CHAPTER 1
Introduction

The law and the legal system are very significant in any civilization society. In modern times, no one can visualize the survival of society without law and a legal system. Law is not only essential for an orderly social life but also necessary for the very survival 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. Therefore, for the sake of charity and inconvenience in understanding their viewpoints, legal philosophers have been divided in to different schools on the basis of their approaches to law.¹

One has to appreciate the fact that defining a legal concept is as difficult as asking the camel to pass through the needle’s eye. It is an accepted factor in identifying the relation of law to other social science and they equally must be apprised of the impact of early periods of theorization, the Sophists, the Greeks, the Roman etc. In the 19th century, meaning of the term ‘law’ can be said that the binding rules of conduct meant to enforce justice and prescribe duty or obligation, and derived largely from custom or formal enactment by the ruler or legislature. For example, Austin puts great emphasis on the relation between law and sovereign.²

In the words of Thurnan Arnold; Law can never be defined. Various schools of law have defined law from different angles. Some have defined it on the basis of its nature. Some

² Dr. Mononita Kundu Das, Jurisprudence, 11-12(Central Law Publications, Allahabad, ed. 1st 2012)
concentrate mainly on its sources. Some define it in terms of its effect on society. There are other who define law in terms of end or purpose of law. A definition which does not cover various aspects of law is bound to be imperfect. Moreover, law is a social science and grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems. In order to keep pace with society, the definition and scope of law must continue to change.

Thus the continental thinkers have utilized most of their time in finding an acceptable response to the question: What is Law?

This question has been answered in all centuries by the people from disciplines including sociology, philosophy, psychology, religion, theology, history and political science. The answers have been come from India, Greece, Rome, France, Germany and Vienna. The answers are about the structure of law, history of law, sociology of law, anthropology of law, philosophy of law and law as pure science and law as it functions. These approaches are known as Natural Law theories, or Natural Law School, Historical School, Philosophical or Ethical School, Pure Theory of Law and Economic interpretation of law. The result is that all these approaches that originally sought to define law, have concluded into the study about the law. But none of these definitions is complete in the sense that they define law for all legal systems and for all times.

Thus, legal theory deals with the question as to nature of law. As such, it is more concerned with the character of law or of a legal system than with its content.

The influence upon Greco-Roman civilization of certain legal terms like those covering the notions of ‘justice’ ‘injustice and ‘law’ has been enormous. Yet the systematic study of those terms is a comparatively late phenomenon. But if the systematic study of legal concepts had to wait until the fourth century B.C.

The study of law begins with the consideration of what this signifies when we speak of the laws of the civil society, when we say, for instance, ‘this is the law of the land’. This

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order is determined by reasons of diverse character. For one thing, it is the clear that the law of society comes before the law of nature in psychological and pedagogically sense. For another, the analysis or resolution of man-made laws into their foundations is the very way to the position and determination of the question as to whether there exist laws of nature. Finally, the term law, as predicted of the laws of the state and the laws of nature, may convey not one meaning but a set related meanings it may be analogical. The tradition of natural law is one of the foundation of western civilization. At its heart is the conviction that there is an objective and universal justice which transcends humanity’s particular expressions of justice. It asserts that there are certain ways of behaving which are appropriate to humanity simply by virtue of the fact that we all are human beings.  

Philosophy of law is meant the pursuit of wisdom, truth and knowledge of law by use of reason. In other words, philosophy of law means the rational investigation and study on the basic ideal and principles of law. Divine laws are those described to God. Divine rights of kings were supposed to have been derived from God. Laws which are claimed to God made may not be amendable by man, their remaining reasoning and provisions also not to be questioned by man.  

1.1 Relativity of law:

Law is a social phenomenon is demonstrated by the relativity of law. While law as such exists in all societies, the particular rules governing a particular social institution differ from society to society. For example, the institution of marriage is a universal phenomenon. But in certain societies marriage is a contract while in certain other societies it is a sacrament. Some societies insist upon monogamy, while other permit polygamy. The relativity of law was first noticed by Greek Jurists. That portion of law which did not vary from society to society was treated by them as part of natural law. The rest was relative law, which differs from society to society. The roman jurists bore this distinction in mind when they postulated a jus gentium common to the nations and a jus

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8 Justice K.N. Saikia, “Philosophy of Natural Law”, Published in Institute Journal September 1996.
civile peculiar to civilas or the state. The German historical school led by Sevigny traced law to the “Volkgeist” or the genius of the people.\(^9\)

Thus, Law can be used a powerful instrument to bring change in the society. It is an effective weapon to criminalise anti-social activities in the society. Law can be agent of injecting direct change in the society. It needs realization on the part of law makers that the society needs to move in a particular direction in order to maintain social order peace and harmony.\(^10\)

Thus law is a conservative force and so is invariably found to be lagging far behind advancing social needs. In a progressive society, law has undergo a progressive change it is sub-serve the needs of the society which it seeks to govern.

These divergences are explicable only on the basis of law being a social phenomenon. The needs of society breed law. These needs being divergent different rules of law in respect of the same social institution make their appearance.

Natural law theory chooses to concentrate on ‘the Law’ as it ought to be. The notable exponents includes Socrates, Plato, Aristole, Kant, Acquinas, Stammler, etc. thus the term natural law means any of the following:-

1. Ideal which guide legal development and administration.
2. A basic moral the quality in law which prevents a total separation of the ‘is’ from ‘ought’
3. The methods of discovering the perfect law.
4. The content of perfect law deducible by the reason.

Thus natural law is the basis of supernatural entity is the assumption based on the faith or belief generated by the religion. But in nineteenth century, a faith suffered set back by due to scientific and theological advancements. The result was the growth of the positivism.\(^11\)

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Positivism is a theory of law that is based on social facts and not on moral claims. Positivism holds that law is based on social facts that have been posited, or assertions, from authoritative figures (heads of state, judges, legislators, etc.) that qualify as law.\textsuperscript{12}

Legal positivism accepts both the rationalism (logical) and empiricism (positivism). Positivism rejects emotionalism; it emphasis on logical analysis of the facts, availed way coming to the truth. Though positivism believes on pre-existing values such as ethics, it does not venture to set forth values for future. It concern is mainly limited with what presently exist as law. It applies logical analysis to describe the knowledge. The philosophy of positivism has implausibly wide bearing on exposition of law.\textsuperscript{13}

Legal positivism is an approach to the question of the nature of law which regards the law’s most important feature as being the fact that it is specifically created and put forward ‘posited’ by certain person in society who are in position of power and who provide the sole source of validity and authority of such law. For legal positivists, the issue raised by the question: what is law, is essentially a question of fact, to be answered by empirical reference to and analysis of, objective social phenomena.\textsuperscript{14}

Legal positivism is generally considered today as the leading theory of law. Its leading thinkers range from Jeremy Bentham and John Austin to Hans Kelsen, and H. L. A. Hart. One may distinguish three main versions of legal positivism: (1) the command theory of law (Bentham and Austin); (2) the norm theory of law (Kelsen); and (3) the rule theory of law (Hart). All three versions of legal positivism share a common agenda: the investigation of extant valid laws, not the morally right laws. The very choice of this agenda as the proper object of study of legal theorists is based on two general theses on law: (1) the “social thesis” that “what counts as law in any particular society is fundamentally a matter of social fact or convention”; and (2) “the separability thesis” that “there is no necessary connection between law and morality.” The separability thesis is

\textsuperscript{12} Jonathan Brett Chambers, L’egal Positivism: An Analysis’, available at: \url{http://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1080&context=honors} (visited on April 20, 2016)
construed in two ways: (a) “a restrictive construal” holding that moral merit or demerit of a legal norm can never be a criterion of legal validity, since the sole “criterion of legality must be some determinate fact,” that is, the legal norm should be traceable to the will of the legislative authority or its creation should meet the procedural requirements of creating valid norms; and (b) “an inclusive (incorporationist) construal” holding that, while “it is not necessary in all legal systems that for a norm to be a legal norm it must possess moral value,” the convention (among legal officials, but ideally among all citizens) that determines the norms that will count as valid legal norms in a particular society can “make the moral value of a norm a condition of its legal validity.\(^{15}\)

1.2 Internal Sub-division of Positivists Theories-

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. Conversely, if a behavioral norm is enunciated by anyone or anything other than a duly authorized governmental body or official, the norm will not qualify as law in the minds of legal positivists, no matter how many people are in the habit of following the norm or how many people take action to legitimize it.

These may be:

1. Strict Positivism (strong or exclusive).
2. Soft Positivism (Incorporationism) or (Inclusive Soft Positivism).\(^{16}\)

Therefore, Legal Positivism is a theory about the nature of law, thought to be characterized by two major talents: First, that there is no necessary connection between law and morality (i.e. Strict Positivism); and second that legal validity is determined


\(^{16}\) Supra note11 at 192.
ultimately by reference to certain basic social facts, e.g. the command of the sovereign [John Austin], the Grundnorm (Hans Kelsen) or the rule of recognition (Hart) (i.e. Soft Positivism )These different description of the basic law determining facts lead to different claims about the normative character of law, with classical positivists (e.g. John Austin) insisting that law is essentially coercive and modern positivists [e.g. Hans Kelsen] maintaining that it is normative.

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. Positivist law is a posited system of norms, as Hans Kelsen described it.17

Legal positivism is the most influential school of thoughts in jurisprudence. This is hardly surprising, as the idea of law as the creation of human law giver that lies at its heart is a common intuition. Ask the person on the street whence comes the law, and expect to hear that law is the work of parliament, monarchs or other rulers. Ask the lawyer’s what the law is, and anticipate an answer drawn from legislation and judicial precedents. The ancients may have regarded the law as received from divine sources but in the modern world, where the most laws have a known human author, people think of law as the product of designing human minds. Legal positivists have their significant disagreements but they share the common aim of helping people understand the law as it actually is.18

Legal positivism is based on simple assertion that the proper description of law is a worthy objective, and a task that needs to be kept separate from moral judgments. In simple terms, legal positivism is built around the belief – or perhaps the assumption or the dogma – that the question of what is the law is separate from and must be kept separate from, the question of what the law should be.19

Thus ‘Positive law consists of commands set as general rules of conduct by sovereign to members of the independent political society, wherein the author of law is supreme.’20

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20 Supra note 9
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.\(^21\)

Positivism suggests that study of law must be confined to the written rules and regulations, which are officially declared by the government. For all positivists, officially declared rules and principles constitute the most appropriate sources of the law. Hence, statute enacted by the legislature, precedents made by the authorized courts and Constitutions are the laws in proper sense. Such rules and principles may be properly considered as law because individuals may be held liable for disobeying them. Austin and Bentham reflection on legal positivism by engaging the following attributes:-

1. Existence of legal rule is dependent on the existence of a sovereign whose authority is recognised by the most members of the society, but who is not bound by any human superior.

2. Criterion for validity of a legal rule in such a society is the possession of the warrant of the sovereign which is to be enforced by the sovereign power and its agents. \(^22\)

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\(^22\) Supra note 13 at 63
The term ‘positivism’ has many meanings, which were tabulated by Professor Hart as follows that laws are commands. This meaning is associated with the two founders of British Positivism, Bentham and his disciple Austin, whose views that the law as it actually laid down, positum, has to be kept separate from the law that ought to be. He further observed that analytical positivism in Britain will be associated to posterity with the names of Jeremy Bentham and John Austin. Accordingly, he distinguished between what he termed ‘expositorial jurisprudence’ and ‘censorial jurisprudence’ or the art of legislation.

1.2.1 Jeremy Bentham’s views on Legal Positivism (1748-1832)

Bentham in his book Theory of Legislation discusses the principle of utility that the public good ought to be the object of the legislator; General utility ought to too be the foundation of his reasoning’s. The right aim of legislation is the carrying out of the principle of utility. In the other words, the proper end of every law is the promotion of the greatest happiness of the greatest number. The grounds for the full recognition of Bentham’s work on law is as follows:

1. His theory of Language and Linguistic Fictions.
2. His contributions to the problem of an International Language.
3. His proposals for the codification of nearly every legal system in the world.

Bentham’s contribution to legal theory is epoch making. He heralded a new era in the history of legal thought. He laid the foundation of positivism in the modern sense of the term. The transition from the peculiar brand of natural law doctrine in the work of Blackstone to the rigorous positivism of Bentham represents one of the major developments in the history of modern legal theory. He gave directions for law making and legal research. Bentham’s legal philosophy is called ‘utilitarian individualism. According to him, the end of the legislation is the greatest happiness’s of the greatest number. 23

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23 P.K. Tripathi, An Introduction to Jurisprudence (Legal Theory, (Pioneer Publications, Delhi)
**1.2.2 John Austin’s Conception Law (1790-1859)**

Positive Law according to Austin’s theory of law can be deduced from the following definition of law given by him in his ‘lecture on Jurisprudence:

‘Positive law consists of commands set as general rules of conduct by sovereign to members of the independent political society, wherein the author of law is supreme.’

Early in the nineteenth century, legal positivism, espousing a narrow definition of “positive law,” or those laws enacted by the State or sovereign in the form of commands, attempted a similar style of reasoning to that of earlier natural law jurisprudence insofar as, like natural law theory, it was both rationalistic and deductive. Legal positivism in John Austin’s prose, considered law to be law (as opposed to morality and custom) if it was a command from a sovereign authority that was coercive. This meant that going against the command of the sovereign brought threat of an “evil.” Law was sovereign, moreover, if it emanated from an authority which was subject to no other, such as a king or parliament, who was habitually obeyed.

The central point of Austinian theory of the law is that positive law is a collection of commands, enforced by a political superior, with the aid of sanctions. That political superior is, of course, sovereign. Every positive law is set by a sovereign person.

John Austin is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as “legal positivism.” For Austin observance, ‘the matter of jurisprudence is positive law, law simply and strictly so called or law set by political superior to political inferior’. In other words for Austin the appropriate subjects of jurisprudence is positive law, that is existing by position or positivism, i.e., law as it is in an independent political community by the express or tacit authority of its sovereign or supreme government. He asserted science of jurisprudence is concern with positive laws without regard to their goodness and badness.

The main interest of Austin’s field of study was the then developed societies and the

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24 Supra note 9
legal systems of the west where politically organization and institutions had acquired stability and where law had separated itself from abstract, moral and ideal laws.  

1.2.3 H.L.A. Hart’s (1907-1992)

H.L.A. Hart’s (1907-1992) significance comes in part from the way he moved legal positivism in different direction. While he continued to insist on the importance of the conceptual separation of law from morality, he criticized attempts to analysis the law in strictly empirical terms. Early advocates of legal positivism included Jeremy Bentham (1748-1832) and John Austin (1790-1859). That a legal system in the modern sense arises when two condition coverage. First, the primary rules that are considered valid by the rule of recognition are generally obeyed by citizens. Second, the rule of recognition is accepted by officials as the standard of official behaviour. The rule of recognition may change through peaceful transition, as when Britain granted its colonies degrees of self-government and finally independence.

Hart’s positivism contains within it a content of natural law. Both unlike Austin and Kelsen who rejected natural law Hart has built the concept of natural law explicitly with positivism what he calls ‘simple version of natural law’. It is necessary for law or morality to have a certain content of natural law for compelling reasons. These reasons have to do with certain ‘natural facts and aims’ of ‘being constituted as men are’ and these facts and aims form a setting in which certain content of law a ‘natural necessity’.

1.2.4 KELSON

Hans Kelson’s pure theory of law is believed to be a refinement on Austin’s theory. This theory is also known as “Vienna School of Legal Thought” or Pure Theory of Law because it proceeds to free “the law from the metaphysical mist” i.e. speculations on justice by the doctrine of natural law. In other words this school attempts to arrive at a theory of law uncontaminated by history, ethics, politics, sociology and other external

28 Supra note. 19.
30 Supra note 27 at 209
factors. According to him law is a norm of action and jurisprudence is a normative science. The content of this theory may be summarized as under\textsuperscript{31}:

1) The rule in the natural science is thus unchangeable and rigid, it is concerned with what is while the norms of the law are ought norms. Law does not say what actually takes place; it only prescribes certain rules according to which certain conduct ought to be punished. According to Kelson the science of law is composed of hierarchy of normative relations.

2) He avoids discussing ethics of natural law and sociological approach.

3) It is the initial ground norm that is the starting point in a theory and from which all inferiors norms get their validity and force. For the example in England “Crown in Parliament” is the ground norm while in U.S.A. and India Constitution is the ground norm; the validity of the ground norm can itself be tested only by non-legal factors. It is the product of historical development or revolution, but not of law.

Kelson defines Norms as regulation setting forth how person are to behave and positive law is thus a normative order regulating human conduct in specific way. A norm is an “ought proposition; it expresses not what is or must be, but ought to be given in certain conditions, its existence can only mean its validity, and this refers to its connection with a system of norms which a form its part.\textsuperscript{32}

Recent years have seen a remarkable refinement of legal positivism. This has led to significant dialogue between so-called hard and soft positivists. The hard positivists (who are often described as ‘exclusive legal positivists) maintain that all criteria of legality must be what its leading advocate, Jospeh Raz, calls ‘social sources’. This means that the determination of whether something is ‘law’ cannot turn on a norms content or substantive value or merit. The existence of a particular ‘law’, in other words, does not depend on whether it ought tobe the law. Soft positivists (or ‘inclusive positivists’ or

\textsuperscript{31} V. D. Kulshreshtha, \textit{Landmarks in Indian Legal and Constitutional history}, 400-401 (Eastern Book Company, Lucknow, 1989)

\textsuperscript{32} Mridushi Swarup, “Kelson’s Thesory of Grundnorm.” Available at: \url{http://www.manupatra.com/roundup/330/articles.html} (visited on September 28, 2014)
‘incorporation’s’) on the other hand, accept that some principles may be legally binding by the virtue of their value or merit, but morality can be a condition of validity only where the rule of recognition so stipulate. A soft positivists accepts that the rule of recognition may incorporate moral criteria (hence their often being dubbed ‘in cooperationists’). Therefore what the law is may sometimes rest on moral considerations. For example, where the constitution obliges a judge to decide a case by reference to considerations of justice and fairness, he will be expected to determine the outcome by evaluating these moral values.  

1.3 Legal Positivism in National Level

From the very beginning of the legal theory and in the ancient Hindu, Greek and Roman law, Natural law has a primordial place. Natural law theory has a history, reaching back centuries B.C. and the vigor with which it flourishes not withstanding periodic eclipse, especially in the 19th century.

The era of natural law as developed from Grotius to Kant came to end in nineteenth century. It was David Hume who destroyed the theoretical basis of natural law. The French philosopher August Comte gave a further death blow to natural law. As a founder of Scientific Positivism and father of modern Sociology, he rejected all a priori speculative or hypothetical thinking intuitive hunches from philosophy, history and science and confined his analyzing to observable facts as they exist. Comte called this kind of explanation- positive, because it confines itself to positive and empirical verification of facts and data ascertainable by observation and analysis. Positivism is a theory of law that is based on social facts and not on moral claims. Natural law thinkers proposed that if a law is not moral, no one is under any duty to obey it, while positivists believe that a duly enacted law, until changed, remains law and should be so obeyed.

Positivism suggests that the study of law must be confined to the written rules and regulations, which are officially declared by the government. For all the positivists, officially declared rules and principles constitute the most appropriate source of law. Such rules and principles may be properly considered as law because individuals may be

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34 Supra note 1
held liable for disobeying them. On this ground, positivism rejects the theories of natural law in entirety.\textsuperscript{35}

1.3.1 Indian Position Prior to the Constitution:

1.3.1.1 Legal Positivism in Ancient period in India-

According to Dharma Shastra in ancient India what prevailed was the ‘rule of Dharma’. The idea of rule of Dharma is wider in its connotations than what we understand by the expression of rule or due process of law, dharma included within its ambit not only what just and legal but what was moral and natural as understood in Shasta’s. In the context of legal and constitutional history dharma means rajyadharma evolved by society through ages and its binding both on king(the ruler) and the people(the ruled). Thus dharma was the real sovereign and not the king. The sovereignty of Dharma i.e. law and not that of the king. Kelsonite theory of Grundnorm fits into the legal philosophy of ancient India in so far as the Indian jurists also subordinated the authority of the king to Dharma which was above the king’s sovereignty. The scriptures enjoined upon the king, a duty to rule and administer justice in accordance with the dharma which was akin to Grundnorm as it did not derive its validity from the king.\textsuperscript{36}

1.3.1.2 Legal Positivism in medieval period in India

With Moghul an invasion of the medieval period, the ancient legal system fell into oblivion and was gradually substituted by the Muslim law of Shariah as laid down by Holy Quran. According to Quarnic verses, “Obey God and obey the Prophet and those amongst you who have authority.” The decision of those learned in Muslim law therefore, was of binding authority.\textsuperscript{37}

1.3.1.3 Legal Positivism during British period in India

The advent of British rule in India brought about radical changes in the existing legal system. The improved system was based on British imperialism which sought to impose English laws and political institutions in India, Macaulay, the law member of Governor

\textsuperscript{35} Supra note 22 at 63.
\textsuperscript{36} B.M.Gandhi, \textit{Landmarks in Indian Legal and Constitutional History}, 459 (Eastern Book company, Delhi, 9\textsuperscript{th} ed. )
\textsuperscript{37} G.S. Sharma, \textit{Essays in Indian Jurisprudence },114-115 (, Eastern Book Company, Delhi, 1964)
General in council, rejected the ancient Indian legal and political institutions as ‘dotage of Brahminical superstition and condemned them as ‘an apparatus of cruel absurdities. Sir Henry Maine criticized Hindu jurisprudence ‘a priestly twaddle or an idealistic imagination’. The colonial legal culture created a class of Indians who were more pro-British than British themselves and who excelled more in Plato, Aristotle, Cooke, Blackstone, Bentham and Austin rather then in Manu, Kautilya, Yajanvalkya etc. while British no doubt introduced the concept of rule of law, political democracy with personal liberty and equality and independence of the judiciary. But the spirit of British rule in the India was in the nature of Austrian legal and political culture wherein the rulers were indifferent to the interests of the ruled and laws were simply in the form of command, coercion, and sanction devoid of the principles of morality, justice and ethical content. Thus the government of India has no existence apart from England. Thus all the characteristic of positive law, namely, command, duty, sanction, sovereign etc. were present in the legal system introduced by British rulers in India. It is in this sense that the analytical positivism found its place in the Indian legal system during the British colonial rule.  

1.3.1.4 Legal Positivism after Independence in India

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. To make a beginning in this direction, the Constitution of India was drafted which came into force on 26th January 1950. It can be termed as Grundnorm in the Kelsonite sense because all the statutes and legislative enactments derive their validity from the Constitution of India whose validity lies in its whole hearted acceptance by the Indian community without any exception. Infact pre-supposed to be valid. With the adoption of the Constitution, the India became democratic, liberal, secular and socialist nation wedded to a new legal philosophy embodying within it the humanistic principles of freedom, equality and social justice. It has attempted to establish harmonious relationship between is and ought i.e. it does not ignore the element of morality and

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39 Ibid
justice from the law. The Constitution of India is viewed by the courts as the Grundnorm to which all the statutes have to conform and the validity of all legislative and executive processes has to in the accordance with this supreme norms.

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.40

In the light of the “the Constitution of India” where the privileges of the parliament and privileges of the members are encoded and equated to the British Parliamentary privileges are existed in Britain that are controlled by the sovereign power of parliament. In India the sovereign power is vested in the people and under the Rule of Law Doctrine. The parliament of India is only a representative body having powers limited to legislation, which is subservient to “Rule of Law” as enshrined in our Constitution.41

Expounding principle signifies that our Constitution text is not a seasonal document but it is a permanent document. It is not static like dead wood but it is dynamic and a living organism since it seems to have acquired legitimacy as a highest norm of public law.42 Our Constitution is not a mere text, but a glossary of Constitution. Its expression needs creative or social engineering approach for the interpretation. Because, the judges of higher courts are required to interpret the exact intention of those who established the textual Constitution. Chief justice Charles Evans Hughes had said, “We are under a Constitution, but the Constitution is what the judges say it is”.43 Thus, unequivocally we

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40 Supra note 23 at 328-329
42 Justice H.R. Khana, “Making of India’s Constitution”, at 1-3
can say that Constitution is what the judges of the Apex Court expound. For example: Kesavananda Bharati case.

In India, the judiciary generally adopted a logical, legalistic, formal and rigid attitude that has naturally led frequently to conflict between the courts and the parliament. The Supreme Court adopted & philosophy and postures trying to determine rigorously the phrase ‘the procedure established by law’ to mean two things. Negatively speaking it was rejection of the American doctrine ‘due process of law’.

Such interpretation can be termed as a kind of legal positivism or what can be said as legal ‘objectivity’. In a series of crucial decision the Indian Supreme courts involving socio-economic justice have been largely influenced by this kind of legal positivism or what can be said as legal ‘objectivity’. In a series of crucial decision the Indian Supreme courts involving socio-economic justice have been largely influenced by this kind of legal positivism.

In terms of legal positivism these were clearly example of the courts have been over reached itself. The directive principle of state policy although supposed to be fundamental in the governance of the country were not enforceable in any court. The court by incorporating them within the fundamental right to life and personal liberty made them enforceable.44

1.3.1.5 Judicial Response

In India, it is this desirable conservatism and not sociological reasoning that has primarily guided judicial thought, resulting in the very frequent conflict between fundamental rights and the laws that have tried to uphold the directive principles of the state policy; this also would explain the conflicting attitude of Parliament and the Supreme Court towards justice. This individualistic conservatism has promoted the Indian Supreme Court to develop judicial methods of its own. Understanding of the nature of judicial justice would involve a sociological study of judicial decisions on crucial socio-economic issues in the light of the methods that have been pursued by the Supreme Court. Methodologically, the Constitution only lay down that the mode of judicial reasoning

would be determined by “procedure established by law”. This clause would be objectively implying two things. Negatively, this would indicate a rejection of the American doctrine of ‘due process of law’. Positively however, this meant emphasis of legality, the logical implications of which would be that laws would be construed strictly in terms of narrow legal and procedural niceties divorced from the social contract. Such interpretation would logically result in a kind of legal positivism or legal formalism in the name of legal objectivity. Crucial decisions of the Indian Supreme Court involving socio-economic justice have been very largely influenced by this legal positivism.\textsuperscript{45}

First, let us to the cases involving legal positivism. This was first evidence in 1951 in the \textit{State of Madras vs. Srimathi Champakam Dorairajan and State of Madras vs. C.R. Srinivasan}\textsuperscript{46} the petitioner’s contention was that n order issued by the province of Madras (known as the communal G.O.) was ultra vires, since the order required the Engineering and Medical Colleges of the state to fill up their seats, on the basis of quota for the economically and educationally backward classes, the details of which were laid down in the order. The petitioner’s contention was that the order was violative of the Fundamental Rights under Article 29(2), which specially stated that no citizen should be denied admission into any educational institution maintained by the state or receiving aid out of the state funds on grounds only of the religion, race, caste, language, or any of them. Thus, the Supreme Court guided by the logic of 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 the case of \textit{Union of India v. Deoki Nandan Aggarwal}\textsuperscript{47}, it has been held that the court cannot rewrite, recast or reframe legislation for the good reason that it has no power to legislate. Assuming there is defect or omission in the words used by the legislature, the court could not go to its aid to correct or make up the deficiency. Then in 1957, the Supreme Court took up the case of \textit{Raja Bahadur Motilal Poona Mills Ltd v. Tukaram},

\begin{footnotes}
\item[46] 1951 SCR 525. vol. 2
\item[47] AIR 1992 SC 96
\end{footnotes}
Piraji Musala\textsuperscript{48} the supreme court, in course of its juristic reasoning was guided exclusively by the narrow legal positivist implications of the word ‘strike’ as it was structured in the aforesaid Act, the logic of legal formalism restrained the judiciary from requiring sociologically into the circumstances that prompted the strike and consequently appreciating the element of social justice which constituted the core of the workers’ stated.

The Supreme Court delivered a momentous judgement in Re the Kerala Education Bill,\textsuperscript{49} the Supreme Court was confronted by two conflicting issues. Whether the Education Bill passed by the Kerala Assembly with a view to discharge the obligation of introducing free and compulsory education under Article 45 of the directive policy of state policy, would be upheld or whether the right of the minorities to establish and administer educational institutions of their own choice under Article 30(1) was to be guarded, since the right was going to the affected by the aforesaid by the aforesaid Bill in the interest of providing free and compulsory education to children below fourteen years. The Supreme Court, while admitting that in determining the scope and ambit of the Fundamental Rights the Directive Principles of state policy could not be ignored said in the final sections of its verdict.

Blind faith in the narrow niceties of legality was again exhibited by the Supreme Court in Model Mills Nagpur Ltd. V. Dharam Das and others\textsuperscript{50} the SC, in upholding dismissal order, took up only the formal, legal meaning of the ‘strike’ with reference to the meaning of its given in the C.P. and Berrar Industrial Dispute Settlement Act, which governed the industrial relation in the area. The exclusive emphasis of the juristic reasoning was pinned on whether the legal form of the strike corresponded to the legal structure of the Act and no attempt was made to appreciate either the social essence of the strike of the human element involved in it. In other words, legal positivist reasoning logically led the Supreme Court to develop a non-normative, value- free approach in the understanding of the meaning of the strike, resulting in a verdict that went against the justice demanded by the dismissed workers.

\begin{flushright}
\textsuperscript{48} AIR 1957 SC 73 \\
\textsuperscript{49} 1959 SCR 995 \\
\textsuperscript{50} AIR 1958 SC 311
\end{flushright}
Finally in 1967, the supreme court made history by reaffirming its faith in the logic of legal positivism in *L.C. Golaknath and others v. State of Punjab*\(^\text{51}\) in the case witnessed a conflict between the vested interests of the owners of surplus lands, who would profit most by rationalizing the non-amenability of Fundamental Rights, and the interests of the common man, which demanded an alteration of this position. 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 17\(^{th}\) Amendment Act 1964 void. However, by following the rule of prospective overruling, the court allowed the said Amendment Act to continue to remain valid.

In the case of *Smt. Indira Nehru Gandhi v. Sri Raj Narain*\(^\text{52}\) 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. K.K. Mathew, j held it was outside the scope of constituent power. The court declared that the 39\(^{th}\) Amendment violated the 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*\(^\text{53}\) declared section 55 of the Constitution (42\(^{nd}\) 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.

In case *Waman Rao v. Union of India*\(^\text{54}\) applied doctrine of prospective overruling to the law declared in Kesavananda Bharati, by holding that all the Amendments to the Constitution which were made before 1973 were valid and the amendments made on or after that date, were open to challenge on the ground that all or any one of them were beyond the constituent power of Parliament being violative of the basic structure of the Constitution.

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\(^{51}\) AIR 1967 SC 1643  
\(^{52}\) AIR 1975 SC 2299  
\(^{53}\) AIR 1980 SC 1789  
\(^{54}\) AIR 1981 SC 271
The legal –positivist approach of the court was quite explicit in the arguments which may be summed up as follows: first, with reference to the marginal note of Article 368, the court pointed out that the Article expressed only the procedure of amendment which should not be identified with the power of amendments. The power of amendment was derived from other provisions of the Constitution and hence it was subject to constitutional limitations. Secondly, a constitutional amendment is also a ‘law’ within the meaning of Art. 13(2) and hence this can be declared void, if it infringes fundamental rights. Thirdly, since the constitution did not specifically mention the amendment of Fundamental Rights in the chapter on Amendment, Part III could not be amended at all. Finally, the fundamental rights were regarded as immutable provisions of the constitution, because they were qualified by the expression ‘fundamental’ meaning, thereby that these were unalterable provisions of the constitution. The obvious implication is that the legal positivist stands of the court on these crucial issues has objectively led to a defence of the rights of the privileged few, may a defence of the Indian capitalisms and the values most cherished by the class.55

Chief justice Charles Evans Hughes had said, “We are under a Constitution, but the Constitution is what the judges say it is”.56 Thus, unequivocally we can say that Constitution is what the judges of the Apex Court expound. The misapplication of this principle in the minority judgement in Sharma’s case57 in the majority judgment in the K.M.Nanawati v. State of Bombay58 Justice Sarkar summed up the position by saying: “we are concerned with harmonizing two conflicting provisions by giving both the best effect possible and it is done by cutting the Gordian knot by removing the conflicting part out of the statue.”

The judiciary is the third important organ of the government and may be said to be the touchstone of the merits and quality of a political system. As a Justice P.B. Gajendragadkar said, it is the courts which act and serve like “watchtowers” to guard the liberty and fundamental rights of the citizens and also as “laboratories for testing the

55 Supra note 44.
57 1958 S.C.R. 895 at 918.
58 (1961) 1 S.C.R. 497
validity of legislative and executive functions.” Lord Bryce rightly said “no better test of the excellence of a government than the efficiency of its judicial system.” In deciding cases, whether civil or criminal, courts have to determine facts and then apply the law. In most case, courts have no difficulty in deciding them because the law is unambiguous and easily applicable. But when law is ambiguous, the court by determining the exact and true meaning of laws, by interpreting the law to make it applicable to new conditions or situations, and by resolving inconsistencies, judges in a way make the law. In interpreting and applying the law, judges are guided by the principles of equity, common sense and natural justice. Through their interpretation of law, judges create precedents or what is called ‘judge made law’ and these precedents are followed in subsequent cases.  

With passage of time, the judiciary in India has become increasingly active. Whereas it was content with interpreting the constitution in the most conservative or even reactionary manner till the early 1970s without trying to read in between the lines of the constitution; during the last two decades or so, it has become more and more active, responsive, dynamic and vibrant. Apart from being the guardian of the Constitution, the Indian judiciary is also acting as an agent of social change, a crusader for social justice a creator of new rules and procedures, and in the eyes of critics a “third chamber” and super executive.  

At times, the judiciary has played a vital role on the one hand, it has to ensure that any law passed by the legislature is in conformity with the provisions of the Constitution and on the other hand it has to ensure that the executive is enforcing these laws efficiently and not in any way acting beyond its power. 

Judicial activism is said to have first originated in the English courts in the form of concepts like ‘equity’ and ‘natural justice’ as there were no sufficient safeguards for people in statutory laws at the time. In the UK the governing the for nature of the judicial process was expressed by Sir Francis Bacon in the early seventeenth century when he said that the judges must remember that their jobs is to interpret law and not to make law.

60 Harashvardhan, Judicial Activism in India, 26 /ILJP, 134(1992).
Inclined towards this tradition, the judges bound themselves in heavier claims of their own making and resulted in their adopting the rule of literal interpretation of the plain and unambiguous language of statues, disregarding the fact that in real life words are rarely plain and unambiguous. This led to number of absurd and inevitable results. The early sixties, however, witnessed the emergence of a new generation of English judges, spearheaded by the likes of Lord Reid, Lord Denning and Lord Wilberforce. With their doctrine of law, reviving and extending ancient principles of private bodies that exercise public power, and rejecting claims of unfettered administrative discretion. However, this concept later developed of the American soil.62

1.3.1.5.1 Judicial Review and Legal Positivism

Judicial review means ‘judicial scrutiny’, i.e. the power of the judiciary to review the Act of the Legislature or the Executive in order to determine its Constitutional propriety. If the Act violates the provisions of the Constitution, it can be declared or held as unconstitutional, illegal or ultra vires. In federal Constitutions, the judiciary is considered as the ‘guardian of the Constitution’ which means, the judiciary has the power to ‘interpretate the Constitution’ which is an also an important part of judicial review.

This doctrine is not fully recognized in U.K. where Parliament is supreme and its acts are unchallengeable, of course the validity of delegated legislation can be challenged there. In USA a judicial review is possible as it is in India. It was first in Marbury and Madison,63 that an act of Congress was held void Chief Justice John Marshall said that in case a law or a statute conflicts with the constitution, then it is up to the court to decide which one is to be followed. It is said to be one of the essential duties of the court. In this case the court held that whenever there is a conflict between a law made by the congress and the provisions of the constitution, it was the duty of the court to enforce the constitution and ignore the law. This led to the birth of the twin concepts of judicial review and judicial activism. Thus the US SC held that the court has the power to interpret the law and declare the act of the legislature as void or unconstitutional. Justice Marshall derived this power of the court from the famous ‘Due Process of Law’ clauses


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62 Ibid.
63 (1803) 5 US 137.
of the American Constitution. Delivering the judgement, J. Marshall observed that the ‘Constitution is the Supreme law of the land and the judges are bound by the oath to give effect to it.’ He further said that ‘when the court is called upon to give effect to a statue passed by the congress, which is clearly in conflict with the supreme law of the Constitution, it must give preference to the latter and hold the former void and of no-effect.’ Thus judicial review was ‘American democracy’s way of covering its bet’, he added. In short, the judiciary has he duty of implementing the constitutional safeguards that protect individual rights. It was a *Fletcher v. Peck* (1800) that a state law was held contrary to the constitution of America. The doctrine of judicial review has been accepted in India. The court has power to review the Acts of Parliament and declare them ultra vires or void. Similarly the actions of administrative machinery could be challenged in a court of law and the court could review them.

The scope of judicial review of administrative actions was laid down by SC of India in *Kishan Chand v. Comissioner of Police*. As remarked by C.J. Pathak in *Raghbir Singh v. Union of India* case the range of judicial review is recognised in the superior judiciary in India is perhaps the widest and the most extensive known in the world of law. The power extends to examining the validity of even an amendment to the Constitution for now it has been repeatedly held that no constitutional amendment can be sustained which violates the basic structure of the Constitution.

Judicial Activism is a facet of judicial review. If implementation of rule of law which is the bedrock of democracy is the basic responsibility of judiciary then it is obligation of the judiciary to see that every aspect which is essential for proper implementation of the rule of law ought to be taken care of.

Since independence, there have been a number of cases where the SC has enjoyed the power of judicial review and has openly declared an Act as illegal or void. In order to access the position of the SC of India, a few important cases are cited below:

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64 Supra note 58, pp 334-335  
65 Supra note 36 at 404-405  
66 AIR 1961 SC705.  
(a) The first case in which the SC exercised the power of judicial review is known as *A.K. Gopalan v. State of Madras* (1950). In this case the validity of the First Amendment of the Constitution as well as the Preventive Detention Act were challenged on the ground that they violate the Fundamental Rights of citizens. But the SC upheld the First Amendment of the Constitution and accepted the plea that the Parliament of India under Article 368 is empowered to amend any part of the Constitution including those of fundamental rights.

(b) The question of amendability of fundamental rights came before the SC of India in the cases of *Shankari Prasad v. Union of India* and *Sajjan Singh v. State of Rajasthan*, the SC took the position that ‘the fundamental rights of the individual under the Constitution though the sacrosanct and constituting limitations on the power of the executive and legislature are not the immutable and absolute character but subject to Parliament’s power to amend the constitution under article 368. in other words, the court made no distinction between the term ‘law’ used in Article 13(2) and in Article 368 and upheld the power of the Indian Parliament of amending any part of the Constitution including the fundamental rights.

(c) But a very significant and a contrary view was taken by the SC in case of *Golaknath v. State of Punjab* (1967) ascribing ‘in violability and trascendentality’ to the individual’s fundamental rights under the constitution. The court upheld that is beyond the competence of Parliament acting under Article 368 to take away or abridge the fundamental rights. Pronouncing the judgement, the then CJ Subba Rao made a distinction in the term ‘law’ used in Article 13(2) and in Article 368, i.e. the term ‘law’ used under Article 13(2) is a constitutional law and the term used under Art. 368 simply deal with the procedure and it does not confer any power on Parliament to amend the fundamental rights. The SC further held that fundamental rights are natural rights or moral rights which every human being ought to possess. According to the judgement, ‘the Parliament will have no power from the date of this decision (27th February 1967) to amend any

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69 AIR 1951 SC 458
70 AIR 1965 SC 845
of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights.’

(d) However, the majority judgement delivered in the case of Golaknath v. State of Punjab was overruled by the SC itself while pronouncing the judgement in the case of Kesavananda Bharati v. State of Kerala (1973) and the SC held that Parliament is empowered to amend any part of the Constitution including the fundamental rights but cannot alter the basic structure of the Constitution and thus limited the amendment power of Parliament.

Thus, the Supreme Court declared in Kesavananda Bharati v. State of Kerala that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution. This decision is not just a landmark in the evolution of Constitutional law, but a turning point in Constitutional history. No other court in the world had taken this position. In Pakistan the Lahore High Court and Baluchistan High Court took the same view but not the Supreme Court. Subsequently the supreme court of Bangladesh adopted the doctrine of basic structure relying on Kesavananda Bharati. 71

Starting on positivist note in 195072, it subscribed to natural law school of thought by 1967,73 only return to positivism by 1976,74 and then again adopted the natural law approach by 1978.75

In modern system and the doctrine of judicial review is sine qua non to keep alive the spirit of the Constitution. However, in a process the judiciary cannot override the legal norms set by the founding fathers of the Constitution.76 This view was affirmed by the Apex court in its observation that ‘the court itself is not above the law’.

Though in India there is no express provision declaring the Constitution to be the supreme law, the power of judicial review by the SC is not a subject of controversy. It

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has power to interpret the constitution and uphold the liberties of the people. No doubt the SC of India is not as powerful as the U.S. SC, yet the judgements pronounced by it have raised its dignity and respect. In the Indian Constitution the term ‘procedure established by the law’ has been used instead of the ‘Due Process of Law’. Article 21 of the Constitution provides that ‘no one shall be deprived of his life and liberty except according to the procedure established by law’. Here the term ‘law’ does not mean ‘the natural law’ but it means state made law. 77

Thus in India on all such questions reaching legal consequences the judiciary generally adopted a logical, legalistic, formal and rigid attitude that has naturally led frequently to conflict between the courts and the parliament. The Supreme Court adopted & philosophy and postures trying to determine rigorously the phrase ‘the procedure established by law’ to mean two things. Negatively speaking it was rejection of the American doctrine ‘due process of law’. Such interpretation can be termed as a kind of legal positivism or what can be said as legal ‘objectivity’. In a series of crucial decision the Indian Supreme courts involving socio-economic justice have been largely influenced by this kind of legal positivism. In terms of legal positivism these were clearly example of the courts have been over reached itself. The directive principle of state policy although supposed to be fundamental in the governance of the country were not enforceable in any court. The court by incorporating them within the fundamental right to life and personal liberty made them enforceable. 78

The emergence of the Indian supreme court as a custodian of peoples rights and a democratic, functional institution is the most significant and important development in the judicial history of independent India. It is seen and perceived as a forum for raising, redressing and articulating the problems of the have-not’s/deprived, oppressed, the downtrodden, women and children, environmental groups, consumer forums, victims of bureaucratic exploitations and abuse of powers and positions by persons holding high public offices. It has become a forum for the representation, articulation and protection of the basic human rights of the people vis-à-vis society. 79

77 Supra note 58 at 335.
78 Supra note 43 at 223.
79 Dr. Dilip Ukey and Tejaswini Malegaonkar, “Right to Life and Personal Liberty- Challenges and Judicial Response”, vol. 30(4) IBR, 539-540 (2003).
In *Jaisinghani v. Union of India*\(^8^0\) the Supreme Court relying on Dicey observed: “it is important to emphasis that the absence of arbitrary power is the first essential of the rule upon which our whole constitutional system is based. In a system governed by the rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits.

In *State of Madhya Pradesh v. Thakur Bharat Singh*\(^8^1\) the court pointed out, “we have adopted under our Constitution not the continental system but the British system under which the rule of law prevails.” *In Bachan Singh v. State of Panjab*\(^8^2\) the court explained, “Necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and democratic form of policy seeks to ensure this element by making the framers of law accountable to the people.”

The first area where the concept of judicial review was exercised was in relation to property areas. There was a kind of tussle between the legislature and the judiciary. The judiciary was trying to protect the landlords from the various provisions in the Constitution and the legislature on the other hand was amending the Constitution, to nullify the effect of the judicial decisions. After that the focus of the judiciary moved from property rights to protecting the civil rights. However, this no longer remained judicial review, but now it had taken the shape of judicial activism.\(^8^3\)

There was a time when law was undoubtedly considered to be a manifestation of will of the dominant social class, determined by economic and political motives. The ideals of justice had little to do with law which was often an instrument of oppression. However, in modern times, the pressure of social interest and security has become the compelling force in law making. One of the major goals after independence of the country was to achieve egalitarian society. The preamble of the constitution eloquently spells out the dynamics of its goal under article 38 which makes it abundantly clear that legislature, executive and judiciary should strive to achieve non-exploitative society. Although

\(^8^0\) *(1983)1 SCC 147*
\(^8^1\) *AIR 1967 SC 1170*
\(^8^2\) *AIR 1982 SC 1325*
judiciary is passive and less responsive to the changing needs of the society as compared to the legislature, nonetheless it is now commonly understood that it has its own role in making law and formulating substantive social policies through the device of judicial activism. Therefore, the goal of social revolution, enshrined in the Part III of the Constitution which guarantees fundamental rights and Part IV which articulates directive principles of state policy, not being ephemeral, should be shared relentlessly by the judiciary. The dynamic rule of law is an instrument of social change and the judicial process must effectuate this transformation in the social order.84

Under the traditional approach the judges usually paid great heed to the letter of law and the mischief that was designed to be removed. Social conditions and economic trends were not supposed to influence him in arriving at certain decision. But this attitude has changed in recent past. A judge now is more conscious of the ‘felt necessities’ of the time. He is duty bound not only to point out the mistakes of the legislature or remove unjustifiable hardships caused by the law, but also to assist in the social and economic progress. Time and again, the SC has vigorously adopted the approach of social justice in Constitutional interpretation which penetrates and destroys the inequities of race, sex, power, position or wealth, which seeks to bring about equitable distribution of social, material and political resources of the community.85

Law making is the function of the legislative branch of government. However, the judiciary in writing its judgements has often strayed into giving guidelines to the executive which have more or less the force of law. This amount to judicial law making. This has happened especially in cases relating to Bonded Labour, Protective Homes for Women, sexual harassment of women at workplace, custodial violence against prisoner, adoption of Indian children by foreigners etc.86

The legal system today is viewed as a dynamic and self evolving enterprises directed towards realization of social goals and aspirations. The Supreme Court has been relentlessly striving to judicial power through variety of techniques of juristic activism

85 Ibid
converting such of the litigation into PIL. The court now recognize form of epistolary jurisdiction through which citizens or groups can activate the court in case of violation of fundamental rights notwithstanding the traditional law relating to locus standi.\(^\text{87}\)

The judiciary not only interprets the law but it has started making laws in cases where, there is no legislation available on that issue. In *M.C. Mehta v. Union of India*, the Supreme Court introduced the concept of absolute liability. This is example of judicial activism, if we go back in the history and look at the Austin’s definition of law, then we might have to look into the legitimacy of this concept of judicial activism. According to Austin law is the command of the sovereign. This means that only the law made by the legislature which is the sovereign in Indian context. The function of the court in this view was to interpret the pre-existing law. This maybe the theory but in practical this was not followed in totality, even in Britain, where it ahs been a notion that a judge cannot make law; the court has showed its activism through the judgements in the cases like *Rylands v. Fletcher* and *Donoghue v. Stevenson*.\(^\text{88}\)

In the case of *State of Madras v. Smt. Champakam*,\(^\text{89}\) wherein the Supreme Court struck down a Madras G. O. regulating admission to an educational institution supported by the state.

Constitutionalism is a political philosophy in which the function of government of state must be in accordance with the provisions of the constitution. The objective of the constitution ensure dignified conditions for the people of India and provide them all rights and liberties with in the ambit of spirit of the constitutionalism embodied in the entire body of constitution. Example article 13. Concept of higher law depicts the constitution as the supreme law. However this type of situation has been prevalent in India till 2007 in different cases such as *Shankri Prasad case, Sajjan Singh case, Golaknath* case but in *Rajarampal* case and *I.R.Coelho versus State of T.N.*, 2007 have reshaped the whole demarcation and establish superiority of principles such as a basic structure of the theory enhancing the spirit of constitutionalism.\(^\text{90}\)

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\(^{87}\) Supra note 83.

\(^{88}\) Supra note 8.

\(^{89}\) 1951 SCR 525

\(^{90}\) Preeti Goyal, Indian Constitutionalism, available at: [www.legalservice.com](http://www.legalservice.com) (visited on September 23, 2015)
Thus the two distinct trends are discernible in Indian legal theory during the first two decades of the Constitution. In Gopalan\(^{\text{91}}\) the court refused to interpret the law in Article 21 as ought to be embodying the principle of natural justice. It adopted a morality neutral test of law as it is for determining the validity of law in the positivist’s sense as expounded by Bentham and John Austin. It is for this reason Gopalan is characterized higher water mark of legal positivism in Indian jurisprudence.

Likewise from Shankari Prasad (1951) and Sajjan Singh (1967) to Golak Nath (1967) the court refused to give any guidance to felt necessities of the time and then to prevailing moral and social imperatives and defeated every amendment for securing egalitarian order as ultra vires of the Constitution. The unamendability of fundamental rights resurrected ghost of Austin’s positivism to ascertain that the law is devoid of inner as well as external morality.\(^{\text{92}}\)

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.

In the Kesavananda Bharati\(^{\text{93}}\) case. The Supreme Court reviewed the decision in the 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.

The progressive contours are boon for the transformative jurisprudence in India that has indeed strengthened the dimensions of new jurisprudential thoughts of ‘affirmative action’\(^{\text{94}}\), ‘human dignity’\(^{\text{95}}\), ‘legal aid’\(^{\text{96}}\) etc.

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\(^{\text{92}}\) Supra note 27 at 396.

\(^{\text{93}}\) AIR 1973 SC 1461

\(^{\text{94}}\) 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
In Francies Carallie v. Union Territory, Delhi\textsuperscript{97}, the SC held that right to live is not merely restricted to mere animal existence. It means something more than just physical survival. Article 21, the right to life includes right to live with human dignity.

The right to privacy which was new right read into Article 21 in Rajagopal v. State of Tamil Naidu\textsuperscript{98} it was held that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education, among other matters.

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\textsuperscript{99}, 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.

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In Centre for Environment Law v. Union of India\textsuperscript{105} on the ground that protecting the environment is a part of Article 21. In Ramlila Maidian\textsuperscript{106} the right to sleep was held to be part Article 21.

In Re Networking Rivers case\textsuperscript{107} the SC directed the interlinks between the rivers of India. In another case Dayas Ram v. Suhri Balham\textsuperscript{108} the SC saying that they were meant to fill legal vacuum. In Ajay Bansal v. Union of India\textsuperscript{109} 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.

With passage of time, the judiciary in India has become increasingly active. Whereas it was content with interpreting the constitution in the most conservative or even reactionary manner till the early 1970s without trying to read in between the lines of the constitution; during the last two decades or so, it has become more and more active, responsive, dynamic and vibrant. Apart from being the guardian of the Constitution, the Indian judiciary is also acting as an agent of social change, a crusader for social justice a creator of new rules and procedures, and in the eyes of critics a “third chamber” and super executive.\textsuperscript{110}

\textsuperscript{103} (1994) 6 SCC 632
\textsuperscript{104} (2003) 6 SCC 1
\textsuperscript{105} (2013) 5SCC
\textsuperscript{106} AIR 2012 SC11
\textsuperscript{107} (2012)4 SCC 51
\textsuperscript{108} (2012)1 SCC 333
\textsuperscript{109} AIR 2013 SC
\textsuperscript{110} Supra note 59 at 134.
At times, the judiciary has played a vital role on the one hand, it has to ensure that any law passed by the legislature is in conformity with the provisions of the Constitution and on the other hand it has to ensure that the executive is enforcing these laws efficiently and not in any way acting beyond its power.\textsuperscript{111}

1.4 Review of Literature

A research can contribute something to the existing literature only if that research has been carried out after reviewing the existing literature in the field. Keeping in the view this general principle and to make the present research more focused the already done research work has been reviewed in this part. While reviewing the research made an attempt to analysis the contents and observation of the various works done by the authors and also the grey areas in these studies. Few numbers of books/ researcher papers/ research consultation mentioned below:-

Legal positivism’s empiricism has exposed it to the suspicion that it is insensitive to the moral dimensions of social life. This is ill-founded. Legal positivism is the child of utilitarian moral theory, which seeks to advance the public good.

Prof. Ashutosh, in his book \textit{Rights of Accused discuss the law, justice and morality} discussed that Justice is the ideal to be achieved by law. Law is a set of general rule is applied in the administration of justice. “Law as it is” may fall short of “law as it ought to be” for doing complete justice in a cause. The gap between the two may be described as the field covered by morality. There is no doubt that the development the law is influenced by morals. The infusion of morality for reshaping the law is influenced by the principles of equity and natural justice as effective agencies of growth. The ideal state is when the ruler of law satisfied by requirements of justice and the gap between the two is bridged. It is this attempt to bridged the gap which occasions the development of new jurisprudence.\textsuperscript{112}

Mark R. MacGUIGAN in his book \textit{Jurisprudence Reading and Cases}\textsuperscript{113} that the history of the jurisprudence shows that there are two elements which have always been

\textsuperscript{111} Supra note 60 at 180.
\textsuperscript{112} Supra note 67 at 91.
\textsuperscript{113} Mark R. MacGUIGAN, \textit{Jurisprudence Reading and Cases}, 70-71 (University of Toronto Press, Canada,1996).
associated with the concept of law by philosophers. These are the reason element and the will or flat element – the element of order discovered and that of order imposed, the given and the construed. Both elements have ancient supporting traditions in the legal philosophy.

Paton in his book *A Text Book of Jurisprudence*\(^\text{114}\) defined law that “Law is never an ideal justice, but human justice defined by those who control the machine. What ends law has served is a question for legal theory; what ends it should serve is question for legal philosophy.”

Edgar Bodenheimer in his book *Jurisprudence the Philosophy and Method of the Law*\(^\text{115}\) explained that the French mathematician and philosopher Auguste Comte (1798-1857) who may be regarded as the philosophical founder of modern positivism, distinguished three great stages in the evolution of human thinking. The first stage, in his system, is the theological stage, in which all phenomena are explained by reference to supplement causes and the intervention of the divine being. The second is the metaphysical stage in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things and as constituting the real moving forces in the evolution of mankind. The third and the last stage is the positivistic stage, which rejects all hypothetical constructions in philosophy, history, and science and confines itself to the empirical observation and connection of the facts under the guidance of methods used in the natural sciences. In the 20\(^{th}\) century, positivism assumed a new and radical shape in the logical positivism of the so called Vienna Circle.

R. W.M. Dias in his book *Jurisprudence*\(^\text{116}\) explained the start of the nineteenth century might be taken as marketing the beginning of the positivist movement. It represented a reaction against the prior method of thinking that characterized a preceding age. The term ‘positivism’ has many meaning, which were tabulated by Professor Hart as follows that laws are commands. This meaning is associated with the two founders of British Positivism, Bentham and his discipline Austin, whose views that the law as it actually

\(^{114}\) Paton , *A Text Book of Jurisprudence*, 83 (Oxford University Press, 1964)
laid down, positum, has to be kept separate from the law that ought to be. He further observed that analytical positivism in Britain will be associated to posterity with the names of Jeremy Bentham and John Austin. Accordingly, he distinguished between what he termed ‘expositorial jurisprudence’ (what the law is) and ‘censorial jurisprudence’ or the art of legislation (what the law ought to be).

Prof. Nomita Aggarwal in her book *Jurisprudence (Legal Theory)*\(^{117}\) the analytical school is also known as Austianian school since this approach was established by John Austin. It is also known as the imperatives school because it treats law as the command of the sovereign. Dias terms this approach as ‘Positivism’ as the subject matter of the school is positive law.

**Suri** Ratanpala in his book *Jurisprudence*\(^{118}\) described that legal positivism bears resemblances to logical positivism, but differs in some ways. Legal positivism aims to identify the law as it is. The other major theme in legal positivism is the claim that law has no necessary connection to morality, although often enough the law will express the morality of the people it regulates.

G. W. Keeton in his book *Elementary Principles of Jurisprudence*\(^{119}\) the central point of Austinian theory of the law is that positive law is a collections of commands, enforced by a political superior, with the aid of sanctions. That political superior is, of course, sovereign. Every positive law … is set by a sovereign person.

N. V. Paranjape, *Studies in Jurisprudence and Legal Theory* that Austin distinguishes positive law from positive morality which is devoid of any legal sanction. Austin’s positive law there is no place for ideal or justness in law. Within analytical jurisprudence, Austin was the first systematic exponent of a view of law known as “legal positivism.”

Brain Bix in his book *Jurisprudence Theory and Context*\(^{120}\) H.L.A. Hart’s (1907-1992) significance comes in part from the way he moved legal positivism in different direction. While he continued to insist on the importance of the conceptual separation of law from

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\(^{118}\) Supra note 17 at 25-26

\(^{119}\) Supra note 26 at 59.

\(^{120}\) Supra note, 19 at 37.
morality, he criticized attempts to analysis the law in strictly empirical terms. Early advocates of legal positivism included Jeremy Bentham (1748-1832) and John Austin (1790-1859).

W. Friedmann, in his book Legal Theory 121 observed that the emergence of the modern state as the more and more exclusive repository of political and legal power not only the produced a professional class, of civil servants, intellectuals and others which increasingly gave its loyalties and its talents to the modern state rather than to an international church or to a distant and impotent emperor. He further also demanded more and more organization of legal system, a hierarchal structure of legal authority and systematization of the increasing mass of legal material.

Mridushi Swarup in his article observed Kelson’s Theory of Grundnorm. Kelson defines Norms as regulation setting forth how person are to behave and positive law is thus a normative order regulating human conduct in specific way. A norm is an “ought proposition; it expresses not what is or must be, but ought to be given in certain conditions, its existence can only mean its validity, and this refers to its connection with a system of norms which a form its part.

1.5 PROBLEM PROFILE

The positive law takes law as the command of sovereign. It’s put emphasis on legislation as source of law. Some of the most influential defenders of legal positivism are the 19th century philosophers John Austin and Jeremy Bentham, and the 20th century legal philosopher H.L.A. Hart

According to Austin, Positive law was the law as it is (Positus) rather than law as it ought to be which he was not at all concerned. Austin believed that law is command of the sovereign and if not obeyed than that shall attract punishment. Austin and Jeremy Bentham provided us with a very strict approach towards law and his approach shows that the scope of morality, ethics, natural justice and sociological aspect of law need not be taken into consideration by the legislator while enacting a law.

The view of John Austin and Jeremy Bentham that law is command of the sovereign, backed by sanction had certain shortcomings and therefore it was criticized to a certain extent. Prof. Hart and Prof. Lon Fuller have attacked the analytical separation of law from morals. According to Fuller, the legality of a law is concerned with the matter that how the rule operates, how they are drafted, promulgated, applied, interpreted and enforced. According to Hart, the idea that law consists merely of orders backed by threat is inadequate to explain modern legal system. For Hart, legality is not something which is politically imposed but it is evolved through a growing complex system of different kinds of rules. The Indian legal system is influenced by the legal positivism. The examples are listed below:

In landmark judgement of A.K. Gopalan v. State of Madras, the petitioner was detained under the Preventive Detention Act, 1950. Petitioner challenged the Constitutional validity of the Preventive Detention Act’1950 on the ground that act infringed Article 19 and Article 21 of the Constitution of India. The Supreme Court upheld the validity of the Preventive Detention Act, 1950 and stated that law is “lex” (the law is only what is laid down by the legislature) and not ‘jus’(whether the law is just or not; it only considered what the law is.) . Therefore law laid down by the legislature is to be regarded as law even if it is not just. Gopalan’s case characterized higher water mark of legal positivism in Indian jurisprudence. This judgement clearly reflected the thinking of the positivist school. The Supreme Court in another case A.D.M.,Jabalpur v. Shivakant Shukla ,decided that while the proclamation of emergency is in force, the right to move to any court was suspended in context to Article 14, Article 21 and Article 22. The Court cannot examine and act even against the writ petition filed on the ground that it was ultra vires the enabling statute or on the ground of being malafide. The court held that once the right to move to any court was suspended in context to Article 14, Article 21 and Article 22, the detained person had no right to approach a court regarding the same; by this logic their writ petitions would have to be dismissed. It was the darkest hour of Indian judiciary which struck at the very heart of fundamental rights and maintained a strict positivist attitude. The researcher is of the view that the strict positivist attitude towards interpretation of statutory law is not right as legal positivism isolated from the historical and natural realities. The study focuses on the reasons for adoption of natural justice in modern era.
1.6 OBJECTIVE OF STUDY

The objectives of research are as follows:

1. To study the relevance if idea of positivism in 21st century.

2. To study the impact of positivism on judicial approach towards the interpretation of the Constitution.

3. To study various theories/schools/ideologies of eminent jurists, philosophers and thinkers regarding positive law.

1.7 RESEARCH HYPOTHESES

To above quest of the research will proceed on the following assumption:-

1. Initial interpretation of Constitution was influenced by legal positivism.

2. Objective of the welfare state can be achieved by emphasizing on positivist and rigid interpretation of the Constitution.

1.8 RESEARCH METHODOLOGY

The researcher will adopt a very precise research methodology based on study of legal literature available on this subject at national and international level. The study will follow doctrinal research method in compilation, interpretation and systematization of the primary and secondary source material. Review and analysis literature available in India and in other countries will be examined. Several online database and internet search engines will be surfed to make the study effective and realistic. The study will be doctrinal nature. The findings and conclusion will be based on qualitative analysis. It provides a theory to explain particular legal doctrine and may be explanatory; it attempts to explain the law as it is.

1.9 Plan of Study: the study has been planned in various chapters briefly discussed and described below.

1) Introduction” Gives the brief introduction of the topics, its problem profile, objectives of the study, research hypothesis, methodology of study, review of literature and Plan of study.
2) **Rejection of the idea of Naturalism and Rise of Positivism**: this chapter includes various aspects of natural law. It includes: Meaning of Natural law, development of natural law in Ancient Period, Medieval, Renaissance and Modern period. Under this chapter, the concept decline of natural law in 19th century and rise of legal positivism has also been discussed in detail.

3) **Western Perspective of Positivism in 19th Century**: it deals with the western legal philosophy and various jurists views which have been influenced law are thoroughly discussed here. It includes the meaning of legal positivism.

4) **Legal Positivism in 21st Century: An Overview**: this chapter introduction of the welfare state and revival of Natural Law Theory has been discussed. The same chapter also throws light on the role of judiciary in welfare state. Under the same chapter Impractability of legal positivism in 21st Century has also been discussed.

5) **Legal Positivism and Indian Constitution**: An Analytical study: this chapter deals with co-relation of legal positivism and Constitution of India. The work in this chapter also throws lights on the active role of judiciary since 1950.

6) **Conclusions and Suggestions**: it deals with concluding remarks of entire work and suggestions of the study.