The Misconceptions of Legal Positivism and the Way Ahead

-*Harsh Mahaseth*

Introduction

The definition of legal positivism is that the thesis depends on the social facts rather than the merits.[[1]](#footnote-1) It has had a long history and a broad influence on society ever since its inception. The theory which was fully developed by John Austin in the 18th century can date back its antecedents in ancient political philosophy.[[2]](#footnote-2) His idea of legal positivism draws heavily from Bentham’s work which was a two-fold view that (1) both law and morality are separate from each other; and (2) all human made laws can be traced back to human lawmakers.

Though the definition of legal positivism that was set by John Austin was widely influential from the late nineteenth century till the early twentieth century, it is now seen as an overly simplistic understanding. The modern doctrines roots lie in the works of HLA Hart and Joseph Raz who have revised the position of legal positivism from the thinkers Thomas Hobbes and David Hume.

Hart has used Austin’s definition, pointed out the flaws present in it and then worked upon it. The following are the points that needed change:

(1) The legal systems also include rules that do not impose sanctions, some empower specified people to do certain things or specify ways in which legal rules can be identified or changed. Making wills are one example of a rule which does not impose a sanction but rather empowers the beneficiary to gain certain property and the officials to oversee it.

(2) It is difficult to identify a “sovereign” as defined by Austin as the law making power is dispersed with different bodies doing different functions.

(3) If legal duties are understood in terms of obedience to a determinate sovereign then it does not explain why laws still remain in force even when there is a change in government.

(4) All threats do not give rise to obligations. If they did then there would have been no difference between a gunman’s threat, where he makes you choose between your money and your life, and an ordinary piece of legislation.

Joseph Raz has played an important role in continuing Hart’s work. The pupil of Hart, Raz edited the second edition of Hart’s book “The Concept of Law”.[[3]](#footnote-3) Raz subscribes to the source thesis which believes that the existence and content of law can be determined without any moral argument and on the reference to its sources. Raz being a hard positivist has argued that the moral criteria of legality is precluded by the concept of authority.

However there has been a renewal in objections regarding legal positivism in the past few decades. The distinguished thinker, Ronald Dworkin, has compiled all the criticisms in his book “Taking Rights Seriously”.[[4]](#footnote-4) His work has focused on the work of Hart and has been a criticism of it. Other thinkers, including Lon Fuller, have also questioned the validity of legal positivism and its methods. However they have not properly displayed an understanding of legal positivism. This paper aims to clarify the stance taken by legal positivism while focusing on the links between law and morality and looking at the works of various philosophers like HLA Hart and Ronald Dworkin.

Links between Law and Morality

Law generates its own discourse of morality. It generates a legal point of view about morality. According to the positivists legality operates at a distance from morality. HLA Hart in his paper titled “Positivism and the Separation of Law and Morals”[[5]](#footnote-5) brought in the idea of law being kept separate from morals. However by this he did not mean that law and morality should be separated. Rather what he meant was that morality sets ideals for law and the law has to live up to those ideals.

Dworkin in his book titled, “Law’s Empire” took an example of the case of *Riggs v. Palmer*.[[6]](#footnote-6) In this case Francis B. Palmer had made his will in which he had given a portion of his legacy to his two daughters, Mrs. Riggs and Mrs. Preston and the remaining portion to Elmer Palmer to be taken care of by his mother Susan Palmer until he reaches the legal age. Elmer feared that Francis B. Palmer would change the will and so he poisoned him till death. A provision was there to convict Elmer under criminal law; however, there was no provision which would regulate his claim to the legacy for taking part in this criminal activity. The court declined to give the defendant his gift under the will as it follows the principle of “no man may profit from his own wrong”. Dworkin used this case as an example to show that in the current case the judge did not rely on legal rules, he applied a principle and did not strictly follow the law. Dworkin further argues that judges should invoke legal principles that do not derive their authority from any official act of promulgation. He says that law does not just consist of rules; it includes certain moral principles as well which have weightage. This is one significant difference between rules and principles. He theorizes that principles lack what rules should have and rules cover what principles should have.[[7]](#footnote-7)

The Dworkin-Hart debate concerns the clash between two different models of law where one determines law based on social facts alone while the other includes moral facts. However in the article written by Brian Leiter titled, “Beyond the Hart-Dworkin Debate” he proves that the debate is over.[[8]](#footnote-8) The debate which was the core organizing role in the judicial curriculum of the twentieth century does not make much sense in the twenty-first century as there is a clear winner of the debate. Leiter disproves all of Dworkin’s claims but one against Hart.

Legal Positivism and Legal Formalism: The Difference

There are three assumptions that have been made about positivism throughout the years. The first attribution to legal positivism is the assumption that law is determinate; there is always a defined limit under which it acts. The second attribution to legal positivism is the amorality of legal interpretation; that law is morally neutral. People often want to see their moral codes being enforced as law. The third and final attribution to legal positivism is judicial restraint.

However, what should be known is that these are the three central features of legal formalism, not legal positivism. Legal positivism has been misconstrued with legal formalism as of lately. This is due to Lon Fuller and his article against legal positivism which may have confused an entire generation and poisoned their minds making them think that positivism had a role in what happened in Nazi Germany and the morally abhorrent deeds of the judges.[[9]](#footnote-9)

The Hart-Fuller debate revolves around law and morality and the example of Nazi Germany. Hart stands by the thesis that there is no necessary relationship between a legal system and the idea of morality or justice. Fuller on the other hand stands by his thesis that law and morality cannot be easily distinguished. However, both of them do agree on the fact that immoral and unjust systems are short-lived and most likely to be unstable. A repressive regime lacks morality and justice; however, when a repressive regime falls, the system falls with it too.

What should be understood is that legal formalism and legal positivism are two distinct theories. Legal positivism is more than a theory, it is more of a tradition of thoughts as there have been various thinkers who have contributed to this system throughout centuries.

The constitutive features of legal positivism are

1. An insight into legal positivism deals with what is called the social fact thesis. What this thesis says is that law is a communitarian human artefact; it is a social institution, a social phenomenon which is based on social facts. There are certain social rules that determine and create the law. Social rejection invalidates the law making procedures and the laws themselves.
2. Another insight into legal positivism deals with the conventionality thesis. This thesis says that the law is created and preserved through convention. Law is primarily a matter of conduct and practice.
3. The third insight into legal positivism is the separability thesis of law. This thesis states that the law is a response to moral problems of the community. The validity of a law cannot be challenged on moral grounds. Law and morality are separate domains with the only necessary linkage being that law is a termination of moral problems.

Conclusion

A positivistic theory of law does not claim that law is determinate. The Hartian core-penumbra theory is an example of this. While there has been criticism against legal positivism saying that it fails to justify the process, the rules are based on social norms and hence, social rejection would invalidate it. For the law to be valid it must have the correct pedigree: the sovereign must follow all the established procedures. To assess the validity of such laws two question have to be answered in the positive: (i) Whether the law created by the correct authority; and (ii) Whether the correct authority followed the appropriate procedures.

Legal positivism has been misunderstood and been shown in the limelight due to its switch in attributes with Legal formalism. To understand what legal positivism is the example of homosexuality and their position in society can be seen. As per legal positivism homosexuality may be legally wrong in a given system but it is wrong only legally. There are other external factors such as morality in which it is not considered wrong. However, as seen previously, it is still criticised on this issue. Legal positivism is a normative theory of law and not a moral theory of law as it does not give a complete account of morality. The legal point of view is a perspective where those who are authorized by the norms of legal institutions have moral legitimacy of their own and when they act in accordance to those norms then the action of authority is *intra vires* and they generate a moral obligation to obey. One has to always remember that the legal point of view, legal authority, always purports or claims to represent the moral point of view even when in reality it fails to do so.

Legal Positivism is still arguably the dominant theory of the nature of law in jurisprudence or analytical legal philosophy. Legal positivists have responded to both Ronald Dworkin and Lon Fuller’s against legal positivism. Legal positivism is still very active as new thinkers with different theories have emerged.

Scott Shapiro, a legal positivist and professor of law and professor of philosophy at Yale Law School, builds upon Hart’s theory and introduces his own concept of the Planning Theory of Law.[[10]](#footnote-10) In this theory Shapiro states that laws are plans as they structure activity so that the participants work together and thereby achieve goods and values that would otherwise be unattainable. Justice Antonin Scalia is another legal positivist who was an Associate Judge of the Supreme Court of the United States of America from 1986 until his death in 2016. He builds upon the interpretation of Hart’s Rule of Recognition. Justice Scalia builds on the rule of recognition and in his book, “A Matter of Interpretation” he says “*A**text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.*”[[11]](#footnote-11)

It is important for people to have different judicial philosophies. As Justice Scalia is no more, his philosophy will be debated upon and a successor will be chosen. It is crucial to have diversity in the area of law as it is only through diversity of opinions that debates occur which sparks creativity and controversy.[[12]](#footnote-12) Both of these are needed to move forward as a society. Thus, legal positivism is a necessary theory of law and it should be properly understood.

1. Legal Positivism, Stanford Encyclodpedia of Philosophy, Jan 3, 2003, <http://plato.stanford.edu/entries/legal-positivism/>. [↑](#footnote-ref-1)
2. Finnis, John, “The Truth in Legal Positivism,” The Autonomy of Law, ed. Robert P. George. Oxford: Clarendon Press, 1996, Pg. 195-214. [↑](#footnote-ref-2)
3. H.L.A. Hart, The Concept of Law, Clarendon Press, 1961. [↑](#footnote-ref-3)
4. Ronald Dworkin, Taking Rights Seriously, Cambridge, Mass.: Harvard University Press, 1977. Pg. 295. [↑](#footnote-ref-4)
5. H.L.A. Hart, Positivism and the Separation of Law and Morals, Harvard Law Review, Volume 71, No.7, 1958. [↑](#footnote-ref-5)
6. *Riggs v. Palmer*, 115 N.Y. 506 (1889) [↑](#footnote-ref-6)
7. Ronald Dworkin, Law’s Empire, The Belknap Press of Harvard University Press Cambridge, Massachusetts, London, England, 1986. [↑](#footnote-ref-7)
8. Brian Leiter, The Radicalism of Legal Positivism, Guild Practitioner, March 8, 2010. [↑](#footnote-ref-8)
9. *Id*. [↑](#footnote-ref-9)
10. Scott J. Shapiro, Legality, Belknap Press, 2013. [↑](#footnote-ref-10)
11. Antonin Scalia, Federal Courts and the Law, A MATTER OF INTERPRETATION, Princeton University, 1997. [↑](#footnote-ref-11)
12. G. Todd Butler, A Matter of Positivism: Evaluating the Legal Philosophy of Justice Antonin Scalia under the Framework Set Forth by H.L.A. Hart, The Holy Cross Journal of Law and Public Policy, Volume XII, 2008. [↑](#footnote-ref-12)