would not be wrong to say as society is developing and changing, hence the discretion to apply which school should be in the hands of the judiciary with certain restriction as it would depend on case-to-case basis. This is best illustrated in the case of ***Kedari Lal v. Board of Revenue and Ors***[53] that justice should be rendered even if there is no guidance from any statue. Judges should look out of the redundant laws and in a sense apply standards and may even adopt for extra legal standards for interpretation and formation of new laws. For an instance Vishaka Guidelines. It should be the duty of the courts to evaluate all the facets of Indian Law and embrace comprehensive and meaningful understanding of Natural Justice then and only then the rights of Indian citizen could be restored.[54] The natural principles that has evolved has been derived by the statutes through interpretation by Indian Judiciary. Natural law is extension of positivism – Article 21 procedure established by law, Keshav Nanda Bharti case the development of basic structure doctrine.

Natural law as it is universally accepted law that is the reason why it does not consider different rationales of different communities, not wrong to say that the with different opinion it will change the definition for various abstract ideas such like what is equal or equity?

[51] Satyawati Sharma v. Union of India (2008) 5 SCC 287.
[52] McCulloch v. Maryland (1819) 17 US 316.
[53] Kedari Lal v. Board of Revenue and Ors 2004 (2) AWC 1158.
[54] SAHRDC, *Judiciary's Skewed Vision of Natural Justice*, EPW, 46, no. 37, 25-27 (2011).

Therefore, in conclusion it has to be as per Indian Judiciary to decide a school of thought through judicial activism or review, irrespective it requires to bend the old redundant laws made by legislature to do justice to the society. Majority of acquittals are based on prosecution not able to prove the guilt beyond reasonable doubt this does not signify that crime did not occur or the victim did not suffer it is just the failure of judicial machinery, therefore judges should have some kind of autonomy subscribed to certain checks and balances, for an instance new methodology could be in criminal cases the burden of proof also to be on accused to prove its innocence beyond reasonable doubt. The methodology be on 'law ought to be' or 'law as it is' or amalgamation, which serves the purpose of fair justice. The discretion should be with the judge to decide for a particular case, and it will differ for each case as the judiciary system is established to render relief to its citizens and provide for justice and it might even solve the issue of piling of cases. Helping in restoring faith in Indian Judiciary.