POSITIVISM AND NATURAL LAW: QUERYING THE SEPARATION

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ABSTRACT

In this essay I undertake two tasks. In the first part, I identify the core theses that positivists and natural lawyers debating the connections between law and morality ordinarily defend. In the second part, I use an Indian legislation to demonstrate what some of these arguments look like in the Indian context. I conclude by making the suggestion that we must approach the debate between positivism and natural law as a search for the truth about the connections between law and morality. Our role in this debate must not be reduced to passively choosing between divergent conceptions developed elsewhere.

I. INTRODUCTION

An enduring theme in western legal theory is the relationship between law and morality. Hart called it a 'recurrent issue' and a 'persistent question.'[1] Hart famously was one of the protagonists in a debate explicating the connections between morality and law. The debate continues to this day and has split legal theory into two camps: that of natural lawyers on one hand and positivists on the other. It is seldom that a serious theorist of law does not identify oneself with one of these sides. This theoretical divide has infected a large part of the terrain of jurisprudence. It is the theorist's take on law and morality that most often determines the trajectory of a theory in answering the great overarching question in western jurisprudence: what is law? And discussions on these issues have become increasingly abstract. An exasperated Posner once wondered why people of the caliber of Hart and Dworkin were so concerned about such questions.[2]

The battle has been internecine in another sense as well. That one can safely assert that 'talking past each other' is a feature of jurisprudence, owes a great deal to this debate.[3] An exchange in the not so remote past illustrates the problem. Raz, a leading positivist, replied to Alexy's claims in 'The Argument from Injustice: A Reply to Legal Positivism' by pointing out that Alexy had misidentified legal positivism. By omitting to refer to any modern version of the separation thesis, Raz argued, at least some of Alexy's charges were misdirected.[4]

It was not too long ago that Raz himself had been similarly refuted by Finnis-a (now unpopular) re-discoverer of classical natural law. Old wisdom was that natural lawyers believed that unjust law is no law. Raz's claim in this vein that natural lawyers use moral worth as the only criterion of

[1] H. L. A. HART, THE CONCEPT OF LAW 7-11 (1961) [hereinafter Hart].
[2] RICHARD POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 11 (1996).
[3] BRIAN BIX, JURISPRUDENCE, THEORY AND CONTEXT 24 (2006).
[4] Joseph Raz, *The Argument from Justice, or How Not to Reply to Legal Positivism,* OJLS 17 (2007).

validity of a law was rejected by Finnis. Finnis asserted that he knew of no theorist who would be committed to that theoretical or meta-theoretical position.[5]

What, then, is it that separates the positivist from the new age natural lawyer? I discuss this in Part I of the essay where I analyse the theses that lie at the heart of positivism and natural law. I also refer to some of the important inflection points in the debate between the two traditions in this part of the essay. This descriptive part is not intended to suggest that one has to passively choose between divergent conceptions of the nature of law developed elsewhere. Legal theory is of no use to us if it cannot engage with, explain and evaluate legal phenomena around us.[6]

To contextualize the claims in the first part, in the second part of this essay, I use the Insolvency and Bankruptcy Code, 2016 [**the IBC**] to explore the links between law and morality that the core theses of rival traditions emphasise. The IBC is an unusual choice for such an exercise given that, at first blush, it may appear morally inert when compared to other recent legislations which have more debatable links to morality.[7] However, the utility of IBC as the site of this experiment will be apparent in Part II.

I conclude by observing that we must resist the temptation of believing that exploring the connections between law and morality is matter of choice between core theses offered by rival systems of thought developed elsewhere.

II. UNJUST LAWS, MERITS AND SOURCES – FOUR KEY THESES

A. The Historical Debate: An unjust law is no law?

The natural law tradition is as old as the hills and some of its core thesis are often traced to Cicero – a first century BC Roman statesman, who wrote 'the Laws' inspired by Plato's work of the same name. There are quite a few passages in the book that capture the idea that law must accord with divine reason. For instance, Cicero notes that "*it should be clear that in the interpretation of the word "law" itself there is the significance and intention of choosing something just and right*".[8] To Cicero, since reason is eternal and divine, a law does not become law when it is written or promulgated, but it comes to being at the same time as the eternal reason. To understand the depth of what may be dismissed as ancient arguments, it is useful to quote an example given by Cicero. His interlocutor, Marcus

[5] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 6 (2nd ed. 2011).
[6] AAKASH SINGH RATHORE & GARIMA TIWARI, RETHINKING INDIAN JURISPRUDENCE 3 (Taylor & Francis, 2018).
[7] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, No. 18 of 2016, The Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019 and the Citizenship Amendment Act, No. 47 of 2019, have all been controversial legislation.
[8] MARCUS TULLUIS CICERO, ON THE COMMONWEALTH AND THE LAWS 133 (Cambridge University Press, 1999).

asks, would not sexual violence or rape be contrary to (eternal) law even if was not written anywhere that it is forbidden?[9] Cicero does not exactly say that an unjust law is no law. What he suggests instead is that laws that are unjust or destructive to the people are 'something different from laws'[10] or 'do not deserve the name law'.[11]

This thesis of natural law is slightly different from the flat assertion that an unjust law is no law or *lexiniusta non est lex*. That assertion is commonly attributed to St Thomas Aquinas. However, the maxim *'unjust law seems to be no law'*[12] is something that Aquinas attributes to Augustine, while making the point that human law diverging from natural law is a perversion of law and no longer a law. However, Aquinas immediately carves out a space for positive law and accounts for the wide differences between laws amongst populations. This is an interesting distinction. While some laws such as 'one should not kill another human being' can be derived theoretically from the natural law that 'one should do no evil', the specific kind of punishment that should be meted out for a crime is not a conclusion that can be drawn in the same manner. This, Aquinas argues, is a matter for human-made positive law and is more in the nature of a specification than a conclusion that can be derived from natural law. Also, he adds a critical observation: laws that are so derived which are in the nature of specifications derive their entire binding force from human law.[13]

Centuries later, a cruder version of this thought is expressed by Blackstone in the introduction to his Commentaries to the Law of England. He argues:

> *"This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."*[14]

Although the paragraph above seems to express the thought that any human law would be invalid if it contradicts natural law, Blackstone also nuances it by making space for positive laws by pointing out that natural law may not be prescriptive as far as the entire variety of human affairs is concerned. In fact, he believes that there are a large number of points on which natural law and

[9] *Id.*
[10] *Id.*
[11] MARCUS TULLIUS CICERO, THE POLITICAL WORKS OF MARCUS TULLIUS CICERO: COMPRISING HIS TREATISE ON THE COMMONWEALTH; AND HIS TREATISE ON THE LAWS 83 (trans. Francis Barham, London: Edmund Spettigue, 1841).
[12] THOMAS AQUINAS, TREATISE ON LAW 46 (Richard Regan, 2000).
[13] *Id.,* at 47.
[14] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 35 (Lemmings, 2016).

divine law are indifferent leaving humans to legislate. He chooses a dull example to illustrate his point. He says, for instance, natural law can have little to say substantively on whether export of wool should be permissible. It is here alone that the inferior human legislature has freedom to legislate unhindered.[15]

Blackstone's views were pivotal to the birth of the central tenet of modern positivism: the separation thesis. Blackstone's view that a human law is invalid if it contradicts divine law irked many. Bentham's first work, 'A comment on the Commentaries' was a savage critique of Blackstone's commentaries. Bentham's primary charge was that Blackstone had all along muddled the law *as it is* with what *it ought to be*.[16] While Bentham's is/ought distinction is popular to this day, it was Austin who isolated what the purist would call the core of positivism. In the fifth lecture of the canonical work, the Province of Jurisprudence Determined, Austin termed Blackstone's notion of the validity of human law being contingent on divine law as "*stark nonsense*"[17] and noted, "*the existence of law is one thing; it merit or demerit another. Whether it be or be not conformable to an assumed standard, is a different enquiry."*[18]

At the time this claim was made, this was a revolutionary thought. What made it revolutionary was the fact that its proponents – Bentham in particular – were passionate utilitarians advocating scientific reform of the law. They advocated positivism as they suspected that natural law theories aided *status quo*: if it were to be thought that the law "as it is" is what "it ought to be", it could not be the subject of moral appraisal. In separating the validity of law from morality, they were not seeking to distance law from morality. Rather the intent was to separate the validity of positive law from morality in a way that would open up positive law to clear and complete moral scrutiny.

In a sense, this is ironic. Today the positivist tradition is associated with a kind of austerity and neutrality.[19] Positivism is thought of as the favoured doctrine of those seeking to preserve the status quo. Nowhere is this more apparent than in constitutional adjudication. Where difficult questions of morality and legality arise today, it is theories developed in opposition to positivism that are invoked in support of moral advancement of the law.

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[15] *Id.,* at 36.
[16] JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 229 (1843).
[17] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 158 (Wilfrid Rumble ed., 1999).
[18] *Id.,* at 157.
[19] SCOTT SHAPIRO, LEGALITY 254-5 (2012).

B. Identifying the Separation Thesis

Positivism acquired a bad name in the immediate aftermath of the fall of the Nazi regime. The blame for the enforcement of abhorrent statutes enacted by the National socialist Government was laid at the doorstep of positivist theories. Radbruch's autopsy of the Nazi legal order in a short piece termed 'Statutory Lawlessness and Supra-statutory Law' was in particular, heavily influential. Radbruch squarely alleged that (German) positivism's slogan 'law is a law' left the legal profession and judges defenceless in the face of criminal and arbitrary statutes.[20] It is worth noting that subsequent work has challenged the narrative of a causal link between positivism and the capitulation of the legal system in Germany.[21]

Hart's work in positivism emerged in this backdrop. That positivism emerged unscathed from the onslaught that linked it to the judgments of the Nazi era courts owes much to Hart. Hart's response to Radbruch and his debate with Fuller garnered worldwide attention. Hart extricated the separation thesis from other notions that were thought to be central to positivism. For example, until Hart, there was a widespread belief that some version of the command theory had to be endorsed by all positivists. In the 'Separation of Law from Morals'[22] and his later work, 'The Concept of Law', Hart demolished Austin's model based on the idea that law is a command. What he preserved, however, was the separation thesis.

Hart commended the separation thesis for the virtue that it was plain speak. To say that an unjust law is no law, he thought was a recipe for confusion. The theoretical or scientific study of law could not ignore laws that exhibited the complex characteristics of law, and instead focus on some narrower set that fulfils an additional condition of being in accord with societal morality or even true morality, Hart argued.[23] Hart's work in positivism was monumental. Those who did not entirely agree with him or even disagreed with him entirely conceived their own theories in opposition to Hart. Dworkin's work is a good example, and his claims in Law's Empire are best interpreted as a series of counterpunches to positivism. Serious questions were asked of the separation thesis by Dworkin's challenges to positivism.

Dworkin's interpretive theory took, as its starting point, positivism's inadequacy to explain what he identified as theoretical disagreements in law. By pointing to cases where lawyers and judges disagreed about the identification and existence of law, he questioned the positivist's account of

[20] Gustav Radbruch & Stanley Paulson, *Statutory Lawlessness and Supra-statutory law*, 26 OJLS 1 (2006).
[21] Stanley Paulson, *Lon L Fuller, Gustav Radbruch, and the 'Positivist' theses*, 13 LAW AND PHIL. 313 (1994).
[22] H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. LAW REV. 593 (1957)
[23] HART, at 209.

adjudication and by extension, their entire theory. His point was that cases such as *Riggs v. Palmer*,[24] *the Snail Darter case*[25]and *Brown v. Board of Education*,[26] showed that law could not be identified by its sources alone. The existence of law and the identification of law in these cases involved moral evaluation, or so he argued. In doing so, and outlining his interpretive theory, his challenge was to the plain fact view of the law that "*Law exists as a plain fact, in other words, and what the law is in no way depends on what it should be*."[27] This was a Dworkinian reformulation of the separation thesis. His rival claim was that adjudication is a process of constructive interpretation which involves moral reasoning to determine what the law, that governs a dispute, is.[28] This was an immensely successful claim. It is not necessary to detail Dworkin's challenge any further here. But it is important to note that it had a profound impact on positivism.

Dworkin's work split positivists into two camps. Exclusive positivism, the purer form of positivism, continues to maintain that a norm is never rendered legally valid as a result of its moral content: determining what the law is entirely dependent on the source of the law.[29] Inclusive positivism, on the other hand, maintains a separability thesis that moral evaluation is not necessarily required to determine the validity of law, but it may be the case that in a given legal system, moral criteria are so used. This position, therefore, only holds that it is possible that there is a legal system where there are no moral criteria to determine the validity of a law.[30] Raz, Marmor and Shapiro are amongst the prominent exclusive positivists while Coleman, Waluchow and Himma[31] describe themselves as inclusive positivists. This debate within positivism has bred complexity and some onlookers are content to deem this a demarcation dispute within positivism with very little at stake for outsiders.[32]

In the meantime, parallel to the erosion of the separation thesis, the natural law thesis has also been weakened. As alluded to in the introduction, theorists such as Finnis assume that it cannot be a logical line of argument to claim that an unjust law is no law. To him the statement, plainly read, is a self-contradiction. Finnis suggests that no one, even Aquinas, could have ever meant that

[24] Riggs v. Palmer, 115 N.Y. 506.
[25] Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
[26] Brown v. Board of Education, 347 US 486 (1954).
[27] RONALD DWORKIN, LAW'S EMPIRE 7 (1986) [hereinafter Dworkin].
[28] *Id.,* at 90.
[29] Andrei Marmor, *Exclusive Legal Positivism*, OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1 (Coleman et al, 2004 Oxford Handbooks Online).
[30] Kenneth Himma, *Inclusive Legal Positivism*, OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 6 (Coleman et al, 2004 Oxford Handbooks Online).
[31] HART, at 265.
[32] John Finnis, *Classical Natural Law,* OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 7 (Coleman et al, 2004) [hereinafter Finnis-Classical].

an unjust law is literally no law.[33] The purpose of such statements where they do occur is only to point out that unjust laws are not central or focal cases of law, while not denying them legal validity. Finnis, on this account, claims that everything that positivism reasonably wishes to insist is clearly and coherently accommodated in classical natural law theory.[34]

For reasons different from Finnis, Mark Murphy, another leading natural law theorist, also argues for a weak natural law thesis under which dictates that are not backed by decisive reasons (from the point of view of practical rationality) are defective as laws.[35] To couch the thesis in an example he repeatedly considers the Fugitive Slave Act 1850 (requiring that citizens aid the capture of runaway slaves), which was defective as law in an intrinsic sense, but one would not deny it the label law for the time it was in force. While one can point to modern theories taking forward the classical natural law tradition, it is important to point out that Dworkin's *sui generis* theory has made his work the principal target of positivism replacing the classical natural law tradition.

This climbdown from the seemingly extreme positions of the past may seem to suggest that the debate is almost over. However, the relationship between morality and law is still approached through the prism of rival theses of which we have now identified four key ones. We began with the strong thesis of natural law that an unjust law is no law. We ended with the weaker thesis of natural law. On the positivist's side, the separation thesis was formulated in opposition to the strong natural law thesis. Dworkin's work has since splintered the positivist's side into inclusive and exclusive positivists, each side with their own version of the positivist thesis. As I have previously noted, it is essential to correlate theoretical claims with facts around us. Only then can we have truly meaningful conversations in legal theory. I attempt to do this in the next section.

III. LEGALITY AND MORALITY: THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The IBC was enacted after a comprehensive study conducted by the Bankruptcy Law Reforms Committee [**the Committee**] in 2015.[36] A bankruptcy law may not be the first legislation that springs to mind when we debate issues of law and morality but the creation of a bankruptcy regime involves questions of justice at multiple levels.[37] The heart of any bankruptcy regime would be a mechanism for ensuring distributive justice: that creditors of the insolvent entity are paid in a fair and transparent manner.[38] Further, a person who suffers genuine business failure should not be

[33] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 364 (2011).
[34] Finnis-Classical.
[35] MARK MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 11 (2006).
[36] BANKRUPTCY LAW REFORMS COMMITTEE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (2015).
[37] FINNIS, *supra* note 33, at 188.
[38] *Id.*, at 18, 22.

unduly penalised.[39] These principles aside, there are important economic rationales to be pursued in the creation of a modern bankruptcy regime. For instance, the absence of an efficient bankruptcy system would mean that lenders in market would be averse lending leading to a shortage of credit in the market.[40]

The Committee's detailed report contained a draft Bill that eventually went through the legislative process and became law in 2016. The first part of the Act that came into force deals with Corporate Insolvency. Under the Act, on the initiation of proceedings by a financial creditor or an operational creditor, the day to day affairs of the Corporate debtor is placed in the hands of a Resolution Professional.[41] Important decisions as to the fate of the Corporate Debtor are to be taken by a Committee of Creditors constituted under the Act. The first attempt in the resolution process is to find applicants who are willing to infuse money into the corporate debtor, repay the creditors as per a resolution plan and continue operations of the Corporate Debtor as a going concern.[42] If the process of resolution fails, then the Act mandates liquidation of the Corporate Debtor in which case creditors are to be paid as per the priority prescribed under the Code.[43]

A major advance in jurisprudence in the last century was the awareness that in order to discover the true nature of law as a practice, we must view law as it appears to a participant in the practice. So I consider a few interactions of participants with the law in the legal process beginning with the stage of lawmaking.

Any law begins, as it were, with some form of moral content. The contents of any law are norms that Parliament or a state legislature has identified as worthy of enforcing as law. In our example, the provisions of IBC embody a new economic approach to the problem of bankruptcy in an economy that is expected to grow at a fast pace. Positivism, as an analytical tradition, has very little to say about this moral content of laws. To be clear, this does not render the separation thesis invalid in any way. The separation thesis is a descriptive claim about the nature of law. By contrast, natural law deals squarely with practical rationality, the moral content of the law and offers a view on how we should individually and collectively engage in the pursuit of some idea of the common good.[44] Therefore, if a bankruptcy system is manifestly unjust in some way that it fails to pursue

[39] *Id.,* at 33.
[40] *Id.,* at 10.
[41] §§16, 22, Insolvency and Bankruptcy Code, No. 31 of 2016.
[42] §25, Insolvency and Bankruptcy Code, No. 31 of 2016.
[43] §53, Insolvency and Bankruptcy Code, No. 31 of 2016.
[44] MURPHY, *supra* note 35, at 1; Finnis-Classical.

the common good, a classical natural law theorist would presumably contend such a law to be defective. This, historically, was the major point of difference between the two traditions.

We leave the issue of validity for the time being and move to an instance of a simple invocation of the law once it is in force. Consider a situation where an operational creditor wants to initiate some action in respect of a debt due. This is almost a banal application of the law. The operational creditor would look at the IBC with the help of her lawyers and decide to proceed by first issuing a notice under Section 8 and thereafter initiating the corporate insolvency process under Section 9 of the IBC. There is good reason to suspect that a vast majority of interactions that people have with the law are of this nature. In such instances, one deals with the law as a matter of fact, as the positivist insists. Both the contents of the law and its validity are determined as matters of fact and involves no moral evaluation. This is the central insight that positivism offers as a claim about the nature of law and defends as the separation thesis asserting it to be true of all our interactions with law. Once a law comes into force, an overwhelming share of the interactions that persons have with the law will be of this kind. However, this claim comes under some stress in more complex interactions with the law which are not uncommon in modern legal systems.

IV. THE HOMEBUYER'S PROBLEM

A. The Facts

The IBC was enacted just when several real estate companies were floundering. These companies had huge debts to banks and other financial institutions but they were also in default to thousands of homebuyers who had booked residential flats. The IBC recognises primarily two kinds of creditors who can initiate action against the Corporate Debtor: financial creditors and operational creditors. The IBC follows a model of placing the creditor in charge during the insolvency process and only financial creditors are part of the Committee of Creditors.[45]

In one of the first cases pertaining to a real estate company under the IBC, when insolvency proceedings commenced against a large company, homebuyers realised that they were neither financial creditors nor were they operational creditors.[46] The moratorium under Section 14 of the IBC meant that on the commencement of insolvency proceeding, their right to exercise other statutory remedies such as under Consumer Protection Act, 1986 or the Real Estate (Regulation and Development) Act, 2016 was also frozen. Since homebuyers were not given the status of

[45] §21, Insolvency and Bankruptcy Code, No. 31 of 2016.
[46] Chitra Sharma v. Union of India, (2018) 18 SCC 575 (India).

financial creditors, they would not have any say in the fate of the Corporate Debtor. It seemed unjust as the people who had the highest stakes could not participate in the resolution process.

A writ petition was filed in the Supreme Court challenging the constitutional validity of various provisions of the IBC.[47] In the meantime, the Union Government took note of the anomalous position of the homebuyers and introduced an ordinance to amend the IBC and include homebuyers as financial creditors. Parliament subsequently amended the IBC in line with the ordinance[48] [**the IBC Amendment Act**]. Soon thereafter, the amendment was challenged in the Supreme Court and was held to be constitutionally valid in *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*.[49]

B. Theoretical Disagreements and The Separation Thesis

One important argument before the Supreme Court was that the amendment that added an explanation to Section 5 (8) (f) that an allottee of a real estate project is to be a financial creditor was in violation of Article 14. The challenge, on behalf of real estate developers, on equality was twofold. First, by picking out real estate developers alone, who are otherwise suppliers of goods, to be subject to the IBC, equals had been treated unequally and second, by equating homebuyers with other financial creditors, unequals had been treated equally.

The determination of the contents of the constitutional rule that a law must not breach equality, is plainly different from our earlier situation of an operational creditor invoking the IBC to initiate action under the IBC. What is of significance here, is that to the real estate developers' lawyers, the amendment as on the date it was enacted, violated the contents of Article 14 which reads "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"

Parliament which enacted the law amending the IBC to remedy the homebuyers' problem had, however, thought otherwise.

While it is true that the rule of equality exists as a matter of fact as do decided cases interpreting the rule, in disputed instances different actors in the legal system arrive differing conclusions as to the purport of the rule. The core of Dworkin's challenge to positivism turns on this point that in adjudication, lawyers and judges employ the language of what the law is and disagree about what

[47] *Id.*
[48] §3, Insolvency and Bankruptcy Code (Amendment) Act, No. 26 of 2018.
[49] (2019) 8 SCC 516 (India).

the law is, which means that the plain fact views of law being source-based that the positivist presents, cannot be correct. [50] Dworkin's theory, instead, is an elaborate account of the kind of constructive interpretation that is involved in the process of discovering what the law is that governs a case. This involves moral reasoning of a profound nature which therefore dislodges the separation thesis.

Dworkin's reliance on the language employed by lawyers and judges of 'discovering what the law is' is therefore a critical move in his argument. He then uses this to refute a simple positivist claim that what judges and lawyers are doing in these cases is altering a norm without actually claiming to do so. In the homebuyer's case, the lawyers and judges appeared to be engaging in a theoretical disagreement while employing the language of what the law is. The lawyers for the petitioners seemed to suggest that the law of equality *is* that a homebuyer cannot be treated as financial creditor, the judges disagreed and held that the law of equality *is* that it permits a homebuyer to be treated as financial creditor.

The interesting feature about our legal culture however, is that cases abound where this language is not really adhered to. In our superior courts, it is not hard to find judges altering laws rather explicitly and the pretense of discovering the law is minimal. For example, in *Arcelor Mittal,*[51] the Supreme Court interpreted Section 12 of the IBC to hold that the period of 270 days in which the resolution process was to be mandatorily completed excludes the period consumed in litigation.

> *"It is also true that the time taken by a Tribunal should not set at naught the time-limits within which the corporate insolvency resolution process must take place. However, we cannot forget that the consequence of the chopper falling is corporate death. The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation."*[52]

This is a thinly veiled act of altering the law rather than discovering the law and seems to have been done with the awareness that the law is being altered. The judges did discover the law as a matter of plain fact and did not find it in accordance with the principle that the act of a court can do no harm. Hence, they decided that the only reasonable construction of the statute could be that the period of litigation be excluded from the time limit for completion of the resolution process.

[50] DWORKIN, at 37.
[51] Arcelormittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1 (India).
[52] *Id.*, at ¶ 86.

It is important to remember that Dworkin's claim that interpretive theory is addressed to the particular legal culture of the author. What the above instances show is that while it might be easy to find similar instances of theoretical disagreements in our legal system, it might be easy enough to find counter-examples as well, where judges and lawyers explicitly alter norms after finding out what the law is from social facts. That leaves us in an interesting position. We might be able to find enough instances of theoretical disagreements to sufficiently destabilize the separation thesis. On the other hand, we can set out on an expedition to find enough counter-instances to affirm the separation thesis and stick to some kind of positivism. In the conclusion of this essay, I argue that we must, however, not succumb to such temptations.

V. CONCLUSION: A GLIMPSE OF THE WAY FORWARD

As I detailed in the first part of the essay, debating the connections between law and morality has a long historical past. The centerpiece of this rivalry even today is the Hart/Dworkin debate though a generation of legal theorists in the Anglo-American tradition who have expended their energies on it. There are those who acknowledge that the debate is stale and that legal theory must move on.[53] Removed as we are from the thick of this debate, we are better placed to think afresh about law and morality than those who born into these rival traditions. Our first task must be to not find ourselves in a position where our role is limited to picking a side. That does not necessarily mean forsaking all that can be learned from the debates between these traditions. Instead, if we were to unburden ourselves of the notion that we have to be singularly committed to one of the rival theses, we can catch a faint glimpse of the way forward.

We interact with the law in diverse circumstances. A lawmaker is tasked with converting moral content into law while adhering to constitutional rules. The view of citizen who follows the law in one instance unquestioningly differs from that of a citizen or a lawyer who challenges the constitutional validity of a law believing a law to be unjust. There may be a judge who sees the legal system as a coherent whole who discovers the law governing each case through moral reasoning as opposed to a judge who interprets a law with the full awareness that he is altering the law.

If one approaches the myriad contexts of our encounters with the law armed with stubborn theses of one kind or another, it is likely that we see what we want to see and not what there is actually to be seen. Perhaps, there is something in the very nature of law that accounts for the mysterious

[53] Scott Hershovitz, *The End of Jurisprudence*, 4 YALE L. J. 124 (2015).

relationship between law and morality. Perhaps, the regularities that the positivists rely on for their thesis and the oddities that natural lawyers point out in their refutations are mere manifestations of some deeper truth. All or nothing approaches do not tell us the whole story. Worse, they may blind us to the truth.