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Why do we Obey Law: Positivism or Naturalism?

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ABSTRACT

The authors of this paper sought to answer the reason behind why we, as a society, obey laws. The authors ponder whether it could be due to the influence of natural law, with its roots in morality and developed by philosophers such as Aristotle, St. Aquinas, Hobbes and many others, or whether it could be due to the analytical school of thought and legal positivism, the polar opposite theory which completely separates law and morality. This paper delves into the history, evolution and modern day relevance of the two schools of thought and the authors gave their opinions on the age old philosophies and what they believe is the correct view.

Keywords: *Austinian, Modern Naturalism, Jurisprudence.*

I. INTRODUCTION

Natural Law is a vague terminology when it comes to the study of Jurisprudence as it applies not only to legal theorems, but also to theories of morality. It does not seek to define the very laws of nature, but simply to craft a relation between legal and moral obligation, stating that there are objective moral truths behind every legal decree. It can be inferred from the works of some influential thinkers like **St. Thomas Aquinas**, that the moral standards which influence human lives are objectively taken from human nature and the nature of the world and society included therein.

So what does Natural Law truly imply? At its core, natural simply means "of reason", believing that laws should be made not with emotion or passion, but through logic and reason. Morality was considered the key of reason, wherein what a society deems to be immoral, has no right to be legal. This is the earliest interlap between morality and legality, and one that continues to this day. We can see this reflected in modern day society, for example India, where the **Directive Principles of State Policy,** a set of non judiciable guidelines meant to be unofficially adhered to, are moral principles that allow aid to the legislations passed by the parliament.

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According to the theory of Natural Law legal theory, the standards we hold citizens or other individuals to from a legal standpoint are borne of the moral standards inculcated beforehand, and the legal repercussions are directly drawn from the morality theory of Natural Law. The legal theories made must rise up to the moral standards that are innate to the society. While classical Natural Law theorists like Aquinas focus more on the overlap theory, i:e the interconnection between legal laws and moral laws, which comes at a stark contrast from Austin's philosophies which attempted to segregate law from non-law in every sphere possible. Modern Natural Law philosophers like John Finnis attempt to develop the classic Natural Theories by attempting to make them more relevant to the modern day necessities of legal theory. One could also argue that Ronald Dworkin's theory of interpretation draws from the basic tenets of Natural Law.

The best way to describe the basis of Natural Law is through an illustration, if one day, theft was rendered legal, it is beyond doubt that theft as an action would increase, it is however undeniable that not everyone shall resort to it. This implies that there is an internal moral compass within everyone, however since it is not obligatory, it is not a reliable means of restricting offences. This is where the overlap between legal and moral theories is most prominent, where legislations are crafted with moral standards kept in mind to create a safe society for the members for a state.

II. ARISTOTLE

The concept of law is deeply embedded in Aristotle's political philosophy. Although legal terminology occurs frequently in his writings, Aristotle does not himself present a systematic and unitary legal treatise.[3] Aristotle believed that humans were beings of nature in two distinct ways, they were primarily children of god and a part of a divine spirit, but also possessed innate reasonableness and logic to shape their thoughts and will. Morality for Aristotle was not a variable element, it was a cornerstone and a pillar for every legal theorem. Aristotle was one of the original natural law theorists, and it was his ideas that gave birth to the modern iterations of Natural Law.

III. ST. THOMAS AQUINAS

St. Thomas Aquinas was a disciple of the church, he was of the belief that the church held supremacy over the state, and was the true sovereign in any given state. Aquinas studied the world of Aristotle and believed he could combine Aristotle's theory of logic and reasoning and

[3] Bowling Green,*Social Philosophy and Policy Foundation*, OH, USA, (Mar.15,2021), https://lawexplores.com/aristotles-philosophy-of-law/

combine it with the faith of the Church. The first precept of natural law, according to Aquinas, is the somewhat vacuous imperative to do good and avoid evil.[4] Aquinas firmly believes that good and evil are not arbitrary terms and can have objective values attached to them based on and derived from human nature. Thus good and evil are both universal and objective.

St. Aquinas came up with four types of law;

- Eternal Law: Anything with permanence, what we consider to be physical, chemical, biological or psychological in modern day, was classified as Eternal Law by Aquinas.
- Natural Law: The law based on reasonableness and logic, where man participates in the creation and following of rational laws.
- Human Law: The laws created by mankind to help supplement the natural and divine laws. Aquinas states that Human Laws are only valid to the extent where their content is in line with the natural law.
- Divine Law: The law of the eternal beings and by proxy, the laws of the church, it was these laws that Aquinas sought to conform to.

IV. SOCIAL CONTRACT THEORY

Social Contract Theory is a hypothetical construct of society, pioneered by three main philosophers, Hobbes, Locke and Rousseau. Social Contract Theory states that the state of nature was not satisfactory to the non-political society that existed at the time, and to protect their natural rights, the people entered into a social contract wherein they surrendered certain rights to a sovereign in exchange for protection of their natural rights of life, liberty and property. Social Contract theory remains a premier example of the creation of Natural Law, stating that man has an innate sense of morality and rationality, the same sense which leads to the creation of the legal aspects of the state. The morality of a law is directly linked to the cause of creation of the law.

V. RELEVANCE IN MODERN DAY

Natural Law is a theorem predating most legal philosophies, however that does not mean that it has maintained its relevance throughout the times. Austin's theory of Positivism completely separated morality from law and it was the prevailing school of thought for a long while. However in the 21st Century, we have found that there is no law without morality. Looking at the Indian Constitution alone; the Directive Principles, Fundamental Duties, Article 21, etc.

[4] Kenneth Einar Himma, *Internet Encyclopedia of Philosophy*, (Mar.15,2021), https://iep.utm.edu/natlaw/

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Morality has rooted itself in the very legal framework of the country.

So why do we obey law? My personal opinion is that natural law forms the very groundwork of legality. Morality and Reasonableness from individuals is what led to their realisation for the need of a sovereign and to the development of modern day Democracy and Welfare States. Morality and Law must be combined, for without morality, laws become arbitrary and without legality, morals are not enough to prevent offences.

(A) Positivist School of Jurisprudence

The Positivist Approach concerns itself with the Positivist Theory of Law which was Propounded by Jeremy Bentham and John Austin in the 19th Century. The basic question to be asked when talking about this theory is "What is law?" Is law written? Where does law comes from?[5] The People who follow this theory are known as 'Positivists'.

The Positivists distinguish between formal analysis and historical and functional analysis. They believe that there should be a separation between historical and functional analysis and Formal Analysis. However, they don't completely deny the existence of historical and functional analysis.[6] In other words, law derives its authority as such from political and social practices rather than existing naturally.

The Advocates of this Particular School of Jurisprudence theorise that Laws are nothing other than the command of the Sovereign which can or cannot be moral in nature. Laws are only sourced in the written rules and regulations and does not concern itself with what is moral and what is not.

VI. WHY IS IT TERMED AS THE POSITIVIST SCHOOL OF JURISPRUDENCE?

The Followers of this theory deals with Law in its present form and analyse the commands of the sovereign as they actually exist in the system of government. They are not concerned with the Past or Future of Laws (***Positus***[7]) and whether they are moral or not. The Advocates of this theory does not question the orders of the Sovereign i.e., the State. This Approach is also known as the Analytical School or Imperative School of Jurisprudence.[8] Legal positivism captures well some features of legal systems – especially the ways that constitutions, statutes, and other laws are products of human agency.

[5] *All Answers Ltd. Legal Positivism.* , (Mar.15,2021), *https://bit.ly/3bFZW53.*
[6] V.D. Mahajan, *Jurisprudence & Legal Theory (5th Edition)*, Analytical Legal Positivism
[7] *Latin for position, place or arrangement*
[8] Manmeet Singh, *Legal Services India.com*,.(Mar.15,2021) https://bit.ly/2LDLzn1.

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VII. PROPONENTS OF POSITIVIST SCHOOL OF JURISPRUDENCE

Thomas Hobbes, Jeremy Bentham, John Austin, Hans Kelsen, H. L. A. Hart are some of the major proponents of Legal Positivism.

1. Thomas Hobbes

Hobbes was on one of the first Philosophers to include the theory of legal positivism in his works. He believed that Law is a command of the Sovereign and people cannot question it even if it is arbitrary, immoral and unjust. According to Hobbes, the Sovereign is Supreme and the general public is in no position to question him.[9]

2. Jeremy Bentham

Bentham was the Founder of British Positivism and discussed that in a legal system, there are two categories of people:

a. Expositors- These are the people who do not relate ethics and morals to Laws.

b. Censors- These are the people who do not separate ethics and morals with laws and criticize certain laws for being unjust and immoral.

According to Bentham, Laws should not be criticized based on their values but they are needed to be obeyed without questioning them.[10]

3. John Austin

Austin, in his approach towards law as a concept, decided to exclude every single external force that influences the concept of law. Austin, in his Theory of Legal Positivism decides to study law as it is regardless of it being moral or immoral i.e., *Postium* which is also called "Positive Law". According to Austin, Law is man-made i.e., rules and regulation made by a Governmental Authority i.e., the Legislature (Command of a Politically Powerful Body). If the Sovereign does not acknowledges a certain source of law, then that law shall be declared void.

He says that the public is obliged to obey the command of the sovereign as it is their legal duty to do so.[11] It is inferred with his research that the political authority i.e. the Sovereign[12] has with itself the capacity to rebuff or punish for the rebelliousness of laws by the general public. This Punishment to enforce discipline in the General Public is called a Legal Sanction.[13]

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[9] Anirudh Vats, *Legal Positivism: Evolution and Challenges*,. https://bit.ly/3nPCQLR.
[10] *Ibid.*
[11] *The Command Theory*
[12] *Austin describes the Sovereign as the Direct Authority which is the Source of Law.*
[13] Kavya Gupta, *John Austin's Analytical Approach to Positive Law: Explanation, Appreciation and Criticism,* (Mar. 13, 2021) https://bit.ly/35JNKMX.

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4. Hans Kelsen

Kelsen's propounded the most influential legal theory of the 20th Century which was his "pure theory of law". He believed that law should be studied as a separate entity and the nature of law should exclude any other elements that influences law as a concept such as Sociology, Psychology, Morality etc.

The Presumption of Kelsen's theory is that every other Natural Law Theory talks about a Dualism of what the law is and what the law ought to be. This Dualism was dismissed by Kelsen in his Theory of Pure Law. Although his theory separated law and ethics, he was exceptionally worried about both the concepts but suggested not to mix both of them.[14]

5. Herbert Lionel Adolphus Hart

Hart is one of the leading representatives of British positivism. His books 'The Concept of Law' (1961), 'Law, Liberty and Morality' (1963), 'Essays on Bentham' (1982), etc. has contributed incredibly to the study of Law and Political Philosophy.

According to Hart, there is no logically necessary relationship between law and morality. Hart combines the theory of positivism with the theory of naturalism. He states that both the theories should be read together in order to understand what the law is and what are the sources of law and why there is a need for every citizen to follow the laws made by the sovereign.

He states that in order to understand laws we need to combine the theories of positivism and naturalism together. The provisions of both the theories are important to be combined. Also, in order to counter Dworkin classifying him as a "Plain- Fact Positivist", he introduced the concept of ***"Soft Positivism"***. Hart suggested that ethics and moral principles including social facts can be counted as sources of Laws.[15] He suggests that to conceptualize all laws as arbitrary or ethical is to force a deceptive appearance of consistency on various types of laws and on various types of social capacities in which laws may perform. Hart introduced the concepts of ***Primary Rules*** **and** ***Secondary Rules*** of Obligations.

Hart portrayed that laws that enforce certain obligations or commitments on people are the "Primary Rules of Obligation". Secondary Rules works towards providing a legitimate and authoritative assertion of the primary rules in order to make those obligations even more functional.[16] Secondary Rules play a major role to counter the issues that exist in a legal system:

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[14] Mizan L. Rev. 346 (2008), *Notes on Jurisprudence - Positivism Continued: Kelsen's Pure Theory of Law.* https://bit.ly/3nMERbl.
[15] Mathew H. Kramer, *In Defence of Legal Positivism: Law Without Trimmings(Oxford University Press).*
[16] Alex Scott, *H.L.A. Hart's the Concept of Law. (2004)(*Mar. 14, 2021). https://bit.ly/3bLiQYq.

i. Laws being Uncertain;

ii. Laws being Inefficient;

iii. Laws being Static in nature.

Types of Secondary Rules according to Hart:

i. Rules of Recognition: Acts as a remedy for the Uncertainty of Laws by letting us know how to identify a law in the modern world and helps us to determine the validity of a law.[17]

ii. Rules of Change: Acts as a remedy for Laws being static and unchanging in nature.

iii. Rules of Adjudication: Acts as a remedy for Inefficiency of Laws by governing the election and procedure of the Judiciary which adjudicates the disputes according to law.[18]

VIII. SEPARABILITY THESIS

The Separability Thesis basically tells us that Law and Morals should be considered as two separate concepts and should not be interlinked with each other. It suggests that ethics and morals when related to the legal framework of the State, may generate conflicts in the functioning of the state and may result in an unstable society.

(A) Arguments in favour

i. Punishment for every single crime regardless of it being Moral or Immoral.

ii. A more Stable and Structural Society.[19]

iii. Lower Crime Rate.

iv. Smoother functioning Society.

(B) Arguments Against

i. Sovereign can exercise its powers arbitrarily.

ii. Laws can be Unjust.

iii. Harder to challenge unjust laws.

iv. Not applicable in a Democracy.

[17] MIT OpenCourseWare., *Paper 1: An Analysis of Hart's Theory of Primary and Secondary Rules. Hart's Theory of Rules* (Mar. 14, 2021) -https://bit.ly/2XJsrXt.
[18] Wikipedia. *The Concept of Law.* https://bit.ly/38KU3l7.
[19]William Anderson, *School Work Helper. Legal Positivism.(Mar. 14, 2021)* https://bit.ly/3sF8TSi.

IX. AUTHOR'S POINT OF VIEW

The Theory of legal Positivism plays a huge role in the formation of societies with strict implementation of Laws where Laws are regarded as more powerful and important than morals and ethics. It clearly states that while interpreting the laws, we need to put ethics and morals separately in order to provide justice to people in agony. Morals only become operative only when it is recognised with a legal sanctions or legal recognition.

Morals differ from person to person and it's really tough to grant justice if we consider morals while hearing the case and while issuing punishments. Something might be moral to one person and at the same time, immoral to another. Morality should be maintained by law and not the other way around. Morality forms the basis of laws. Morality can be different for different set of people and including morality can be a major obstacle in the process of doing justice.

The positivist school is relevant in cases where morals does not play a major role. However, in certain cases, the Concept of morality has to be invoked for doing justice and we need to use the theory of natural law for it, for example, in the cases of theft where people commit the offence in order to survive or help the homeless people to survive. However, the implementation of morals and ethics completely depends on the Judge that is hearing the case.

"A Judge punishes lawbreakers as a burning house injures its occupants. A person may be burned to death while robbing a home or saving a friend. Similarly, from a moral point of view, the judge's work is good or evil, depending on whether the laws he enforces are good or evil."[20]

-Thomas Stephen Szasz

Therefore, being one of the most prominent legal theories of the 19th century, it can't be said that it is absolutely perfect and it does come with some flaws.

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[20]Goodreads.com., *Legal Positivism Quotes.*(Mar. 14,2021)https://bit.ly/2Ng6gpD