In Tamanaha's chapter "The Contemporary Relevance of Legal Positivism"[1], the author addresses the relevance of current legal positivism by considering the changes and criticisms that it has undergone. He intends to reinforce the importance of positivism by reconsidering the relationship between law and morality. He goes a step further to highlight that perhaps, "natural lawyers ought to become allies of legal positivists in scrutinizing all natural law or natural law-sounding claims made by legal systems".

Despite the obvious that Tamanaha classifies as being part of the legal positivist approach, his present view of the legal positivist theory, sharply raises doubt as to what extent he can be said and is willing to be considered as one. He acknowledges, "something is amiss with the theory", that it is suffering from a malaise. As to the origin of this, he recognises the separation thesis, Hart's unchanged concept and the inner division within the positivists as growing awareness outlines, that law is closely linked to morality. How then, can Tamanaha consider himself a legal positivist if he is questioning and ultimately doubting the ultimate theory of legal positivism?

In an attempt to bring back to life legal positivism, he diverts from the negative image, described as "almost entirely pointless"[2], to illustrate its contemporary benefits. His endeavour to achieve this aspiration has a knock on effect as natural law is ultimately pointed to as the most acceptable theory.

Throughout the essay, contradictions arise as to the effectiveness of legal positivism throwing into sharp relief the poor and weak notion that Tamanaha is unable to argue in favour of legal positivism. Unlike most positivists, he does not concur with what most legal positivists see as their principal task that is about legal philosophy and considering moral value a secondary factor. This reflects his tendency to reflect naturalist criteria.

[1] Brian Z Tamaha, "The Contemporary Relevance of Legal Positivism"
[2] William Twining, "Imagining Bentham: A Celebration' in M D A Freeman (ed), Current Legal Problems 1998: Legal Theory of the End of the Millenium (1998) 1, 2l.

The separation thesis primarily looks at "what law is and what law ought to be"[3]. Legal positivism initially developed around the core idea that "law can be bad" undermining the naturalist theory of *Lex iniusta non est lex*[4]. Radbruch refers to this:

> Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law.[5]

Positivists argue that an entire legal system, which is immoral in content or effect, can nonetheless be valid law. Conversely, if fascist and communist states responsible for history's worst atrocities appeared to have functioning legal systems, did it make sense to call that law? Morality after all does seem central to law.

The author counterclaims by referring to John Austin who responded to the position of the naturalists by saying that it is nonsense to say that human laws, which conflict with Divine law are not binding. As a devotee of soft positivism, Tamanaha draws a comparison between naturalists and positivists. This belief symbolises a diversion from the origins of strict positivism and consequently infers a challenge. The inspiration of soft positivism enables to move towards a broad abstract thought. This allows the incorporation of the idea that "a moral obligation to abide by the law rests in morality, not with law alone".[6] Consequently, it prevents positivism to loose significance yet places it closer to naturalism.

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[3] John Austin, *The Province of Jurisprudence Determined* (W E Rumble ed. First published 1832, 1994 ed) 157.
[4] St Thomas Aquinas, *Summa Theologica* (R J Henle trans, 1993 ed) 95.2.
[5] Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law" (1946) *Oxford Journal of Legal Studies*, Vol. 26, No. 1 (2006), pp1-11
[6] H L A Hart, "Positivism and the Separation of Law and Morals" (1958) *Harvard Law Review* 593, 617-21

Positivists argue that immoral law has to be obeyed as long as it is "not too egregious". If we relate this to the earlier situation of the communist and fascist system, would it not give the impression that their law was too egregious? Tamanaha counterclaims arguing that judges ruling during the Nazi era were not complying with statutory law, instead they departed from it and could consequently not blame upon legal positivism. To support this possibility, he refers to Martin Luther King's citation that law can be "just on its face and unjust in its application". He then goes on to support King's view that "one has a moral responsibility to disobey unjust laws". This contradicts Austin's earlier citation "that saying that immoral law is not binding is to talk stark nonsense".

Positivists distinguish whether law is valid and then ask whether it is moral and therefore gives rise to an obligation. This distinction seems irrational as one is bound to follow the law whether morally correct or not. Naturalists perceive immoral law as "a perversion of law"[7] that gives rise to no obligation. Had thus a naturalist system of law existed during the nazi or communist era, the atrocities committed would have most probably been prevented.

The current situation in Pakistan reaffirms this suggestion. Tamanaha supports Hart's argument that distinguishing between law and morals facilitates challenging evil law. This challenges Hart's subsequent argument that while "wicked men (e.g. Musharraf) will enact wicked rules which others will enforce", there is a necessity to submit the law to moral scrutiny. If General Pervez Musharraf's actions can be justified on the grounds of positivist theory, then a big question mark as to the effectiveness of positivism should be posed. The lawyers rallying against Musharraf, perceive the

[7] Norman Kretzmann, "*Lex Non Iniusta Non Est Lex*" (1998) *American Journal of Jurisprudence* 99, 116-121.

general's actions as unlawful and immoral and are therefore unwilling to oblige them, this denotes the naturalist theory.

The author questions as to what extent the positivist theory can "definitely answer with respect to any particular context". This doubt can be perceived as a challenge towards positivism and infers Tamanaha stepping a step closer towards naturalism. The author holds Hart responsible for "injecting philosophical concepts" in what originally Austin had urged should remain a science theory. Tamanaha lays down his disapproval of current positivists who favour philosophy. He describes these current positivists as lacking training or experience in law as they are trained philosophers. Paradoxically, his current view relies on Raz who insisted that philosophy improves our understanding of the concept of law.

Garder reflects that it is absurd to say that there is no connection between law and morality. Inclusive positivists have therefore shifted from the separation thesis to a separability thesis, which asserts that "there exists a conceptually possible legal system in which the legal validity of a norm does not depend on its moral merits". This shift supposes a devastating effect to the theory of positivism.

The Islamic code of Shari' a notes that the best deterrent to prevent crimes are harsh sentences such as the death sentence by stoning or the sentence of lashes of cane. While this may appear harsh, the grand khadi argues that without punishments, such an act "will happen again and again". Peculiarly, these acts do occur repeatedly despite harsh sentences.

The Shari'a is classified as divine law, not the product of human legislation but "God's will"[8] hence it cannot be subject to alteration by human wishes. Nonetheless, Muslim rulers alter single rules by suitably disguising them. Rather than criticising the Shari'a

[8] John L Espusito, Islam: *The Straight Path* (3rd ed, 1998) 78.

itself, Grand Ayatollah Hossein-Ali Motazei holds the judicial system liable for misusing the law. Along these lines, Tamanaha had argued the possibility that judges during the nazi regime had diverted from statutory law. What we can subsequently deduct is the author's attempt to manipulate citizens by diverting the failure as a result of positivism to the judicial system.

Consistent with naturalism, Islamic countries have adopted, as a result of modernization, similarly to positivism, the idea that law and morality are closely linked. They have as a result, borrowed substantial bodies of laws and legal institutions from Western legal systems.

Tamanaha knowledge's the fact that Islamic law possesses a characteristic that renders it uniquely problematic for legal positivism, namely that Islamic law is inherently moral. "There is no space here for separating law and morality". This is coherent with natural law and therefore sounds a lot like natural law as the author correctly points out. This nevertheless only applies where morality plays a substantial part, not in a system that considers stoning to be morally respectable.

Arguing that the Shari'a and natural law are strikingly similar because both have religious origins, illustrates the author's failure to draw a reliable comparison. The author is conscious of the paradoxical assertion that "even when law and morality are explicitly fused, the thesis of the separation between law and morality still applies". Tamanaha is nonetheless incapable to recognise the ineffectiveness the theory of positivism amounts to.

The author misjudges the role of naturalism by requesting naturalists to admit that "it is impossible to be certain whether what has been positively recognized as law by legal officials is ever consistent with natural law". Naturalists' desire is to show that the

status of law depends not simply on the fact that it has simply been laid down in whatever way, but also on some additional factor/s external to that system.

Neither does a natural lawyer deny the fact that legal systems have done bad things in the name of natural law however they do argue that the natural law principles are the true objective moral principles, and thus provide the correct standard of evaluation.

Tamanaha comes to find, with regard to the Islamic Code, that it is significant that natural lawyers echo the legal positivist separation thesis in relation to a fused version of law and morality, at least with respect to the Shari'a. Positivists make out that the Shari'a renders a unique problem for legal positivists, as they understand their law to be inherently moral, should that not require legal positivists to echo the naturalist theory?

Tamanaha conveys that legal positivists "never denied that law can in fact be moral and can have connections with morality". Exclusive positivists however persist that the separation thesis is the positivist's main identity.

> A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on the facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument[9]

Tamanaha intends to exhibit legal positivism as having always recognised the possibility of law taking moral factors into account. The citation above clearly illustrates that this is not the case. The author seeks to break even the positivist and naturalist theory "natural lawyers ought to become allies of legal positivists" by weighing out the pro's and con's of each theory. His decisive goal is to prevent the population at large to be made aware of the contradictions positivism poses and it's recent shift towards a naturalist approach.

Two groups, the inclusive and the exclusive positivists can be found within positivism. Hart, an exclusive positivist, set out his theory to contradict Austin's command theory.

[9] Josheph Raz, *The Authority of Law,* 1979, pp. 39-40.

According to Hart, law consists of more than just commands but of a set of rules, primary and secondary rules. Dworkin, who can be placed towards the natural law end of the scale, attacks Hart's model by insisting that law involves more than just rules, "it includes moral and political principles as well"[10].

Hart's solution to the question as to what happens where the court has no relevant rules available is, that the court must come up with a new rule. Dworkin objects, highlighting that this would result in unfairness because "a party may be punished not because he violated some duty he had, but rather a new duty created after the event". In contrast to moral and political principles, which can be utilized when making decisions in hard cases, the legal positivist rule model of law is inadequate.

Tamanaha insists "natural law had focused on attacking the separation thesis from every angle possible that they ought to begin looking at matters in a new light". As a result of Dworkin's theory, there was no need for natural theorists to attack positivism, as confusion resulted in positivists dividing into two groups. Tamanaha expresses criticism towards exclusive positivists who "fail to encompass the way morality comes into law and unduly circumscribes its application".

Nonetheless, the author responds to Dworkin arguing that judges do sometimes refer to moral principles and make moral judgments in the course of rendering legal decisions, but the separation thesis still applies because judges' decisions can nonetheless be immoral. As Pound correctly observes:

> analytical jurists continue to insist vigorously on this separation between law and morals, even after the law has definitely passed into a new stage of development[11].

[10] Ronald Dworkin, "The Model of Rules I" and "The Model of Rules II", *Taking Rights Seriously* (1997)
[11] Roscoc Pound, *The Ideal Element in Law* (2002) 207.

If we were to divide the two categories of naturalism and positivism into opposite ends of a spectrum of possibilities, inclusive positivists would be placed at some way towards the natural law end of the scale. They recognise that the rule of recognition incorporates moral principles and thereby transforms the separation thesis into an abstract possibility that considers imaginable that a legal system could exist. The "Separability Thesis" has thus turned the separation thesis on its head and now stands virtually in position to the spirit of the original idea. Inclusive theorists fail to recognise that the separability theory is based on naturalist law, which would explain why Hart, before he died, endorsed the inclusive version without explanation. Little has to be said as to the importance Hart's shift means for positivism.

As the legal theorist Brian Bix refers to, "if legal positivism is not about the importance of the separate and "scientific" study of law, or at least not about that today, one might wonder what its purpose and meaning is"[12].Tamanaha sees inclusive legal positivism as the stronger theory within positivism praising that it recognizes and incorporates the variety of moral considerations.

To finally conclude, Tamanaha should recognize that the separability theory has nothing to do with positivism; it is after all, about natural law. Dworkin's view of positivism best describes the current situation of legal positivism. Exclusive positivism "deploys artificial conceptions of law and authority whose only point seems to be to keep positivism alive at any cost. Inclusive legal positivism is worse: it is not positivism at all. As a last cry for help, Tamanaha relies on John Dewey's essay, who observed that:

philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophers and becomes a method, cultivated by philosophers, for dealing with the problems of men[13].

[12] Brian Bix, "The Past and Future of Legal Positivism"
[13] Jeremy Waldron, "All We Like Sheep" (1999) 12 *Canadian Journal of Law & Jurisprudence169, 181.*