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Positivism or Naturalism: Why Individual Obey Law?

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Abstract: ***The nature and source of law have always been the main focus of jurisprudence. This article focuses on the division of philosophical legal ideology and the origin of laws and the rationale for obeying the law by analyzing two different schools of jurisprudence; the Positivist school and the Naturalist school. In the beginning section, the article deals with the positive school and philosophical contributions made by various positivist jurists like Jeremy Bentham, John Austin, and Prof. H. L. A. Hart. The naturalistic approach to law is elaborated with Hobbes' theory and Lon Luvois Fuller understands of natural school in the second part. Following this, a detailed view of the Hart v. Fuller debate and the arguments is explained. The article is concluded with our opinions on why an individual should obey the law.***

Keywords: Jurisprudence, law, natural school, positive school, morals, order

1. Introduction

The pivot of jurisprudence towards nature is out of a concern to understand the philosophy behind the enactment of law. The apprehension is to understand the legal system which we are surviving. Through the understanding of this legal system, perhaps, we will be able to explore more about the nature and quality of our obligation to obey the law. Interface between the two schools namely positivist and naturalist schools of jurisprudence seems impossible from the beginning. The divide among the school is the result of the debate on the issue of how law came into existence and why we should obey the law? There is a lack of systematic treatment of this issue that seems to divide the two competing schools. The conflict was inexorable, examining the concept of both schools. Assuredly, there are valid arguments for both the schools.

The law is essential for maintaining peace and order in the society, but will that mean; there will be no peace and order in absence of law. What if tomorrow we don't find any punishment for committing murder, will it result into people committing murder everywhere? The answer will surely be a 'no'. Is it some sense, natural humanistic approach towards law or will it only be based on sanction? Perhaps this is a division point of thoughts, where both school of law clashes. Both the side has a valid point to justify themselves and their arguments. On the other side, this is also true, that if there is no punishment of murder then there might be an increase in cases of murder. So, will it mean that the basic natural humanistic approach is different for different people? This difference is where the two school divides [1].

There has always been a trend on both the side to characterize their legal position by either maintaining as more 'positivistic', i. e., the law is what it is and no deviation must be allowed, or maintain the notion, that law is more 'naturalistic', i. e., towards humanistic approach and leaning more towards the ideal code that drives human being forward.

The Positive School of Jurisprudence:

The analytical school of jurisprudence, otherwise known as the positive school of jurisprudence because its exponents are neither concerned with the past nor with the future of law, but with the law as it exists, i. e., law as it is and this school's major premise is also to deal with law as it exists in present form. Analysing without reference either to their historical origin or development but its main thing is that it starts from actual facts of law as it seems today. The positive school takes for granted the developed legal system and proceeds logically to analyse its basic concepts and classify them as to bring out their relations to one another. The paramount jurists of analytical school are Jeremy Bentham, John Austin, Prof. H. L. A. Hart, Hans Kelson & others. Its founder is John Austin who was the professor of Jurisprudence in the University of London. Positivists had no confusion on "ought and is". They maintained clear notion to what law "is". The primary aim for the positivist is only limited to study the law, as it is. The law got the very sanction behind it since it has got its validity from the authority itself. Positivist views this authority, as the only reason to obey the law, in the famous words of Austin, it being the "Command of the Sovereign". They always separated ideals from the law and this school stood as a great criticism for natural school as of separating law from moral.

Bentham's Contribution:

Jeremy Bentham's contribution to legal theory is epoch making. "The transition from the peculiar brand of natural law doctrine in the work of Blackstone to rigorous positivism of Bentham represents one of the major developments in the history of modern legal theory." [2] He gave new directions for law making and legal research. With him came the advent of legal positivism and with it, the establishment of legal theory as a science of investigation as distinct from the art of rational conjecture. Bentham laid the foundations of this new approach, but far from containing the solution to problems involving the nature of positive law, his work was only the beginning of a very long and varied series of debates, which are still going to today. [3] He gave his famous understanding of greatest happiness principle or

the utilitarian principle. In this, he explains that it is not just the usefulness but also determining the extent to which it creates happiness. Bentham does give importance to the fact of creation of moral obligation to produce the greatest amount of happiness.

Concept of Analytical Postivism by Austin

Austin confined his study only to positive law and applied analytical method for this purpose. By positive law, Austin meant laws properly so called as distinguished from morals and other laws which he described as laws improperly so called which lacks force or sanction of the state. Austin described positive law as the aggregate of the rules set by men as politically superior to men as politically inferior subjects. He attributes command, duty, sanction and sovereign as the four essentials attributes of positive law [4]. Austin was crystal clear in maintaining the notion of law being not moral. In one of the lectures, Austin clearly said, "The most pernicious laws, and therefore those which are most posed to the will of God, have been and are continually enforced as laws by Judicial tribunals". Even if the law is opposed to nature, it is still a law, and must be obeyed, since it is given by the sovereign.

H. L. A. Hart

H. LA. Hart is a great jurist of the twentieth century. He combines positivism with natural law. He has attempted to restate a natural law position from a semi - sociological point of view. He states that there are certain substantive rules which are essential if human beings are to live continuously together in close proximity. "These simple facts constitute a of indisputable truth in the doctrines of natural law. Hart places primary emphasis on an assumption of survival as a principal human goal. We are concerned with social arrangements for continuous existence. There are, therefore, certain rules which any social organisation must contain; and it is these facts of human nature which afford a reason for postulating a minimum - content of natural law. certain facts of the Hart do not state the actual minimum universal rules, but rather "human condition" which must lead to the existence of some such rules, but not necessarily rules with any specific content. Hart says that these facts of the human condition as consisting of human vulnerability, approximate equality; limited altruism; limited resources and limited understanding and strength of will. His argument is that, in the light of these inevitable features of the human condition, there follows a natural necessity "for certain minimum forms of protection for persons. Property and promises. It is in this from that we should reply to the positivist thesis law may have any content". Hart is not, however, claiming that "law is derived from moral principles or that there is some necessary conceptual link between the law and moral" [5].

Characteristics of Analytical Positivism

Analytical positivist thinkers consider that the law to have an undifferentiated relationship with the state. Law is originated by law makers. This law maker can also be sovereign on the judicial part of the state. Law is promoted by the sovereign. An organized society is the basis of the sovereign political power. It is only by the influence of the force of organized society that the sovereign is able to implement the law in a disciplined manner. Austin the principal promoter of analytical positivism called the law the command of the sovereign. Analytical thinkers have stated the determination of legal power as essential to make the method enforceable. These thinkers consider the court necessary for the use of discipline [6]

Natural School of Jurisprudence

In jurisprudence, the term natural law means those rules and principles which are considered to have emanated from some supreme sources, other than any political or worldly authority. Based on this rule different jurists referred to this school as divine law, moral law, law of nature or natural law, universal law, law of god, unwritten law and so on. These theories reflect a perpetual quest for absolute justice. It has been an appeal to absolute justice, authority and rules higher than positive law. The natural law theories have not been evolved to explain any given legal system, but rather to serve an ulterior end, the fulfillment of the social need of the age [7]. Natural law is the moral theory of jurisprudence and often states that laws should be on the basis of ethics and morals. This law also states that law should focus on what is 'correct'. In addition, natural law was found by humans on their disposition of reasoning and choosing between good and bad. Hence, it is said that this law plays a significant role in establishing moral and ethical standards.

There is another way of looking at natural law. It is viewing at it from positivistic or empiricist angle abstract metaphysical ideals and notions which is described generally as natural law. According to Fuller "by legal positivism I mean that direction of legal thought which insists on drawing a sharp distinction between law that 'is' and that 'ought' to be, natural law on the other hand is the view which denies the possibility of a rigid separation of the 'is ' and the 'ought ' and which tolerates a confusion of them in legal discussion. There are of course, many 'systems' of natural law. Men have drawn their criteria of justice and of right law from many sources from the nature of things, from the nature of man, form the nature of God But what unites the various schools of natural law and justifies bringing them under a common rubric, is the fact in all of them a certain coalescence of the 'is' and 'ought ' will be found [8].

Thomas Hobbes's Social Contract Theory:

Hobbes' theory also proceeds from the "social contract. Before the "social contract', man lived in a chaotic state. According to him, man's life in a state of nature was one of fear and selfishness. It was "solitary, poor, nasty, brutish and short'. The idea of self - preservation and avoiding misery and pain are inherent in his nature. He desires society also. These natural inclinations induced him to enter into a contract and surrender his freedom and power to some authority. The law of nature can be discovered by reason' which says what a man should do and what he should not do. Man has a natural desire for security and order. This can be achieved only by establishing a superior authority which must command obedience. Therefore, Hobbes is a supporter of absolutism. Subject has no rights against the sovereign. Though he makes a suggestion that the sovereign should be bound by 'natural law', it is not more than a moral obligation. Hobbes's theory of 'natural law' is a plea to support the absolute authority of the sovereign. He advocated for an established order. During the Civil War in Britain, his theory

came to support the monarch. In fact, it stood for stable and secure government. Individualism, materialism, utilitarianism and absolutism all are interwoven in the theory of Hobbes [9].

The Natural Law Philosophy of Lon L. Fuller

Much of the new emphasis on natural law can be traced to the failure of positivism, the prevailing legal philosophy, to give meaningful answers to the problems of life in society; also, to the fear generated by the dreadful experiences of "lawless law" enacted by totalitarian dictatorships like Adolph Hitler's. One contemporary legal philosopher who has been vitally aware of the failure of legal positivism and who was articulately urging a return to the natural law even before the full tragedy of Hitler had run its course, is the present Carter Professor of General Jurisprudence at the Harvard Law School, Lon Luvois Fuller. Professor Fuller points out that in defining the law in terms of its source (the sovereign) the positivists had one advantage. They could point to a statute or a command and say, "This is law. " What the sovereign does is clear; it makes positivism possible. But a question that remained unresolved in the theories of Hobbes and Austin was the precise identity of the sovereign [10]

Fuller asks: Is it (the sovereign) a real thing, a datum of nature existing apart from men's thinking? Or is it merely a way of viewing the world of possible legal phenomena? Is it an actuality, or a metaphor? He takes the basic premise of the positivists - the striving for a complete separation of the is and the ought in law - and shows first that it cannot be justified in terms of reality. He thereafter points out in example after example how this attempted separation leads to disastrous consequences in practice [11].

In simple examples he shows that what the law is cannot be separated from what it is for, and what it is for cannot be separated from what it ought to be. A judge, for example, cannot properly interpret a law without considering its purpose. Positivists have tried to argue that words have a core of meaning and that this core is enough for the judge to work with. Fuller poses the case of a statute which excludes "vehicles" from parks, and then asks if such a law would exclude a truck used in World War II mounted on a pedestal as a memorial [12].

Hart V. Fuller Debate: A Solution?

HLA Hart's View:

Hart is a positivist, so he does not believe that there is a necessary connection between law and morality. While he does acknowledge that there is a close relationship between law and morality, and does not disagree that the development of the law has been immensely influenced by morality. However, he does not believe that they are interdependent on each other [13]. Hart believes that officials should display truthfulness about the law by concentrating on what it says rather than focusing on what one desires it to say. According to Hart the law consists of primary and secondary rules. Primary rules art duty imposing rules on the citizens and have a legal sanction. Secondary rules are power conferring laws that describe how laws should be recognised, adjudicated or changed. Hart says these rules form the heart of the legal system and the rule of recognition is the glue that binds the legal system as a whole. So, Hart advocates that conformity to a certain moral standard is not required for a legal system to exist. Hart acknowledges that law and morals are bound to intersect at some point, for instance where a case comes up where the wording of the relevant statute is not sufficient to give effect to the purpose of the law (professor hart refers to these as problems of the penumbra), Hart says that such cases can be solved by way Judicial interpretation. A decision can be made about what the law ought to be, and moral factors play a crucial role in deciding such hard cases [14].

Fuller's View:

Fuller is a naturalist, and he sees laws as a way of achieving social order by regulating human behaviour through laws. He believes that our legal systems are derived from the norms of justice which have a moral aspect. He argues that for a law to be valid, it must conform to a certain moral function test.1 These are the eight desiderata set out by Fuller; (I) Rules (ii) published (iii) prospective (iv) intelligible (v) not contradictory (vi) possible to comply with (vii) reasonably stable through time (viii) followed by officials [15]. Fuller implores law makers to take into consideration each of the above before determining whether a law is valid. Fuller goes further to explain morality by categorising it in two; Morality of aspiration and morality of duty. Morality of aspiration suggests a desired norm of human conduct that promotes his/her best interest. Morality of duty describes the standards people follow to ensure smooth functioning of society. Other forms of morality discussed by Fuller are "Internal morality of law" and "External morality of law". the former is concerned with procedure of law making while the latter focuses more on substance rules of law which are applied in decision making [16] fuller rejects the positivist approach to law and argues that society's goals can be achieved by other means rather than relying solely on law.

Critical Analysis of the Debate

Upon examining both Hart and Fullers view on what the law is and how it relates to morality we find that Fuller's naturalist ideals offer the most solutions to the problems in the modern - day legal system. A good example this point is that of the grudge informer case that was discussed in the Hart - Fuller Debate Published in the Harvard law review because it demonstrates the differing views of naturalism and positivism, particularly in the context of Nazi laws. Facts of the case are as follows:

"A German woman denounced her husband to the authorities in accordance with the anti - sedition laws of 1934 & 1938. He had made derogatory remarks about Hitler. The husband was prosecuted and convicted of slandering the Fuhrer, which carried the death penalty. Although sentenced to death he was not executed but was sent as a soldier to the Eastern front. He survived the war and upon his return instituted legal proceedings against his wife. The wife argued that she had not committed a crime because a court had sentenced her husband in accordance with the relevant law of the time. However, the wife was convicted of 'illegally depriving another of his freedom', a crime under the Penal Code, 1871, which had remained in force

throughout the Nazi period. The court described the Nazi laws as "contrary to the sound conscience and sense of justice of all decent human beings" (1951)" [17].

If we follow Hart's positivist views, the decision given by the Court was wrong, because hart believes that no matter how heinous the Nazi laws were, they were in accordance with the Enabling Act passed by the Reichstag, and was valid. It satisfies Hart's rule of recognition. I find this very disturbing for many reasons. Fuller on the other hand recognised the Court's decision because it created respect for law and morality, and by using his 8 desiderata Fuller states that all Nazi laws were illicit. This justifies the courts overlooking of the earlier 1934 act and upholding the wife's conviction. Without the courts applying a moral concept in the application of the law, the courts would have had to acquit the wife and agreed with Hart, a decision I feel would have been wrong.

According to Hart, the Courts were left with only two options to preserve the integrity of the judicial decisions, either to let the wife go free because the statute protected her, or make a retrospective law repealing the statute under which she claimed protection, and declaring the acts of the perpetrators of such atrocities as criminal [18]. Even though Hart did not favour the retrospective application of criminal statutes, he argued that the Nazi regime could have been considered an exceptional circumstance for the application of retrospective of laws, if the Courts were afraid that Hitler's accomplices would be acquitted. Hart was strongly against the Court's decision to introduce a concept of morality and deciding the statute which protected the woman was no law at all [19].

Fuller contended that Hitler's regime was so harmful to morality, that there was nothing in the system that could qualify to be called a law as they did not comply with his desiderata. He stated that the Nazi laws lacked the necessary internal morality required in the process of law making, which gives laws respect and makes them obligatory to be followed by citizens. Fuller believed that unless the Nazi laws were treated as non - laws, the perpetrators of evils under the Nazi regime would go unpunished. A result I feel is unjust.

2. Conclusion

Onto my final point, the issue with principles of morality is that various societies will have different moral principles. So, in pluralistic societies such as ours, there will be conflicting ideas of what is, or not moral. For example, in Muslim countries it is considered immoral for a woman to walk outside without a hijab, whereas in the west this is not considered immoral. There is also the issue that morals tend to change over time, so what was deemed immoral 50 years ago may no longer be immoral. An example of this same sex marriage, this was perceived as being so immoral that it was illegal. It wasn't until the Marriage (Same Sex Couples) Act 2013 [20] was passed by the UK Parliament that it became legal and somewhat morally acceptable in the UK. Personally, I disagree with same sex marriage, but it does aid my case that the law reflects what society deems as moral as such there is a connection between law and morality. In Forsythe v DPP and the AG of Jamaica the courts said **"**That a law is valuable not because it is 'the law' but because there is 'right' in it and laws should be like clothes; the Laws should be tailored to fit the people they are meant to serve. " [21]

In conclusion, I believe that there is a necessary connection between law and morality. Although some of the arguments by hart and the positivists is not without its merits but that is not sufficient to prove law and morality are not connected. Fuller's arguments present the least amount issues on this topic therefore I believe law and morality are interdependent on each other.

References

[1] Anton Donoso, Jurisprudence Today: Naturalism versus Positivism, 41U. Det. L. J. 59 (1963)
[2] John D. Finch, Introduction to Legal Theory (IInd Ed.) p. 70.
[3] John D. Finch, Introduction to Legal Theory (IInd Ed.) p. 40.
[4] B.N. Mani Tripathi, Jurisprudence The Legal Theory (19th edition) p.19-20.
[5] Lloyd's Introduction to Jurisprudence (6th edition) p. 119
[6] Philosophus oculus, Characteristics of Analytical School of Jurisprudence https://www.legalserviceindia.com/legal/article-5234-characteristics-of-analytical-school-of-jurisprudence.html
[7] Pound, An Introduction to the Philosophy of L aw, p.71-99.
[8] Prof. Anjali Dixit, Natural Law School Jurisprudence https://www.intolegalworld.com/note?title=natural-law-school-jurisprudence
[9] B.N. Mani Tripathi's, Jurisprudence The Legal Theory (19th edition) p.103.
[10] Charles L. Palms, C.S.P. The Natural Law Philosophy of Lon L. Fuller, vol.11, spring 1965, no.2. https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1533&context=tcl
[11] Fuller, American Legal Philosophy at Mid Century, 6 J. LEGAL ED. 457, 459-60 (1954)
[12] Fuller, Positivism and Fidelity to Law-A Reply to Professor Hart, 71 HARV. L. REV. 630, 661-63 (1958).
[13] HLA Hart, The Concept of Law, Revised edition, Oxford University Press Publications, 2002 at p. 185-200
[14] HLA Hart, „Positivism and the separation of law and morals" [1958] Vol 71, no. 4, Harvard Law Review at p. 593- 629
[15] Lon Fuller, The Morality of Law (Yale University Press c 1964) 33 – 91
[16] Benjamin C Zipursky, „Practical Positivism versus Practical Perfectionism: The Hart Fuller Debate at fifty", [2008] Vol 83, New York University Law Review at p.1170- 1212
[17] Lon Fuller, The Morality of Law (Yale University Press c 1964) 245 – 255
[18] HLA Hart, 'Positivism and the Separation of Law and Morals' [1958] 71(4) Harvard Law Review 619

[19] Stephanie Patron, "The Inner morality of law- An analysis of Lon L Fuller's Theory", [2014], Glasgow University Law Society Law Review,https://unilaglss.wordpress.com/2015/03/10/the-inner-morality-of-law-an-analysis-of-lon-l-fullers-theory/.
[20] Marriage (Same Sex Couples) Act 2013
[21] Forsythe v DPP and the AG of Jamaica https://ohrh.law.ox.ac.uk/jamaican-marijuna-reform-rastas-and-rights/.