A CRITICAL ANALYSIS ON "POSITIVISM"

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ABSTRACT

Legal positivism is a pretty straightforward theory when expressed with a high degree of generality. It informs us that the law is a matter of fact. Despite its apparent simplicity, it has sparked a great deal of intellectual discussion and controversy. Austin understood law as a construct made up of three essential elements: command, obedience, and sanction. But, as Hart pointed out, the law does not function that way. Legal positivism is the belief that the existence and content of law are determined by social circumstances rather than its merits. In this article, we attempt to figure out the true meaning and essence of positivism, i.e., 'what law is' rather than, 'what law ought to be'. The positivist notion of sovereign, numerous positivist exponents, its distinctiveness from other legal theories, and critique are all addressed.

Introduction

Positivism is derived from the Latin term 'Positus' ,which implies to firmly adhere something's existence. Auguste Comte, a French philosopher, coined the term "positivism." Legal Positivism is widely acknowledged as one of the world's most significant schools of thought. This school is sometimes referred to as the Analytical School of Jurisprudence. Because the school was prominent in England, it is also generally known as the English School

Method

Positivists are individuals who utilize empirical methods from the natural sciences to monitor and anticipate human behavior in some way connected to the law. Although the concept put out by the jurists varied but they all agreed that they saw the law "as it is." So, the unifying goal of all these jurists was to make law intelligible, to make law as it is rather than how it should be without any moral precepts. The positivists' goal was to analyze the law without regard for its historical origins or evolution, as well as its ethical relevance or validity.

According to this view, scientific inquiry should only focus on things that can be directly experienced. It is founded on the empiricism-based tenet that all knowledge of fact must be supported by sense experience or inferred from statements obtained from clear evidence. The only certainties are those that are publicly observable, meaning sense experiences that can be communicated with others.[1]

Source of Law

Predetermined rules must be used to make decisions. This school of thought holds that the most important aspect of law is its relationship to the state. Legal positivists believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution. It is based on a superior's power rather than being good or bad. The group can be split into positive and negative positivists based on the weight accorded to moral ideals.[2]

Positive positivists such as Hart believed that moral principles exist in the universe but that they are not essential for the law to follow. 'It is in no way a necessary reality that law meet

[1] All Answers ltd, 'Overview of Legal Positivism' (Lawteacher.net.) <https://www.lawteacher.net/free-law-essays/jurisprudence/legal-positivism.php?vref=1> accessed 18 July 2022
[2] Ibid

moral needs, though they have often done so,' argues Hart. As a result, they do not rule out the existence of moral standards. Negative Positivists, on the other hand, fully deny the existence of ethical and moral principles. As a result, they rejected the existence of moral values. This includes jurists like John Austin. Legal norms or laws are valid not because they are based on moral or natural law, but because they are imposed by legitimate power and acknowledged as such by society.

Legal positivism can be interpreted in a variety of ways. The separation thesis, according to Hart, a contemporary legal positivist, is the essence of legal positivism. The thesis's major argument or core is that law and morality are conceptually separate. For positivists, the source of law is legislation or law made by the sovereign. They rejected tradition and precedent as sources of law. Positivists think that law is the command of the sovereign over the political inferiors or subordinates. The "sovereign" is defined as a person (or definite body of individuals) who gets habitual obedience from the majority of the population but does not habitually obey any other person or organization. According to the positivist notion of law, the highest political superior is the state, as a collective legal association governed by majority rule. This notion gave rise to the legal theory of non-suability.[3]

Positivism - Distinguished from other outside factors

Positivists differentiated between formal analysis, historical analysis, and functional analysis. They do not dismiss the importance of historical and functional analysis but argue that they should be separated from formal analysis. Friedmann writes, "The analytical lawyer is a positivist. He is not concerned with ideals; he takes the law as a given matter created by the state whose authority he does not question. On this material he works by means of a system of rules of a legal logic, apparently complete and self-contained. In order to be able to work on his assumption, we must attempt to prove to his own satisfaction that thinking about law can be excluded from the lawyers province. Therefore the legal system is made watertight against all ideological intrusions and all problems are concluded in terms of legal logic."[4]

It refers to a system of pure facts in which all rules and values are eliminated. Legal positivism is a legal theory that holds that all laws are nothing more than the expression of the will of

[3] V.D. Mahajan, Jurisprudence and Legal Theory, 441 (5th ed.2018)

[4] All Answers ltd, 'Overview of Legal Positivism' (Lawteacher.net, November 2021) <https://www.lawteacher.net/free-law-essays/jurisprudence/legal-positivism.php?vref=1> accessed 18 November 2021

whichever power created them. The law should be objective and precise.

Major exponents of Positivism

The prominent exponents of the Positivists or Analytical school in England are Jeremy Bentham, John Austin, and H L A Hart. Gray and Hohfeld encouraged the School in the United States, while Kelsen, Korkunov, and others encouraged it on the European continent.[5]

John Austin

Austin's legal theory is commonly referred to as the "command theory of law" since it is based on the notion of command. Positive law has its own criteria, which is based on the principles of sovereign, command, and sanction. This simply implies that anyone who violates a directive issued by the top political superior, or who infringes on the sovereign's sovereignty, is liable to penalty. He distinguished between law 'properly so called' (positive law) or human laws and 'law improperly so called. The laws properly so called are further subdivided into two parts: God's law and human law. Human law comprises positive law and positive morality. Positive law is formulated by the political superiors which he called as sovereign for the political inferiors. Laws improperly so called are separated into two categories: rule by metaphor (which covers expressions of uniformity in nature such as the law of gravity) and law by analogy (which shares a common aspect of previous experience like the law of fashion). These are laws that are neither directly or indirectly imposed by a political superior and have no legal ramifications if not obeyed. This covers natural science law and so-called international law regulations.

Austin defined law as "rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[6] Nothing, according to him, is entitled to be labelled as 'Law' unless it possesses all of the features of state-created and state-enforced law, and thus, logically, one must conclude that customary law is not law at all, or that it is 'imperfect' or 'inchoate' law. Law is a man-made rule enforced by the sovereign on the society it rules. Such a mandate entails an obligation to obey it. If such a directive is not obeyed, a legal consequence will be imposed. Austin believed that when there is no sovereign or political command, society lacks positive law in the strictest sense.

[5] V.D. Mahajan, Jurisprudence and Legal Theory, 441 (5th ed.2018)441
[6] Ibid, pg 447-448

Jeremy Bentham

He defined law as, "assemblage of signs, declarations of volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons." The reward should be given to people who follow law and sanctions to be imposed upon those who does not follow law.

Bentham classified Jurisprudence into two categories: Censorial and Expository. Censorial refers to what law ought to be, whereas expository refers to what law is. Expository jurisprudence was further classified as Authoritative (derived from legislative powers) and Unauthoritative (derived from textbooks).

Bentham asserted unequivocally that the sovereign's will governs the behaviour of the individuals to whom it pertains. Bentham dismissed the importance of ethics. A law can be divided into eight categories: aspects, extent, expression, force, object, remedial appendages, subject, and source. The source of law is the sovereign's will, which may conceive law that he personally issues, adopt laws already issued by prior sovereigns or subordinate authorities, or approve laws to be issued in the future by subordinate authorities. But, "Bentham in his fanaticism really strove to make the legal as reliable as a timetable. The fetish of legal certainty and the fear of subjectivity of notions of justice account for the attempt of positivists to work out a pure theory of law, to separate rigidly 'is' and the 'ought', and to treat all economic, political, and ethical considerations bearing upon legal institutions as metalegal."[7]

Principle of Utility

Bentham is well-known for his Utility Principle. It is based on the Hedonism theory, which implies seeking maximum pleasure. He claims that a person is governed by two masters, one of which is pain and the other is pleasure. Everyone wishes to maximise pleasure while decreasing pain. Both are the inverse of one another. Policymakers should bear this in mind when enacting legislation that maximises pleasure while decreasing pain. And every legislation is evaluated using the Utility principle. Bentham also advocated for the codification of all laws, claiming that the uncodified set of norms that comprised English law was unworthy of the title law.[8]

[7] Kelsen, The Function of the Pure Theory of Law, in Law a Century of Progress 231, 241 (1937).
[8] http://www.ijlljs.in/wp-content/uploads/2014/10/Legal-Positivism-An-analysis-of-Austin-and-Bentham.pdf

Positivism and Natural Law

The natural law school holds that every individual has some natural right that he has inherently regardless of whether the state gives it or not. The fundamental principles of justice are generalized means of securing generalized wants, referred to as "primary social goods," which include basic liberty, opportunity, power, and a minimum of wealth. Positive law holds that law is created by men for men. Postmodernists have distinguished between law and morality, claiming that the two are separate characters or entities. Positivists oppose natural law because it is based on the concept of 'what law ought to be' rather than 'what law is'. They believe that natural law varies from person to person, whereas positive law is consistent and uniform in nature.

Positivism and Historical school

The positive school of thought denied the significance of customs and said that customs are not a genuine law. It can only be called a law if it is sanctioned by the sovereign or a superior body, but they neglected the fact of social will. The positivists believed that the historical idea that law emerges from life and spirit is ambiguous.

Criticism:

On Command

According to Duguit, the concept of command does not apply to current social legislation that binds the state rather than the person. The word command implies the presence of a commander. The mechanism for producing laws in a contemporary legal system may be so complicated that it is impossible to identify any commander; this is especially true when sovereignty is split into federal states.

On Sovereignty

The head of the historical school of thought, Sir Henry Maine, has criticised the definite and absolute nature of sovereign. He believes that the term "sovereign" is neither determinative nor absolute.

Customs and precedents were not considered as a law

According to CK Allen, custom is "self-contained, self-sufficient, and self-justified law," and the court's job is "declaratory rather than formative." As a result, when a custom is shown in

court by adequate evidence, the court's job is simply to proclaim the custom operational law. Thus, custom does not derive its inherent legitimacy from the Court's authority. But Positivists believed that courts do not make laws. They just state the law. The authority to make laws was concentrated in the hands of the Sovereign.

Separation of law from morality-Lon Fuller

Fuller rejects the distinction between law and morality. He argues that whatever qualities are inherent in or result from clear, consistent, prospective, and open procedures may be found not just in law but in all other social practices having similar characteristics, including custom and positive morality. His other point of contention is that if the law is a matter of fact, we are left with no explanation of the duty to comply. On the other hand, there is a responsibility to follow if moral legislation is enacted.

On International Law

Austin classified international law as "law improperly so called" or "positive morality," since it lacked the component of sanction. Austin's definition excludes this critical area of the law.

Conclusion

Legal Positivism is a jurisprudential approach to understanding and interpreting law that aims to distinguish law as a separate and autonomous study divorced from ethical, moral, or social issues. Positivism established the fundamental concepts that are still used in current legal systems. The importance of legislation, rules, and regulations, as well as the judicial system's discretion, are all seen in the way that law is passed from the political superior to the general populace. But Positivism does not provide us with a criterion for distinguishing between a rule of law and arbitrary order of a despot.

In positivism, it makes no difference whether a rule is followed out of fear or as an expression of the community's sense of fairness.[9] Whereas, in today's modern society, ethical issues lie at the heart of any rule, regulation, or law. Laws worldwide are becoming less arbitrary, with a greater emphasis on preserving freedom and liberty. The focus of legal institutions is changing away from being a system of orders and punishments and toward ensuring the prosperity of the

[9] Kessler, Friedrich. "Theoretic Bases of Law." The University of Chicago Law Review, vol. 9, no. 1, 1941, pp. 98–112. JSTOR, https://doi.org/10.2307/1597152.

people it serves. It may be stated that Legal Positivism provides a unique viewpoint on understanding our legal systems, and while it is not without defects, it is nonetheless of great academic relevance.