

# Control and Conscience: Positivist Approaches to Religion in India and South Africa

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*Legal positivism and religion are sometimes seen to be mutually exclusive. This Article begins with a challenge to this belief on a theoretical basis, demonstrating that morality exists in positivism but also raises doubts over the viability of fixing inherently flexible religious laws in time via codification. This is developed with a study of India and South Africa, two diverse jurisdictions which have attempted positivism in different ways, namely codification and accommodation. In analysing the approaches and outcomes in both countries, it comes to the conclusion that positivism is ultimately possible and the answer lies in the more implicit attitude adopted by South Africa. Codification as seen in India faces the theoretical and practical issue of fixing flexible religious and customary practices in time, whereas accommodation strikes a balance between flexibility of religion and the maintenance of the authority and integrity of positive law.*

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## I. INTRODUCTION

Legal positivism and religion are sometimes considered mutually exclusive. One appears to be indifferent to values of morality, while the other is inseparable from them. This view is enthusiastically supported by Lord Justice Laws.<sup>1</sup> He states that the role religion plays in the law amounts to the control of thought and action and thus the law should be independent of it. This Article seeks to counter this view with the assertion that positivism does offer a viable approach to religion. This will be explored on two fronts. Firstly, discussion will revolve around the theoretical question of whether it is possible, or even preferable, to fix religious law in time, with evolution only permitted through the avenue of statutory amendment. Secondly, the practical examples of incorporating religion and customary law in the common law jurisdictions of India and South Africa will be analysed and presented as evidence of successful

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<sup>1</sup> Laws LJ, 'Law and Religion' (2010) 62 South Carolina Law Review 471, 478.

positivist approaches to religion, with the conclusion that a positivist approach to religion is possible, with the accommodation and implicit positivism displayed in South Africa being the most effective path in achieving this aim.

## II. CONTROL, CONSCIENCE AND CODIFICATION

The orthodox and widely accepted view of legal positivism is characterised by the recognition of an exclusive source of legal authority, the state. This is distinguished from natural law, which looks to morality and religious texts as sources of law. In the tradition of the former, law is binding because it is posited; for the latter, law is posited because it is binding.<sup>2</sup> Religious law adopts the natural law position, with a set of codes relating to morality and ethics that govern the actions of believers. This supposed demarcation between state-derived law and constantly evolving standards of morality in religion gives rise to a key issue; whether or not it is possible to codify the fluid nature of religion to form comprehensive legislation.

In order to do so, we must first clarify the relation between law and morality. It is important to dismiss the claim that for legal positivists there is no link between law and morality, it is merely a question of authority also known as the separability thesis. This issue arises because they do not recognise a law on the basis of its merits, only on its validity. In spite of this, any question regarding the law is a question about morality, since the results and possible implementation of solutions contrived during their discussion will have morally important consequences for someone.<sup>3</sup> As interpreted by John Gardner, legal positivism is 'agnostic' about whether or not a law is worth having or following, but crucially it does not amount to a complete denial of the role law plays in shaping morality, a feature acknowledged by H.L.A Hart himself, who endorsed a 'minimum content of Natural Law' since its absence would offer citizens no reason to voluntarily obey the law.<sup>4</sup>

We can thus see that the positivist approach accepts the presence of an element of morality in the law-making process. Developing upon this moral aspect is the relationship between state law and religion, particularly in scenarios where the state's intention contrasts with a religious view and/or doctrine. This scenario was played out in the case of *Bull and another v Hall and another*,<sup>5</sup> in which a

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<sup>2</sup> Thom Brooks, 'Legal Positivism and Faith in Law' (2014) 77(1) *Modern Law Review* 139, 140.

<sup>3</sup> J Gardner, *Law as a leap of faith* (OUP 2012) 161.

<sup>4</sup> HLA Hart, 'Positivism and the Inseparability of Law and Morals' (1958) 71 *Harvard Law Review* 593.

<sup>5</sup> *Bull and another v Hall and another* [2012] 2 All ER 1017.

homosexual couple were denied an overnight stay at a B&B owned by a Christian couple. The claimants were eventually awarded damages by the Supreme Court. Such conflicts between religious beliefs and state positive law raise the question of whether the two can be reconciled.

Reconciliation can occur, but only to a limited extent. One such explanation is that there is a distinction, as highlighted by Gary Watt, between basic rational capacity and a particular 'rationality'.<sup>6</sup> In this context, rational capacity is the ability to ascribe some meaning to experience and action. This is to be contrasted with 'rationality', which is a description of particular ways of ascribing meaning to experience and action. It is indeed the 'rationality' aspect that contains the problem of the fluid nature of religion, since it is subject to change not only across different religions, but often within one, either through different denominations or more importantly for legal positivism, when a religion adopts a different 'rationality' over time. The state must incorporate the need to respect the beliefs of religious groups within its own positivist framework and codification is a possible solution to this. Though at first glance statutory and scriptural interpretation may seem radically different, there are in fact several uniting features between the two. Both treat texts as repositories of *hidden* or esoteric meanings, as well as *authoritative* for our own decisions and conduct; and finally treat a diversity of seemingly disparate texts as forming a 'harmonious, univocal whole'.<sup>7</sup> The process of interpreting the relevant scriptures and their subsequent codification could theoretically, through emphasising the similarities between legal and scriptural interpretation, be less contentious than is often presumed.

However, as noted above, the existence of significant discrepancies within various religions is a major issue. Codification would have to tread a very fine line between various conflicting religious schools of thought, whilst simultaneously holding onto state authority. This contention is further compounded by the dynamic nature or 'rationality' aspect of religion, with precise codification amounting to an impossible attempt to step into Heraclitus' philosophical river twice. Any codification must take a very open form, allowing for the courts to interpret it within the confines of both state positive law and the ever-changing religious laws. This would fit into Watt's proposal for a relationship between state positive law and religion based on reciprocity. Reciprocity would provide religious groups the right to seek legal recognition and set out their opposition to the state, but the state also reserves the power to

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<sup>6</sup> Gary Watt, 'Giving unto Caesar' (2001) 4 Law and Religion 46.

<sup>7</sup> Steven D Smith, 'Law as a Religious Enterprise' (2001) 4 Law and Religion 83, 84.

deny granting legal recognition where it does not correspond to its own values or rationality.<sup>8</sup> This power of recognition, explored further in the South African example, preserves the vital element of state authority that is inherent in legal positivism, but the flexibility of recognition prevents the state from becoming completely ignorant of the moral consequences of ostracising religions, avoiding the trap of dismissing H.L.A Hart's 'minimum content of Natural law'.<sup>9</sup> Limited positivism would be a direct consequence of such a liberal approach to codification, but it remains that codification is at least theoretically possible.

### III. INDIA: A CAUTIONARY TALE OF STATUTORY INFLEXIBILITY

An example of the consequences of codifying religion into law was demonstrated in India when it enacted the Hindu Succession Act (HSA) 1956. As part of the newly independent nation's commitment to a secular state, it sought to incorporate the Hindu laws and customs followed by the majority into state law. An explicit approach was adopted – the Act adhered to the Mitakshara school of thought and codified the particular rule which declares that maintenance of the family property lies with the eldest brother, effectively excluding women taking on the role of coparcener.<sup>10</sup> This enforcement of gender inequality was mitigated by the abolishment of women's limited rights via the granting of full ownership of property, but nevertheless it represented an uneasy balance between India's secular constitution and its centuries-old traditional laws. Such uneasiness may have arisen due to the status of the Hindu Law, which has been argued not to fit into a positivist framework. According to Werner Menski's Triangle, Hindu law fits into the middle of the triangle away from positivism and state-structured law, falling within the realm of legal pluralism.<sup>11</sup> This model suggests that the aim to codify a fundamentally pluralistic form of law was flawed from the beginning, considering religion is a continually evolving concept and statutory change would always fall behind the practical socio-legal reality, strengthening the notion that the state cannot codify a fluid concept.

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<sup>8</sup> Watt (n 6) 62-63.

<sup>9</sup> Hart (n 4).

<sup>10</sup> Archana Shridhar, 'The Conflict Between Communal Religious Freedom and Women's Equality: A Proposal for Reform of the Hindu Succession Act of 1956' (2003) 20 Berkeley Journal of International Law 555, 559.

<sup>11</sup> Werner Menski, *Comparative Law in a Global Context* (2nd edn, CUP 2006) 187.

An attempt to amend mistakes to the law occurred with the Hindu Succession (Amendment) Act 2005, which after forty years addressed gender inequalities.<sup>12</sup> It amended Section 6 of the Hindu Succession Act 1956, providing equal rights for daughters of the deceased along with sons. This highlighted two flaws in the codification option with regards to positivising religious law. Firstly, the time it took for the state to address the issue demonstrates the inflexibility and inefficiency of codifying religious law, resulting in a widening gap between the state's intentions and the socio-legal reality of religious communities, which in turn led to a failure to successfully incorporate the practical application of their law into the positivist framework. The second flaw is rooted in the nature of this particular form of codification. With statutory amendment as the sole venue for change, the evolution of religious law is now firmly in the hands of legislators who may or may not be well informed of the changes that are taking place in certain communities. Gradually, the state begins to shape the 'religious' in its own image, and the state becomes deified in its newly granted position as a religious lawmaker. This can be said to negate the exchange of reciprocity that is a prerequisite of a positivist approach to religion. In doing away with the notion that religious law derives from a divine source, the state has effectively adopted merely the customary practices of the religious law, but not the core nature of the religion. Codification has thus enabled the balance to swing too far in the favour of legal positivism. Furthermore, legislators and the state have replaced the role once played by senior clerics and the sacred texts and scriptures of religions.

Nevertheless, the state's approach to religion may in fact reflect the true nature of Hindu law. It is proposed that Hindu law is in fact inherently positivist in nature, and the problems arising out of the Indian scenario was due to a misunderstanding of the importance natural law plays in Hindu law. Donald Davis argues that the primary importance of the Vedas is in fact symbolic and ideological. As a result, the element of natural law in the Vedas is present, yet weak. The substantive context of *dharma* has got little in common with the Vedas' provisions. The power to determine what *dharma* is, is displaced onto individuals who are knowledgeable and trained in the Vedas.<sup>13</sup> Once the authority for the determination and creation of *dharma* is shifted to persons, the natural law quality of Hindu law is undermined. Hence Menski's assumption that Hindu law represents a culture-specific form of natural law must be re-evaluated.<sup>14</sup> Whereas natural law maintains the superiority of natural law, Hindu jurisprudence admits the superiority of social facts in the determination

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<sup>12</sup> The Hindu Succession (Amendment) Act 2005.

<sup>13</sup> Donald Davis, 'A Realist View of Hindu Law' (2006) 19(3) Ratio Juris 287, 293.

<sup>14</sup> Menski (n 11) 194.

of *dharma* and law despite any contravention of Vedic 'natural law'. Rules of *dharma* are centred on the social authority of elites in a variety of social groups. As a result Hindu law can be described as positivist. The specificity of legal decision-making is a hallmark of Hindu law, meaning that *dharma* is continually predetermined in every separate case.

Though it can be said that the codification of Hindu law amounted to the shifting of authority to the state, this reassessment of Hindu law sheds light on the possibility of a positivist approach to Hindu law by emphasising its inherent positivist aspects. This draws parallels with the previously mentioned similarities between scriptural and legal interpretation which further compounds the notion that emphasising the overlapping principles between positive law and religion, as opposed to their differences, has the potential to develop into a more inclusive legal system, one which promotes understanding of religion and its nuances. The example of India can be seen as a cautionary tale; the approach was correct, but the execution and handling of the issue was far from satisfactory, owing as much to the application of positivism and the inherent problems that arise out of codification.

Whilst the inefficiency of the reform system was startling, it is not solely the fault of positivism. In the spirit of Davis' positivist interpretation of Hindu law, a committee of Hindu/Sanskrit experts could have been employed by the state in order to maintain a level of gradual and continuous change to religious laws, avoiding the decades long delay of an amended Hindu Succession Act, and proverbially tackling the two flaws regarding delay and authority in codification with one stone.

#### IV. SOUTH AFRICA: IMPLICIT AND INCLUSIVE

An alternative but still positivist approach to changing concepts was attempted in the rainbow nation of South Africa. The implicit positivism employed here successfully avoided the overly rigid nature of codification and its accompanying problems. This Article recognises it as a more preferable venue for positivism to incorporate religion into the framework of state law. One important point to note is that whilst South Africa used its implicit positivism to resolve its relationship with customary law, not religious law, both have very prominent similarities. These include their dynamic and evolving nature, not originally being part of the state positive legal system in addition to being occasionally viewed as operating in parallel with state law, placing both firmly

within the second tier of *unofficial law* in Masaji Chiba's tripartite model of law.<sup>15</sup> Echoing India's independence from British colonial rule, South Africa was also emerging from the shadow of Apartheid.

This new Constitution sought to promote racial and gender equality, though two obstacles stood in its way, namely the tainted status of the state law inherited from the apartheid regime and the patriarchal nature of customary law in the country.<sup>16</sup> Approaching the question of patriarchy is common across customary and religious law, and indeed this has been explored with regards to the gender imbalances in the Hindu Succession Act. Faced with a similar problem, the South African government decided to adopt an implicit but still positivist position. In *Shilubana v Nwamitwa*,<sup>17</sup> the Court was called to consider the appointment of a female chief in the Valoyi tribe, in conflict with the traditional practice of male primogeniture. It was held that traditional leaders reserved the authority to develop their own customary law and in this scenario their unanimous decision to depart from male primogeniture (in appointing Ms. Shilubana as chief) was in line with the Constitution's principles of non-discrimination and on the path towards gender equality.

This implicit accommodation did not amount to a weak state, the case of *Bhe v Khayelitsha Magistrate*<sup>18</sup> showcased the South African courts' determination to refuse recognition of a customary rule that conflicted with the Constitution. This not only fulfilled the criteria of maintaining authority of the state for legal positivism, it also avoided the trap of slow and unpredictable statutory amendments experienced in India. An additional consequence of the *Shilubana* case was that of a stern message; if tribes were reluctant to reform their practices and traditions in line with the official Constitutional position, the courts would respond in kind and be equally reluctant in granting recognition.<sup>19</sup> The importance of this cannot be overstated. It is a radical departure from either the complete exclusion of religion and customs proposed by Laws LJ, as well as the growing perception of courts kowtowing towards all religious practices irrespective of their conflicts with principles of human rights and equality, particularly in the EU.<sup>20</sup>

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<sup>15</sup> Menski (n 11) 119.

<sup>16</sup> TW Bennett, 'Re-introducing African Customary law to the South African Legal System' (2009) 57 (1) American Journal of Comparative Law 1.

<sup>17</sup> (CCT 03/07) [2008] ZACC 9; [2008] 9 BCLR 914 (CC); [2009] 2 SA 66 (CC).

<sup>18</sup> *Bhe and Others v Khayelitsha Magistrate* (CCT 49/03) [2004] ZACC 17; [2005] 1 SA 580 (CC); [2005] 1 BCLR 1 (CC).

<sup>19</sup> *Shilubana* (n 17) 2.

<sup>20</sup> Roger Trigg, 'Why Tolerate Religion?' (2014) 16(1) Ecclesiastical Law Journal 106.

Like the bird-cage theory proposed by the Chinese political leader Chen Yun, where the economy was allowed to roam free within the restrictions of central planning, the South African position asserts that unofficial laws are free to evolve provided that it is within the confines of the Constitution.<sup>21</sup> This approach was echoed in a recommendation to post-war Nepal,<sup>22</sup> as well as the UK during the case of *Ghai v Newcastle City Council*,<sup>23</sup> wherein the courts successfully accommodated Hindu burial beliefs while still ensuring that it complied with the English law meaning of 'building' governed by the Cremation Act 1902. The accommodation of religious and customary beliefs within a positivist framework underlies the success of this implicit approach, since it effectively satisfies the wishes of religious believers, provided they adhere to the laws of their respective state, thereby simultaneously maintaining the integrity of legal positivism.

## V. CONCLUSION: RECONCILIATION BY ACCOMMODATION

Theoretically speaking, positivism and religion are not mutually exclusive; positivism is capable of recognising morality, and religion is able to reciprocate this by operating within the confines of State law. The question then posed pertains to what approach would result in the maintenance of the integrity of both sides. On purely legal terms, explicit codification is a viable option, and the example in India highlighted the importance of recognising positivist aspects in religions such as Hinduism. Yet the slow pace of change effectively erases the dynamic nature of religions, making this positivist approach impossible in practical terms. Conversely, South Africa's implicit position, founded upon their Constitution, allows for an environment of change that not only recognises State authority, but also induces religious groups to develop their practices in line with the principles of equality enshrined in the Constitution. This reconciliation of religious beliefs with State law by accommodation thus offers a viable, efficient and principled positivist approach to religion.

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<sup>21</sup> Wing Thy Woo, 'The Real Reasons for China's Growth' (1999) 41 *The China Journal* 115, 123.

<sup>22</sup> United Nations Development Programme, 'Enhancing Access to Justice for Consolidation of Peace in Nepal' (UNDP, 2011)

<[http://www.np.undp.org/content/dam/nepal/docs/projects/UNDP\\_NP\\_A2J%20factsheet.pdf](http://www.np.undp.org/content/dam/nepal/docs/projects/UNDP_NP_A2J%20factsheet.pdf)> accessed 14 February 2014.

<sup>23</sup> *R (Ghai) v Newcastle City Council* [2009] EWHC 978, [2011] QB 591.

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