THE POSITIVE MIND AND LAW

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Positivism's impact on and relation to law is rather peculiar and some legal theorists who write about so- called *legal positivism* do not think that it is necessary for them to engage into discussions on positivist philosophy. In many encyclopedias and dictionaries, there are separate entries on positivism and legal positivism although you will look in vain for entries on psychological or economic positivism. The special character of positivism's relation to law is reflected also by other facts. Most natural and social scientists (but in no case all) deny today that they are proponents of positivism even if, actually, they are doing science in a manner fully or partly compatible with the precepts of late logical positivism. In other words, many researchers active in the natural and social sciences think (or thought from the end of the sixties until recently) that positivism is a rather outmoded standpoint.

The situation in legal science is quite different. It is so because the link between legal positivism and positivist philosophy is somewhat less direct than, say, between positivist sociology and positivist philosophy. Two schools of legal theory have competed heatedly from the 19th century until the present, one of them being precisely legal positivism. The recent and authoritative *Companion to Philosophy of Law and Legal Theory* informs its readers that «Along with natural law theory, legal positivism is one of two great traditions in legal philosophy»[1] and makes it perfectly clear that both traditions have continued until today. Many legal theorists not only are but also declare themselves to be adherents of legal positivism.

Although the link between legal positivism and positivism as such is really less direct than between some social sciences and positivist philosophy, this link seems to be closer than some legal theorists and lawyers admit. Yet before defining a position called legal positivism and examining its links with positivist philosophy, it is worth briefly outlining the doctrine legal positivism opposes, namely natural law theory which chronologically precedes that of legal positivism.

Traditional natural law theory asserts that not every properly enacted law is just and valid. Above laws enacted by human beings is a higher, natural law which enables the appraisal of enacted law. This higher law (or law-like standard) is contained in sacred texts or may be discovered by way of inquiry into nature, especially human nature; its source may be religious revelation or moral intuition. Cicero, who (being not the first proponent of natural law theory) stated it *in extenso,* held that «natural law is unchanging over time and does not differ in different societies; every person has access to standards of this higher law by use of reason; and only just laws [i.e.

in accordance with natural law] "really deserve [the] name" law»[2].

In the middle ages, the best known proponent of natural law theory was Thomas Aquinas. He distinguished several kinds of law but the most important *in retrospecto* is his opposition of *natural* law to the *positive* law enacted by human beings. According to him, natural law is not only above positive law: positive law must be derived from natural law either through deduction or by concretization.

Natural law theory was standard law theory also in the 16th, 17th, and 18th centuries. Its most conspicuous representative in the 18th century, William Blackstone, took over Cicero's and Aquinas' views although he left a bit more room for choice of positive laws, dropping Aquinas' requirement of derivability. According to him, no human laws are of any validity if *contrary* to natural law.

Precisely this basic idea of natural law theory was attacked by John Austin, who is commonly regarded as the leading representative of legal positivism in the 19th century. By opposing this idea and the theory of natural law in general, he laid emphasis on the fact that a Court of Justice delivers its sentences on the basis of a positive law, and if an innocuous or even beneficial — from the point of view of natural law — act is strictly prohibited by a positive law, a delinquent will be sentenced disregarding his or his defender's appeals to natural law.

According to natural law theory, positive law, which is contrary to natural law, is not just and, therefore, not valid. Austin was of different opinion on the issue which he expressed in *The Province of Jurisprudence Determined* in a famous phrase crucial for understanding the essence of legal positivism: «The existence of law is one thing; its merit or demerit is another»[3]. All legal positivists share his conviction that there is no necessary connection between law and morality. Some other legal ideas of Austin, including the notion of law as the command of the sovereign, were later dropped. All legal positivists agree that whatever is properly enacted by a lawmaking agency is law, but in the 20th century they held a broader view than Austin's: «that what counts as law in a particular society is fundamentally a matter of social convention»[4]. The latter thesis is often called «the social thesis» and together with the «separability (of law and morality) thesis» it constitutes the crux of (the modern reading of) a doctrine of *legal positivism*.

Although Austin himself is not regarded, as a rule, a representative of positivist philosophy, his links with it were rather close. He was a utilitarian, belonged to Bentham's circle, and was convinced that legal science must be based upon the principle of the greatest happiness for the greatest number. Hume's positivist philosophy made a substantial influence upon him and he, in turn, was John Stuart Mill's teacher. The most positivistic (in the philosophical sense of the word) of his views is his conviction that what actually exists must be clearly distinguished from what might or must exist. The positivist fact/value distinction takes a peculiar form in Austin's philosophy of law and in legal positivism in general. Laws (say acts adopted by legislature) exist, they oblige all members of a society, sanctions are imposed on those members who violate them. Thus, laws must be treated

as social *facts*. They may be judged against some moral standards as good or bad, they may have merits or demerits, but they exist and are valid irrespective of our moral attitude towards them. Our *values* do not affect their status of binding laws. We may claim that these values were revealed to us or to humankind by God, or that we acquired them by studying our nature and making the best use of our reason but moral values and norms cannot be treated as a kind of Higher Law which invalidates those lower, positive laws which are incompatible with this allegedly higher law. Hence, law and morality must be carefully separated.

Some aspects of the natural law doctrine were directly criticized by Comte and Mill, who treated it as a *metaphysical* doctrine. The natural law doctrine was used by Locke and others to substantiate the claim that individuals have some inalienable natural rights, say rights to property. Yet Comte was especially eager to emphasize that the very notion of *natural right* is a metaphysical notion because it has no empirical content. Comte had explicitly claimed that individuals have only those rights which society grants them. Thus, they have no reason or ground to require anything from society. In general, individuals must think more about their duties and obligations, not about their rights. And although Mill (especially when discussing issues related to liberty) emphasizes not duties but freedoms, he avoids, with rare exceptions, even mentioning rights, not to say natural rights which he as a positivist cannot acknowledge.

Likely the most important representative of legal positivism in the 20th century is Hans Kelsen. His impact on legal science was overwhelming. Sometimes he is called simply «The jurist of our century»[5]. There is no doubt that the influence of positivist philosophy on his legal theory is deep and profound. In the years when the Vienna Circle was active, Kelsen was in its midst. He took part in The Unity-of-Science Movement as a member of a major Committee for International Congresses for the Unity of Science formed in 1935, was a speaker at the fifth Congress at Harvard in 1939, the sixth Congress in Chicago in 1942 and a contributor to the «Library of Unified Science» in which he published his *Vergeltung und Kausalität* (Retribution and Causality) in 1940. Yet in his main works *The Pure Theory of Law* (Reine Rechtslehre, 1st ed. 1934, 2nd ed. 1960; English trans. 1968), *General Theory of Law and State* (1945) Mach's influence is felt as well as that of logical positivism.

The very title of his major book *The Pure Theory of Law* may be interpreted as referring to Mach's program of the purification of experience. Of course, the subject of purification differs: it is theory of law, not experience. Yet Kelsen's definition of «pure» theory is clearly derivative of Mach's ideas. According to Kelsen, his theory «is called "pure" because it seeks to preclude from the cognition of positive law all elements foreign thereto»[6]. At the same time, when enumerating which «elements foreign thereto» must be excluded from this theory, he sounds like a logical positivist who is interested in building the logic of science in strict separation from the psychology and sociology of science: «The limits of this subject and this cognition must be clearly fixed in two directions: the specific science of law, the discipline called jurisprudence, must be distinguished from the

philosophy of justice, on the one hand, and from sociology, or cognition of social reality, on the other»[7]. And the impression that here a positivist is speaking is enhanced by Kelsen's remark that by separating legal science from the philosophy of law he declares himself «incompetent to answer either the question whether a given law is just or not, or the more fundamental question of what constitutes justice»[8] because these questions cannot be answered in a scientific way. On the other hand, by separating the pure theory of law from sociological jurisprudence, he tries to avoid «that syncretism of method which is the cause of numerous errors»[9].

From a methodological point of view Kelsen's legal positivism is a much stricter doctrine than that of Austin's. According to Kelsen, pure jurisprudence is a normative discipline and the norm is its central concept. Austin did not use this concept and Kelsen claims that he did not regard the distinction between «is» and «ought» as crucial for legal science. By the way, the normative character of jurisprudence is another very important feature which opposes it to natural (and social) sciences and requires one to discuss positivism's influence upon law separate from its influence on natural and social sciences. «Natural science», Kelsen emphasizes, «describes its object – nature – in is-propositions; jurisprudence describes its object – law – in ought-propositions»[10]. In this respect jurisprudence, in Kelsen's interpretation, resembles more the logic of science than empirical science itself. And of course, being like all positivists, a champion of value-free science, he is firmly convinced that no «ought» can be derived from an «is».

By interpreting laws as norms, Kelsen opposes Austin's notion of law as a command. At the same time he, like Austin, emphasizes the role of coercion as an essential characteristic of law. And like Austin (or Comte) he underlines the primacy of duty in relation to right and quotes approvingly the words of his great predecessor: «Duty is the basis of Right»[11].

The third major representative of legal positivism is H.L.A. Hart. His book *The Concept of Law* (1961; 2nd ed. with an extensive «Post Scriptum» was published one year after Hart's death, in 1994) is regarded as one of the most conspicuous treatises in 20th century legal theory. According to Michael D. Bayles, Hart's opinions on the origins of philosophical perplexities in law, definitions of legal terms and ways of addressing many other problems in legal theory «quickly gained such widespread acceptance that some legal philosophers take them as uncontroversial principles of legal philosophy... Whether or not Hart's particular views are accepted, he has transformed Anglo-American legal philosophy during the last part of the twentieth century»[12].

The central issue of legal theory is the question «What is law». Hart reformulates it in the following, less metaphysical way: «How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?»[13]. All these questions are related to the opposition of legal positivism to natural law theory. The second, however, is of greatest philosophical importance and we will focus on it.

Hart's stance towards the relation of law and morality is less categorical than Kelsen's. For Kelsen law and morality are two different and, essentially, not intersecting orders. Hart, however, emphasizes that both positive law and positive, i.e. generally accepted, morality constitute social constraints on action although the role and nature of these constraints is different.

According to traditional natural law theory, to be valid, laws must conform to the moral principles which most often are regarded as discoverable by natural reason. Hart is convinced that there is no logically necessary relation between legal and moral rules. Yet he thinks that it is possible to indicate another, not logical and less direct link between morality *and* law. He argues as follows: «To raise ... any ... question concerning *how* men should live together, we must assume that their aim, generally speaking, is to live. From this point the argument is a simple one. Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control... Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name»[14]. These rules of conduct can be derived from human vulnerability, approximate (physical) equality, limited altruism, limited resources, and limited understanding and strength of will. However, Hart is eager to emphasize that specific laws which are incompatible with these fundamental rules are not thereby invalid. In Bayles' words: «The minimum content does not exclude or rule out rules; rather it indicates types of rules that are incorporated. Moreover, the minimum content is not necessary for the existence of a legal system or rule, only for its viability. Thus, if law or morality lacked such a necessary rule, for example, had no rule against murder or theft, the legal system might exist for a while, but it would not long endure»[15].

In Hart's interpretation a legal system is more open than in Kelsen's. Principles of different natures - not only purely legal nature – are used not only by judges when discharging their duties (especially when facing hard cases) but by ordinary citizens when appraising laws and legal system in general. Hart acknowledges that «laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims»[16]. On the other hand, he thinks that moral criticism may be effectively used against purely instrumental treatment of the legal system in general. It was already mentioned that legal positivists were blamed for justifying, at least indirectly, the use of law as a simple tool of power. It seems that Hart takes this reproach more seriously than Kelsen, although their positions on the issue do not differ much. He is eager to emphasize that men confronting the official abuse of power «should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and

that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny»[17].

Legal positivism exerted an extremely strong influence not only on legal theory but on legal practice also. In fact, this practice, at least in democratic countries, is based mainly on the doctrine of legal positivism which was developed precisely with the aim to make law more transparent and better capable of serving the people. Legal positivists did not deny the mutual influence of law and morals on each other. Their intention when denying the *logically necessary connection* between law and morals was, starting with Austin, to avoid, on the one hand, anarchy, and on the other hand, conservation of the existing legal system. They were afraid of the undesirable social consequences of the natural law theory. Those who identify law and morals may ignore all laws which are incompatible with their moral views. This leads to anarchy. On the other hand, the lack of separation of law and morals can produce the conviction that all laws are moral and, therefore, unchangeable. When claiming that to insist on the logically necessary relation of law to morals is a mistake, all legal positivists were inspired by the same progressivist ideas as philosophical positivists. They also sought both *order and progress*. They did not want to destroy the legal order. Simultaneously they were rather more critics of the *status quo* than its defenders. MacCormick in his monograph on Hart correctly states that «Hart is a positivist because he is a critical moralist. His aim is not to issue a warrant for obedience to the masters of state. It is to reinforce the citizen's warrant for unrelenting moral criticism of the uses and abuses of state power»[18].

At the same time it is worth noting that the initial radical opposition between natural law theory and legal positivism has become, in recent years, less acute as both doctrines gradually changed their shape and partially assimilated elements of each other. Both our analysis and, especially, Hart's celebrated discussion with two famous representatives of the natural law school, Lon Fuller and Ronald Dworkin bears evidence of this. These developments and related events taking place in other, less important, schools of legal science (such as the sociological and historical schools) brought about attempts to create a so-called integrative jurisprudence which would combine classical schools of legal theory; the best known theoretician who tried to advance this idea is Harold J. Berman[19]. Neither he nor, say Jerome Hall could afford, however, to ignore in such attempts legal positivism and disregard the doctrine of which any present-day legal discussion is simply unimaginable.

Notes

1 Coleman, Jules L. & Brian Leiter, (1996). Legal Positivism. In D. Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory*. Cambridge, MA: Blackwell, p. 241.

2 Bix, Brian (1996). Natural Law Theory. In D. Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory*. Cambridge, MA: Blackwell, p. 224.

3 Austin, John. (1832). *The Province of Jurisprudence Determined*. New York: Noonday Press, 1954. P. 184.

[4] Coleman, Jules L. & Brian Leiter, (1996). Legal Positivism. In D. Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory*. Cambridge, MA: Blackwell, p. 241.
[5] Weinberger, Ota. (1973). Introduction: Hans Kelsen as Philosopher. In H. Kelsen, *Essays in Legal and Moral Philosophy*. Dordrecht; Boston: Reidel, p. ix.
[6] Kelsen, H. (1941), *Essays in Legal and Moral Philosophy*. Dordrecht; Boston: Reidel, 1973. P. 266.
[7] Ibid.
[8] Ibid., p. 266–67.
[9] Ibid., p. 269.
[10] Ibid.
[11] Ibid., p. 276.
[12] Bayles, Michael D. (1992). *Hart's Legal Philosophy*. Dordrecht; Boston; London: Kluwer Academic Publishers, p. 1.
[13] Hart, H.L.A. (1961). *The Concept of Law*. Oxford: Clarendon Press, p. 13.
[14] Ibid., p. 188–189.
[15] Bayles, Michael D. (1992). *Hart's Legal Philosophy*. Dordrecht; Boston; London: Kluwer Academic Publishers, p. 120.
[16] Hart, H.L.A. (1958). Positivism and the Separation of Law and Morals. In R. M. Dworkin (Ed.), *The Philosophy of Law*. Oxford: Oxford University Press, 1977. P. 29.
[17] Hart, H.L.A. (1961). *The Concept of Law*. Oxford: Clarendon Press, p. 206.
[18] MacCormick, Neil. (1981). *H.L.A. Hart*. Stanford, CA: Stanford University Press, p. 160.
[19] See: Berman, Harold J. (1988). Toward an Integrative Jurisprudence: Politics, Morality, History. *California Law Review*, 76 (4), p. 779–801.