

Legal Positivism

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Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English jurist John Austin (1790-1859) formulated it thus: “The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” (1832, p. 157) The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction. Austin thought the thesis “simple and glaring.” While it is probably the dominant view among analytically inclined philosophers of law, it is also the subject of competing interpretations together with persistent criticisms and misunderstandings.

1. Development and Influence

Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought (see Finnis 1996). The modern doctrine, however, owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham (1748-1832) whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law. The most important architects of this revised positivism are the Austrian jurist Hans Kelsen (1881-1973) and the two dominating figures in the analytic philosophy of law, H.L.A. Hart (1907-92) and Joseph Raz among whom there are clear lines of influence,

but also important contrasts. Legal positivism's importance, however, is not confined to the philosophy of law. It can be seen throughout social theory, particularly in the works of Marx, Weber, and Durkheim, and also (though here unwittingly) among many lawyers, including the American "legal realists" and most contemporary feminist scholars. Although they disagree on many other points, these writers all acknowledge that law is essentially a matter of social fact. Some of them are, it is true, uncomfortable with the label "legal positivism" and therefore hope to escape it. Their discomfort is sometimes the product of confusion. Lawyers often use "positivist" abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists. Among the philosophically literate another, more intelligible, misunderstanding may interfere. Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism (the meaning of a sentence is its mode of verification) or sociological positivism (social phenomena can be studied only through the methods of natural science). While there are historical connections, and also commonalities of temper, among these ideas, they are essentially different. The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts. To say that the existence of law depends on facts and not on its merits is a thesis about the *relation* among laws, facts, and merits, and not otherwise a thesis about the individual *relata*. Hence, most traditional "natural law" moral doctrines--including the belief in a universal, objective morality grounded in human nature--do not contradict legal positivism. The only influential positivist *moral* theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions. Such theists and relativists apply to morality the constraints that legal positivists think hold for law.

2. The Existence and Sources of Law

Every human society has some form of social order, some way of marking and encouraging approved behavior, deterring disapproved behavior, and resolving disputes. What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist answers, it bears emphasizing that these are not the only questions worth asking. While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has *in common* with other forms of social control. Some Marxists are positivists about the nature of law while insisting that its distinguishing characteristics matter less than its role in replicating and facilitating other forms of domination. (Though other Marxists disagree: see Pashukanis). They think that the specific nature of law casts little light on

their primary concerns. But one can hardly know that in advance; it depends on what the nature of law actually is.

According to Bentham and Austin, law is a phenomenon of large societies with a *sovereign*: a determinate person or group who have supreme and absolute *de facto* power -- they are obeyed by all or most others but do not themselves similarly obey anyone else. The laws in that society are a subset of the sovereign's *commands*: general orders that apply to classes of actions and people and that are backed up by threat of force or "sanction." This imperatival theory is positivist, for it identifies the existence of legal systems with patterns of command and obedience that can be ascertained without considering whether the sovereign has a moral right to rule or whether his commands are meritorious. It has two other distinctive features. The theory is *monistic*: it represents all laws as having a single form, imposing obligations on their subjects, though not on the sovereign himself. The imperativalist acknowledges that ultimate legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives (for example, permissions, definitions, and so on). But they regard these as part of the non-legal material that is necessary for, and part of, every legal system. (Austin is a bit more liberal on this point). The theory is also *reductivist*, for it maintains that the normative language used in describing and stating the law -- talk of authority, rights, obligations, and so on -- can all be analyzed without remainder in non-normative terms, ultimately as concatenations of statements about power and obedience.

Imperatival theories are now without influence in legal philosophy (but see Ladenson and Morison). What survives of their outlook is the idea that legal theory must ultimately be rooted in some account of the political system, an insight that came to be shared by all major positivists save Kelsen. Their particular conception of a society under a sovereign commander, however, is friendless (except among Foucauldians, who strangely take this relic as the ideal-type of what they call "juridical" power). It is clear that in complex societies there may be no one who has all the attributes of sovereignty, for ultimate authority may be divided among organs and may itself be limited by law. Moreover, even when "sovereignty" is not being used in its legal sense it is nonetheless a normative concept. A legislator is one who has *authority* to make laws, and not merely someone with great social power, and it is doubtful that "habits of obedience" is a candidate reduction for explaining authority. Obedience is a normative concept. To distinguish it from coincidental compliance we need something like the idea of subjects being oriented to, or guided by, the commands. Explicating this will carry us far from the power-based notions with which classical positivism hoped to work. The imperativalists' account of obligation is also subject to decisive objections (Hart, 1994, pp. 26-78; and Hacker). Treating all laws as commands conceals important differences in their social functions, in the ways they operate in practical reasoning, and in the sort of justifications to which they are liable. For instance, laws conferring the power to marry command nothing; they do

not obligate people to marry, or even to marry according to the prescribed formalities. Nor is reductivism any more plausible here: we speak of legal obligations when there is no probability of sanctions being applied and when there is no provision for sanctions (as in the duty of the highest courts to apply the law). Moreover, we take the existence of legal obligations to be a *reason for* imposing sanctions, not merely a consequence of it.

3. Moral Principles and the Boundaries of Law

The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due. A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. Accordingly, positivism's critics maintain that the most important features of law are not to be found in its source-based character, but in law's capacity to advance the common good, to secure human rights, or to govern with integrity. (It is a curious fact about anti-positivist theories that, while they all insist on the moral nature of law, without exception they take its moral nature to be something *good*. The idea that law might of its very nature be morally problematic does not seem to have occurred to them.)

It is beyond doubt that moral and political considerations bear on legal philosophy. As Finnis says, the reasons we have for establishing, maintaining or reforming law include moral reasons, and these reasons therefore shape our legal concepts (p. 204). But *which* concepts? Once one concedes, as Finnis does, that the existence and content of law can be identified without recourse to moral argument, and that "human law is artefact and artifice; and not a conclusion from moral premises," (p. 205) the Thomistic apparatus he tries to resuscitate is largely irrelevant to the truth of legal positivism. This vitiates also Lon Fuller's criticisms of Hart (Fuller, 1958 and 1969). Apart from some confused claims about adjudication, Fuller has two main points. First, he thinks that it isn't enough for a legal system to rest on customary social rules, since law could not guide behavior without also being at least minimally clear, consistent, public, prospective and so on -- that is, without exhibiting to some degree those virtues collectively called "the rule of law." It suffices to note that this is perfectly consistent with law being source-based. Even if moral properties were identical with, or supervened upon, these rule-of-law properties, they do so in virtue of their rule-like character, and not their law-like character. Whatever virtues inhere in or follow from clear, consistent, prospective, and open practices can be found not only in law but in all other social practices with those features, including custom and positive morality. And these virtues are minor: there is little to be said in favour of a clear, consistent, prospective, public and impartially administered system of racial segregation, for example. Fuller's second worry is that if law is a matter of fact, then we are without an explanation of the duty to obey. He gloatingly asks how "an amoral datum called law could have the peculiar quality of creating an obligation to obey

it” (Fuller, 1958). One possibility he neglects is that it doesn't. The fact that law *claims* to obligate is, of course, a different matter and is susceptible to other explanations (Green 2001). But even if Fuller is right in his unargued assumption, the “peculiar quality” whose existence he doubts is a familiar feature of many moral practices. Compare promises: whether a society has a practice of promising, and what someone has promised to do, are matters of social fact. Yet promising creates moral obligations of performance or compensation. An “amoral datum” may indeed figure, together with other premises, in a sound argument to moral conclusions.

While Finnis and Fuller's views are thus compatible with the positivist thesis, the same cannot be said of Ronald Dworkin's important works (Dworkin 1978 and 1986). Positivism's most significant critic rejects the theory on every conceivable level. He denies that there can be *any* general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its merits, and he rejects the whole institutional focus of positivism. A theory of law is for Dworkin a theory of how cases ought to be decided and it begins, not with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects. Force must only be deployed, he claims, in accordance with principles laid down *in advance*. A society has a legal system only when, and to the extent that, it honors this ideal, and its law is the set of all considerations that the courts of such a society would be morally justified in applying, whether or not those considerations are determined by any source. To identify the law of a given society we must engage in moral and political argument, for the law is whatever requirements are consistent with an interpretation of its legal practices (subject to a threshold condition of fit) that shows them to be best justified in light of the animating ideal. In addition to those philosophical considerations, Dworkin invokes two features of the phenomenology of judging, as he sees it. He finds deep *controversy* among lawyers and judges about how important cases should be decided, and he finds *diversity* in the considerations that they hold relevant to deciding them. The controversy suggests to him that law cannot rest on an official consensus, and the diversity suggests that there is no single social rule that validates all relevant reasons, moral and non-moral, for judicial decisions.

Dworkin's rich and complex arguments have attracted various lines of reply from positivists. One response denies the relevance of the phenomenological claims. Controversy is a matter of degree, and a consensus-defeating amount of it is not proved by the existence of adversarial argument in the high courts, or indeed in any courts. As important is the broad range of settled law that gives rise to few doubts and which guides social life *outside* the courtroom. As for the diversity argument, so far from being a refutation of positivism, this is an entailment of it. Positivism identifies law, not with all valid reasons for decision, but only with the source-based subset of them. It is no part of the positivist claim that the rule of recognition tells us how to decide cases, or even tells

us all the relevant reasons for decision. Positivists accept that moral, political or economic considerations are properly operative in some legal decisions, just as linguistic or logical ones are. *Modus ponens* holds in court as much as outside, but not because it was enacted by the legislature or decided by the judges, and the fact that there is no social rule that validates both *modus ponens* and also the Municipalities Act is true but irrelevant. The authority of principles of logic (or morality) is not something to be explained by legal philosophy; the authority of acts of Parliament must be; and accounting for the difference is a central task of the philosophy of law.

4.1 The Fallibility Thesis

Law does not necessarily satisfy the conditions by which it is appropriately assessed (Lyons 1984, p. 63, Hart 1994, pp. 185-6). Law should be just, but it may not be; it should promote the common good, but sometimes it doesn't; it should protect moral rights, but it may fail miserably. This we may call the moral fallibility thesis. The thesis is correct, but it is not the exclusive property of positivism. Aquinas accepts it, Fuller accepts it, Finnis accepts it, and Dworkin accepts it. Only a crude misunderstanding of ideas like Aquinas's claim that "an unjust law seems to be no law at all" might suggest the contrary. Law may have an essentially moral character and yet be morally deficient. Even if every law always does one kind of justice (formal justice; justice according to law), this does not entail that it does every kind of justice. Even if every law has a *prima facie* claim to be applied or obeyed, it does not follow that it has such a claim all things considered. The gap between these partial and conclusive judgments is all a natural law theory needs to accommodate the fallibility thesis. It is sometimes said that positivism gives a more secure *grasp* on the fallibility of law, for once we see that it is a social construction we will be less likely to accord it inappropriate deference and better prepared to engage in a clear-headed moral appraisal of the law. This claim has appealed to several positivists, including Bentham and Hart. But while this might follow from the truth of positivism, it cannot provide an argument for it. If law has an essentially moral character then it is obfuscating, not clarifying, to describe it as a source-based structure of governance.

4.2 The Separability Thesis

At one point, Hart identifies legal positivism with "the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" (1994, pp. 185-86). Many other philosophers, encouraged also by the title of Hart's famous essay, "Positivism and the Separation of Law and Morals," (1958) treat the theory as the denial that there is a necessary connection between law and morality -- they must be in some sense "separable" even if not in fact separate (Coleman, 1982). The separability thesis is generally construed so as to tolerate any *contingent* connection between morality and law, provided only that it

is *conceivable* that the connection might fail. Thus, the separability thesis is consistent with all of the following: (i) moral principles are part of the law; (ii) law is usually, or even always in fact, valuable; (iii) the best explanation for the content of a society's laws includes reference to the moral ideals current in that society; and (iv) a legal system cannot survive unless it is seen to be, and thus in some measure actually is, just. All four claims are counted by the separability thesis as contingent connections only; they do not hold of all *possible* legal systems -- they probably don't even hold of all historical legal systems. As merely contingent truths, it is imagined that they do not affect the concept of law itself. (This is a defective view of concept-formation, but we may ignore that for these purposes.) If we think of the positivist thesis this way, we might interpret the difference between exclusive and inclusive positivism in terms of the scope of the modal operator:

(EP) It is necessarily the case that there is no connection between law and morality.

(IP) It is not necessarily the case that there is a connection between law and morality.

In reality, however, legal positivism is not to be identified with either thesis and each of them is false. There are many necessary "connections," trivial and non-trivial, between law and morality. As John Gardner notes, legal positivism takes a position only one of them, it rejects *anydependence* of the existence of law on its merits (Gardner 2001). And with respect to this dependency relation, legal positivists are concerned with much more than the relationship between law and *morality*, for in the only sense in which they insist on a separation of law and morals they must insist also--and for the same reasons--on a separation of law and economics.

To exclude this dependency relation, however, is to leave intact many other interesting possibilities. For instance, it is possible that moral value *derives* from the sheer existence of law (Raz 1990, 165-70) If Hobbes is right, any order is better than chaos and in some circumstances order may be achievable only through positive law. Or perhaps in a Hegelian way every existing legal system expresses deliberate governance in a world otherwise dominated by chance; law is the spirit of the community come to self-consciousness. Notice that these claims are consistent with the fallibility thesis, for they do not deny that these supposedly good things might also bring evils, such as too much order or the will to power. Perhaps such derivative connections between law and morality are thought innocuous on the ground that they show more about human nature than they do about the nature of law. The same cannot be said of the following necessary connections between law and morality, each of which goes right to the heart of our concept of law:

(1) Necessarily, law deals with moral matters.

Kelsen writes, "Just as natural and positive law govern the same subject-matter, and relate, therefore, to the same norm-object, namely the mutual relationships of men -- so

both also have in common the universal form of this governance, namely *obligation*.” (Kelsen 1928, p. 34) This is a matter of the content of all legal systems. Where there is law there is also morality, and they regulate the same matters by analogous techniques. Of course to say that law deals with morality's subject matter is not to say that it does so well, and to say that all legal systems create obligations is not to endorse the duties so created. This is broader than Hart's “minimum content” thesis according to which there are basic rules governing violence, property, fidelity, and kinship that any legal system must encompass if it aims at the survival of social creatures like ourselves (Hart 1994, pp. 193-200). Hart regards this as a matter of “natural necessity” and in that measure is willing to qualify his endorsement of the separability thesis. But even a society that prefers national glory or the worship of gods to survival will charge its legal system with the same tasks its morality pursues, so the necessary content of law is not dependent, as Hart thinks it is, on assuming certain facts about human nature and certain aims of social existence. He fails to notice that if human nature and life were different, then morality would be too and if law had any role in that society, it would inevitably deal with morality's subject matter. Unlike the rules of a health club, law has broad scope and reaches to the most important things in any society, whatever they may be. Indeed, our most urgent political worries about law and its claims flow from just this capacity to regulate our most vital interests, and law's wide reach must figure in any argument about its legitimacy and its claim to obedience.

(2) Necessarily, law makes moral claims on its subjects.

The law tells us what we *must* do, not merely what it would be virtuous or advantageous to do, and it requires us to act without regard to our individual self-interest but in the interests of other individuals, or in the public interest more generally (except when law itself permits otherwise). That is to say, law purports to obligate us. But to make categorical demands that people should act in the interests of others is to make moral demands on them. These demands may be misguided or unjustified for law is fallible; they may be made in a spirit that is cynical or half-hearted; but they must be the kind of thing that can be offered as, and possibly taken as, obligation-imposing requirements. For this reason neither a regime of “stark imperatives” (see Kramer, pp. 83-9) nor a price system would be a system of law, for neither could even lay claim to obligate its subjects. As with many other social institutions, what law, though its officials, claims determines its character independent of the truth or validity of those claims. Popes, for example, claim apostolic succession from St. Peter. The fact that they claim this partly determines what it is to be a Pope, even if it is a fiction, and even the Pope himself doubts its truth. The nature of law is similarly shaped by the self-image it adopts and projects to its subjects. To make moral demands on their compliance is to stake out a certain territory, to invite certain kinds of support and, possibly, opposition. It is precisely because law makes these claims that doctrines of legitimacy and political obligation take the shape and importance that they do.

(3) Necessarily, law is justice-apt.

In view of the normative function of law in creating and enforcing obligations and rights, it always makes sense to ask *whether* law is just, and where it is found deficient to demand reform. Legal systems are therefore the kind of thing that is *apt for* appraisal as just or unjust. This is a very significant feature of law. Not all human practices are justice-apt. It makes no sense to ask whether a certain fugue is just or to demand that it become so. The musical standards of fugal excellence are preeminently internal -- a good fugue is a good example of its genre; it should be melodic, interesting, inventive etc. -- and the further we get from these internal standards the less secure evaluative judgments about it become. While some formalists flirt with similar ideas about law, this is in fact inconsistent with law's place amongst human practices. Even if law has internal standards of merit -- virtues uniquely its own that inhere in its law-like character -- these cannot preclude or displace its assessment on independent criteria of justice. A fugue may be at its best when it has all the virtues of fugacity; but law is *not* best when it excels in legality; law must also be just. A society may therefore suffer not only from too little of the rule of law, but also from too much of it. This does not presuppose that justice is the only, or even the first, virtue of a legal system. It means that our concern for its justice as one of its virtues cannot be sidelined by any claim of the sort that law's purpose is to be law, to its most excellent degree. Law stands continuously exposed to demands for justification, and that too shapes its nature and role in our lives and culture.

These three theses establish connections between law and morality that are both necessary and highly significant. Each of them is consistent with the positivist thesis that the existence and content of law depends on social facts, not on its merits. Each of them contributes to an understanding of the nature of law. The familiar idea that legal positivism insists on the separability of law and morality is therefore significantly mistaken.