

TUKARAM AND OTHERS VS STATE OF MAHARASHTRA – POSITIVIST VIEW

Written by *Vartika Rungta*

3rd Year BBA LLB student, Christ (deemed to be) University

Legal positivism is a philosophy of law that emphasizes the conventional nature of law—that it is socially constructed. According to legal positivism, law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law.¹ Legitimate positivism does not construct law in light of celestial instructions, reason, or human rights. Lawful positivism does not suggest a moral legitimization for the substance of the law, nor a choice for or against the acquiescence to law. Positivists don't pass judgment on laws by inquiries of equity or mankind, yet only by the routes in which the laws have been made. This incorporates the view that judges make new law in choosing cases not falling plainly under a legitimate run the show. Positivist law theory says laws are made by the sovereign and are backed by sanction.

Mathura was a young orphan tribal girl living with one of her two brothers. She was a *dalit*. The incident is suspected to have taken place on 26 March 1972; she was between 14 and 16 years at that time. She met Nushi's nephew named Ashok who wanted to marry her, but her brother did not agree to the union and went to the local police station to lodge a complaint claiming that his sister, a minor, was being kidnapped by Ashok and his family members. After receiving the complaint the police authority brought Ashok and his family members to the police station. Following general investigation Mathura, her brother, Ashok and his family members were permitted to go back home. However, as they were leaving, Mathura was asked to stay behind while her relatives were asked to wait outside. Mathura was then raped by the two policemen.

When her relatives and the assembled crowd threatened to burn down the police chowky, the two accused policemen, Ganpat and Tukaram, reluctantly agreed to file a panchnama (legal

¹ Available at <http://www.iep.utm.edu/legalpos/>

recording of evidence).The case came for hearing on 1 June 1974 in the session's court. The judgment returned found the defendants not guilty. It was stated that because Mathura was 'habituated to sexual intercourse,' her consent was voluntary; under the circumstances only sexual intercourse could be proved and not rape .On appeal the Nagpur Bench of the Bombay High Court set aside the judgment of the Sessions Court, and sentenced the accused to one and five years' imprisonment respectively. The Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse

However, in September 1979 the Supreme Court of India justices Jaswant Singh, Kailasam and Koshal in their judgement on *Tukaram vs. State of Maharashtra* reversed the High Court ruling and again acquitted the accused policemen. The Supreme Court held that Mathura had raised no alarm; and also that there were no visible marks of injury on her person thereby suggesting no struggle and therefore no rape. The judge noted, "Because she was used to sex, she might have incited the cops (they were drunk on duty) to have intercourse with her".

Positive schools of law are man-made laws and the authority lies within the sovereign. The sole power of making new laws lies with the sovereign. Back in nineties dalits were considered to be lower to other classes and their exploitation was a social convention back then and not even backed by sanction. In the present case, Mathura was a young orphan dalit girl hence was not liable to defend herself. As mentioned above, positive law is not based on humanity and justice and believes in punishments. Likewise, this case was not judged on the basis of humanity and the accused were punished accordingly and Mathura was shown no humanity. Positivists believe that laws evolve from precedents and only the authority has the power to make new laws. This case was the starting point for the emergence of rape laws in India, thus proving the authority of the sovereign. The authority in this case was the judges who made new laws for rape. This case was clearly an example for showing the authority of the sovereign and also Mathura was not shown any humanity. The case filed by the relatives stated that she was raped by the policemen- Tukaram and Ganpat within the police station premises.

Since, there was no sign of alarm and no visible marks on her body, proved that she incited the cops to have intercourse. Furthermore, it was also mentioned that she was habituated to sexual intercourse which shows sovereign took the right decision of acquitting the policemen. The authority was also justified that there was no point in questioning the policemen for filing the FIR. Here we can also observe that justice was fairly given without any bias by the authority.

If the policemen were convicted, the authority would have been at stake because it is against the positivist law principle.

As the sovereign dictates the policemen has a right to file the case under their authority. Thus, they were right on their part. Here the case was filed by Mathura's brother in the first place which was malicious as Ashok and his family never really kidnapped Mathura. Thus, only to protect his sister from getting humiliated in the society he filed a case and tried to shake the foundation of judiciary. If the decision was other way round, an ill bonafied case would have won which is completely against the spirit of positivist school of law. The high court sanctioned the policemen but the Supreme Court carefully and judicially looked into the matter and recognized the wrong dispensation of power and acquitted the accused. Legal positivism does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to law². This case was also the proof that judges make new law in deciding cases not falling clearly under a legal rule. Positivists do not judge by the questions of justice and humanity. Humanity is not the basis to take any decision; if the accused is not guilty he/she must not be punished. The policemen – Tukaram and Ganpat were not guilty so the court acquitted them irrespective of their position in society. This case was the turning point as it led to the emergence of 'Rape Laws' in the country. Thus, this makes it a landmark judgment and as clearly mentioned judges make new laws so was it here. Sovereign being the supreme shall make rules which will govern the behavior of the subject as it did in this case by making laws relating to rape.

This case is a perfect example that shows the authority and power of the sovereign to make new laws in the country, here it being the Supreme Court. Positivist says that every law is backed by sanction and so is the rape law which evolved from this case.

² Available at <http://www.iep.utm.edu/legalpos/>