

THE POSITIVIST THEORY OF RIGHT AND LAW AND ITS MORAL IMPLICATIONS IN THE CONTEMPORARY WORLD

ABSTRACT:

Starting from the assumption of the inadequate comprehension of the foundation and the ultimate purpose of law as Kant and Cicero observed in jurists, this paper looks at the positivist interpretation of law, critically analysing the tenets of legal positivism and how this approach to law upholds amoral laws. Dissociating morality from law has the tendency to derail society of ethical and moral values, plunging it on the slippery slope of the perversion of justice, something that undermines public morality and ushers in a social menace. In order to avert such an unfortunate situation, we should look at the philosophical foundations and the ultimate purpose of law as an institution that exists in service of humanity. For this reason, the paper concludes on the note that any vision of law should address itself primarily on the subject and object of law, the human being. Thus, the creation of a legal system and the interpretation of laws that foster the maintenance of public order, the adequate resolution of conflicts and the peaceful coexistence of the members of a society require an integral anthropology.

INTRODUCTION

The prevailing tendency that dominates the contemporary interpretation and application of law in most legal systems is juridical or legal positivism as championed by Hans Kelsen. Like the philosophical trend, positivism, from which it bears its origins, this interpretation of the law only looks at the given data of the law, without any metaphysical or ulterior speculation on the essence of the law itself. It refrains from going beyond the physical

expression of the law. Owing to its failure to recourse to any transcendental enquiry, that is, the moral imperative for the justification of the law, juridical positivism justifies the law on the grounds of the competent authority who has enacted it and because it has been promulgated in the right manner and procedure. Consequently, this approach to law only ushers in legalism, formalism and coercion for its adherence. M.D.A. Freeman re-echoed this view by saying, "The emphasis on law as a science can lead to a neglect or even a denial of a critical aspect of the concept of law."¹

The fundamental problem that lies beneath this vision of law is the refusal of any norm of universal morality, or the holding onto the so-called ethical relativism, in all aspects of human life. The contemporary era witnesses to many relativists refrain from heeding to the fact there is something out there called a universal morality on which every act of living should be modelled. They rather hold on to the particularity and relativity of everything. Essentially linked to this factor for the on-going crisis is the seeming negation of the natural law from which the human positive laws originate. This problem has been created by the nihilist existentialist philosophers like Jean Paul Sartre and Martin Heidegger, who deny the existence of something called human nature, for which any talk of a human natural law could be justified, and consequently to justify human positive laws.

Thus, contemporary legal systems tend to establish rights, laws and canons that are not those of the natural rights and natural laws, but only rights and laws based on social contracts between people. In this case, the imperative of rights and laws has no foundation other than the contract agreed on. Hence, this is the positivism of law. In addition, since this approach basis law solely on social contract, the contracting parties may dispose of it when it no longer suits them. This is the utilitarianism of law. In this situation when *few*

¹ M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, 6th Edition, 11.

powerful individuals of a society sit together and deem something to be useful, agree in a contract of its utility, they declare it as a right and enact a law to promote it, and *vice versa* for something (someone) they consider not useful anymore. This moral deficiency manifests itself in many contemporary societies in their exploitative and discriminatory democratic laws, the moral emptiness of some of the human and animal rights they clamour for, some of the institutionally unjust economic policies they establish in relation to the poor countries, and all the constitutional social evil and social injustice the world is experiencing today.

THE PHILOSOPHICAL FOUNDATIONS OF THE NATURE AND THE PURPOSE OF THE LAW

Immanuel Kant had a certain diffidence in the jurists of his era with reference to their comprehension of what law really is, saying that that they (jurists) are still searching for a definition of their concept of law.² It is intellectually debatable whether present day jurists and lawyers have a clear understanding of what law really is. However, we cannot debate but agree with Cicero on the idea that "ignorance of laws leads to more lawsuits than knowledge of it."³ Based on the scepticism over the understanding of the essence of law and the dire need of its understanding for the reduction of lawsuits, we need to tap on the writings of the great masters of thought on the nature and the ultimate essence of law.

Aristotle, for example, said that we do not know the truth without knowing the cause.⁴ Thus, if a law is given, one should first know its motive. He also asserted that man is a being that is sociable by nature,⁵ that is, he lives in community with others, being a political animal by nature,⁶ called to live in

² Immanuel Kant, *Critique of Pure Reason*, 410.

³ Cicero, *On the Laws*, Bk1, 18.

⁴ Aristotle, *Metaphysics*, II, 1,993b 23-24.

⁵ Aristotle, *Nicomachean Ethics*, I, 7, 1097b 11.

⁶ Aristotle, *Politics*, III, 6,1278b 18-20.

unison with others. This is what he refers to, in his concept of justice, that justice is something political saying that "justice is the bond of men in States...the principle of order in political society."⁷ Thus for Aristotle, the law is the regulation of the civil community and justice is the discernment of the just, where the just (man) is the one who conforms to the law and respects equality.⁸

We can also learn from Heraclitus who held that all human laws are nourished and sustained by only one law, the Divine law.⁹ Leibniz, in his attempt to establish the philosophical foundations of law, also asserted that the existence of God is the ultimate foundation of right and law.¹⁰ Cicero also asserted that "all nations shall be bound by this one eternal and unchangeable law whose author, expounder and mover is God."¹¹ Thomas Aquinas crowned it all by proclaiming that the Eternal Law of God is the foundation of every law (just law).¹² It was on these grounds that Thomas Aquinas asserted that all laws derive from the Eternal Law in a triple manner: as *exemplary cause*,¹³ as *efficient cause*,¹⁴ and as a *directive cause*.¹⁵

Following from the ideas of these great thinkers, we must come to terms with the fact that any concept of law must carry with it the characteristics of transcendence in its enactment and in its application in order for it to serve the purpose of its enactment, that is, the good of the individual and that of the community. Aristotle lends credence to this fact stating that human

⁷Aristotle, *Politics*, I, 2, 1253a, 37-39)

⁸Aristotle, *Nicomachean Ethics*, V, 1, 1129a-32b -1.

⁹ Heraclitus, *Fragment* 114(Diels),

¹⁰ Gottfried Leibniz, *Nova Methodus Discendae docendaeque Jurisprudentiae*, 76, Dutens IV, pars III, p.214

¹¹ Cicero, *On the Commonwealth*, Bk 3, 53.

¹² That is the reason that governs all things in God, who is the king of the universe (Summa Theologica, Vol.1, Part I-II, q.93, article 3)

¹³ In as much as no law is just if it does not conform to the Eternal Law from which it should be modelled(ST, I-II, q.91.a.2)

¹⁴ In as much as the legislating power among men is established by God as the origin of every authority.

¹⁵ In as much as the Eternal Law, known either through faith nor reason, directs law makers in order to see which laws they should enact according to the diversities of times, places and persons(ST, I-II, q.93, a.3)

beings enact laws to produce and preserve the happiness of a political society.¹⁶ Banking on this concept Saint Thomas Aquinas defined law as a promulgated ordinance of reason for the common good, made by him who is in charge of the community.¹⁷ Unless and until the law is conceived, enacted, and enforced in view of its inherent finality, that is, the common good and ordered happiness of all in society, we are bearing a misguided concept of right and law, a misconception that erodes and hinders the very welfare of society.

BRIEF EXPOSITION OF POSITIVISM AND JURIDICAL POSITIVISM

Between the 18th and 19th century, an epoch that marked the outburst of scientific development, speculative philosophy, especially the German classical idealism championed the historical course of philosophy. However, this German classical idealism was unable to respond to the philosophical problems that had risen because of scientific development. Positivism, therefore, emerged as a philosophical trend claiming that the natural or empirical sciences are the only secure source of true knowledge, thereby rejecting the cognitive value of philosophical study.

Positivism had, as its central tenet, the adherence to the verifiable and quantifiable criterion for the meaning of cognitive statements and it limited itself only on nature and science. It studied only one aspect of reality, the material reality, and from one side only, the verifiable and quantifiable aspect, that is, the given or perceived data. Thus, positivism, in its extreme form, rejected all theoretical and metaphysical speculation as a means of obtaining knowledge and declared false and senseless all concepts and propositions of traditional philosophy on being, substance and causes. In a word, it only concerns itself with that which appears in the immediate senses

¹⁶ARISTOTLE, *Nicomachean Ethics*, V, 1, 1129b 14-18.

¹⁷Thomas Aquinas, *Summa Theologica*, I-II, q.90, articles 3 and 4.

(the physical) and does not go beyond the mere phenomenological existence (ignoring completely metaphysics).

JURIDICAL POSITIVISM AND ITS CONSTITUTIVE ELEMENTS

The predominant approach among the theories of law in the contemporary age is the normative approach that hinges on the idea of juridical positivism. By juridical positivism, we mean the specific interpretation of juridical norms from the perspective of the positivist and scientific vision of reality. Thus, it is the positivist mentality applied to the ambit of juridical norms. Just as positivism out rightly refuses to investigate the finality or purpose of things, juridical positivism refuses the investigation of a justification of juridical norms beyond the normative existence of the norms themselves. Based on this premise, juridical positivism attacks any recourse to universal validity as an absolute standard to which law must conform. This position contrasts with the concept of *jusnaturalism* that proclaims the existence of a supreme moral norm created by a Supreme Being, God, or the existence of an absolute moral norm universally accepted and lived by. (cf. the ideas of the philosophers cited above under the philosophical foundations of law).

Juridical positivism, on the other hand, does not recourse to any ideal outside the precincts of the given data of law which it considers the creation of the legislative arm of government, and whose authority cannot be questioned in any way. The fact that the norms do not reflect any ultimate significance other than their mere enactment sometimes makes their efficacy and adherence disturbing.

The principal proponent of this juridical positivism is Hans Kelsen. He is notable for his coherent attempt to liberate and purge the juridical cognitive process of an innate value, which he considers an element that is irrational,

emotive and subjective, and therefore, unacceptable. In fact, for him the law should have no moral connotation whatsoever.¹⁸ Thus for Kelsen, nothing like politics, ethics, morals and religion should influence law.

Kelsen justifies his opinion from the grounds of the Kantian epistemology¹⁹ and abandons the opinion of perceiving the law as the outcome of a rational deduction or an inductive abstraction; rather, he presents the law and its constitution in an *a priori* thinking.²⁰ Since any *a priori* justification does not depend on any sensory or introspective experience, Kelsen's *a priori* interpretation of the contents of the law say nothing about what the law depends on but that the law has been made. Thus, the Kelsenian juridical positivism is an outright negation of the principles that generate and sustain juridical norms. Hence, his affirmations utterly refuse the logical transcendence of the juridical norms, together with the motives that induce the promulgation of a particular law and the validity of that law itself.

In the positivist mentality, the legitimacy of a law depends on its promulgation by the competent authority and in the mode established by the law itself. From this mentality, we can underscore two elements of law in juridical positivism: legalism, in that the competent authority promulgated the law; and formalism, in that it is enacted in the proper mode or form. The combination of both elements only leads to a coercive legal system.

LEGALISM

¹⁸Hans Kelsen, *General Theory of Law and State*, 5.

¹⁹Immanuel Kant introduced the terminology *a priori* in philosophical discussions to indicate the knowledge that comes before (prior to) sense experience and is therefore independent of sense experience. This is the emphasis of the rationalists. Its antonym is *a posteriori*, that is, the knowledge that comes after (posterior to) sense experience and is therefore dependent on sense experience. This is what the empiricists emphasize.

²⁰Virgilio Giorgianni, *Neopositivismo e Scienza del Diritto*, 162-166.

One of the characteristics of juridical positivism is legalism. This is nourished by the Utilitarians, especially Bentham and Austin. With their concern over legal and social issues in their era, they called for the distinction between *laws as they are*²¹ and *laws, as they ought to be*.²² This distinction poses two dangers according to Professor Hart: the danger that law and its authority may be reduced to man's conception of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.²³ This last danger is exactly the pitfall of juridical positivism in that the law appears to replace morality. In reality when we talk of commands we mean the order that one person gives to another to carry out or abstain from some action, for which their disobedience is meted out with punishment. Commands become laws when they are generalized for everyone and enacted by the competent authorities like sovereigns, who on many occasions, only issue orders to others while not giving account to anyone for their own comportment. Hence, such a characteristic of law only serves the sovereigns who are outside the law themselves. Law in this case becomes the command of the un-commanded commanders of society. Thus, the utilitarian dichotomy of law has an inherent inadequacy since the law is robbed of its essential link with morality.²⁴ This separation of law and morality only looks at the mere adherence to the dictate of the law, the legalism of the law, without bearing upon its finality.

FORMALISM

Coupled with the utilitarian reduction of the essence of the law is the aspect of formalism since the law is pursued only in relation to how it is defined, what it commands and not why it commands it. In the positivist speculation, therefore, law becomes a mere formalism and simply a procedure of

21 This refers to the mere formula of the words of the decree without any reference to the goal for which it has been enacted.

22 This underscores the purpose of the law.

23 H. L. A. Hart, "Positivism and the Separation of Law and Morals" in *Law and Morality*, 77.

24 H. L. A. Hart, "Positivism and the Separation of Law and Morals" in *Law and Morality*, 78-79.

command and sanction. It is simply saying, "obey or be punished". This is more or less a mechanical application of the law, stipulating a determined measure of punishment for every law transgressed. It does not give room for exceptions like in certain situations in which the law can be broken if that action is done for a greater good. For instance, in the case of someone who ignores a red traffic light because of an emergency of rushing a seriously sick person to the hospital.

COERCION

In his book *Theory of Justice*, John Rawls asserted that a legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation (and so) when these rules are just they establish a basis for legitimate expectations.²⁵ Such an assertion epitomizes the positivist trend of law for which, in the absence of any moral authority to command the adherence to the law, coercion enforces it. The binding force to its keeping is coercion; being that it has no moral imperative to command its obedience, except its imposition, sanctions enforce it. Here then enters into play the discussion on the rule of law, the role of force and the institutions of law enforcement like the police, the gendarmerie, etc. In this vision of law, it is the law that defines the basic structure that governs human activities. This implies that the law, and not love and morality, is the guiding principle of human social living. Such a vision of juridical norms categorically denigrates any sense of philosophy of right, law and justice.

SOME HISTORICAL EXAMPLES OF THE INHERENT INADEQUACY OF THE POSITIVIST APPLICATION OF RIGHT AND LAW

²⁵ John Rawls, *A Theory of Justice*, p. 235.

There are many celebrated episodes in history of morally evil laws or the 'so-called natural rights' that ensue from the separation of law and morals. A salient example of this is the issue of the war crimes convicts of the Nazi regime. After the wanton destruction of lives and property at the end of the Second World War, some top Nazi warlords arraigned before the court of justice for crimes against humanity for their contribution to the holocaust, argued that they merely executed the then accepted laws of the *Third Reich*. Thus, their actions were legal under the laws of the regime in vogue. The court revoked the argument of those criminals on the grounds that the laws upon which they acted were invalid, contravening the fundamental principles of morality.²⁶

Saint Augustine and St. Thomas Aquinas, two great legal-minded Christian thinkers had already made this argument in the mediaeval period. The former, in his book, *De libero arbitrio*, stated, "A law that is not just seems to be no law at all."²⁷ The latter, in reference to this same argument said, "Such laws do not bind in the court of conscience."²⁸ Thus, it is difficult to uphold the formalistic approach to law. One cannot abide by a law just because a legitimate authority gives it even if it is morally unjust. In a sense, we are not obliged to abide by certain rules if they are evil or if they have a moral iniquity. Hence, we should not stick to the formalism and legalism of the law.

CRITICAL ANALYSIS OF THE POSITIVIST THEORY OF RIGHT AND LAW

²⁶ H. L. A. Hart, "Positivism and the Separation of Law and Morals" in *Law and Morality*, 84.

²⁷ Augustine, *De libero arbitrio*, 1:5.

²⁸ Thomas Aquinas, *Political Writings, Cambridge Texts in the history of Political Thoughts*, 144.

From the foregoing arguments, it is evident that the positivist theory of law is a legal system that is blind to and devoid of morality. This scenario raises several questions in the minds of critical thinkers: what good or benefit to society has such a morally deficient interpretation of law? How can amoral laws achieve the ends of law? In other words, how can morally neutral laws bring about the maintenance of order and the provision of an outlet for the peaceful resolution of disputes in society? It is difficult to see how amoral laws can shape the ethos of society. The absence of morally guided laws is, therefore, a recipe for the erosion of public morality making people cease to act according to the acceptable norms of human behavior. Thus, it ushers in the leeway for citizens to subvert moral consciousness while society easily slumps into the institutionalization of immorality.

The prevailing reality in the interpretation of juridical norms is the outcome of the philosophical development in the contemporary age. It all has to do with the anthropological vision on of man: How man perceives himself in relation to the rest of reality in the various epochs of history. Man has traversed the *theocratic* stage when the fulcrum of everything was God. In this stage, man saw himself as a being called to give account of his life to a Superior Being. But with the modern age with its birth in the dichotomy of the human person by René Descartes' and the Copernican revolution, that has ushered in a shift of existential focus from *theocentrism* to *anthropocentrism*, especially with the immanentist approach to life, it is no longer the case. In the modern era man does not look beyond the mere fact of his existence, he is not occupied with the metaphysical questions of his ontology, but merely settles down on the fact of his biological and physical existence.

This shift in man's orientation and centrality of existential focus has affected every facet of the human reality. In the ambit of rights, justice and law, it

has attendant consequences. In the first case, with the philosophy of positivism, which denigrates any reflection on metaphysics and the investigations on being and causality, it has robbed its followers of any recourse to transcendence, as to the “why” of things and the “why” of man himself. When we apply this positivist approach to the juridical systems, it also robs the law of its existential finality and any investigation on the “why” of juridical norms. Since the norms themselves are in need of a justification for their obedience, they become justified simply by their mere existence and so they become enforced by coercion.

In the positivistic mentality of law, we can see that legal sanction constitute punishment, but not a process of social healing. However, we must remember that there is no absolute natural measure for due punishment: absolutely the law of talon (life for life, eye for eye) is off target because it concentrates on the material content or consequences of criminal acts rather than on their formal wrongfulness. The aim of sanctions is to regulate society, a venture that is rationally called for by the common good. For this reason, the punitive sanction ought not only to serve as a deterrent but as a means of restoring reasonable personality or making the offender realize his/her wrong action, reforming him/her for the sake of the common good in order that he/she may lead a good and useful life.²⁹ We should bear in mind that the purpose of the law is for the common good of the community, which is the good of all its members. Thus, it is also the good of the offender. It is in this ambit, therefore, that we should view the legal sanction of the law as social healing, not to use the law as a strategy of social defence against recalcitrance.

Owing to this reason, we advocate that prisons and houses of detention not seen as edifices of punishment where prisoners suffer torture and subhuman

²⁹ John Finnis, *Natural Law and Natural Rights*, 264.

treatment; rather, used as corrective institutions where prisoners get a chance to repent of their wrong deeds, something that is unattainable if they are subjected to suffering as a payback for their deeds. Hence, with John Finnis we wish that prisons and all houses of detention be houses of healing, as quarantine centres, as asylums for the insane, and as preventive detention.³⁰ It is my view, therefore, that such institutions be correction schools where transgressors learn the art of good citizenship, that is, the practice of mutual respect of the rights of each other for the common good.

In juridical positivism, the authority of the law depends on the application of force to command its obedience. Thus, the law is synonymous to and reduced to coercion. However, Aristotle taught the necessary link that exists between law and coercion. He outlined two modes of operation of the law: as directive and as coercive. We can only apply the coercive aspect of the law in the case of a recalcitrant behaviour that fails to respond to the imperative call to acting right. The most important aspect of the law for Aristotle is not its coercive force but its role as a directive for peaceful coexistence. That is why in the *Rhetoric*, he admonishes that we should not look at the law but at the lawmaker, not at the words of the law but at the thought of the lawmaker, not at the action but at the intention, and not on a sector but at the totality of the law.³¹ The teaching of Aristotle is, therefore, a call to speculate on the *raison d'être* of the law, to search for the virtuous life, the moral life, the good life, the life that builds up community.

What Aristotle said philosophically about the essence of the law re-echoes in religion through the founder of Christianity, Jesus Christ, in his famous discourse with the Pharisees on their legalism with respect to the observation of the Sabbath law of rest: "the Sabbath was made for man, not man for the

³⁰ John Finnis, *Natural Law and Natural Rights*, 262.

³¹ Aristotle, *Rhetoric*, I, 13, 1374b 9-15.

Sabbath.” (cf. Mk. 2:27). Let us note that when the law is not accorded its true place and function in human life, it becomes counter-productive and ends up acting against itself, undermining the very motives of its existence thereby compromising the intrinsic dignity of man, the subject of the law itself.

Owing to the fact that the philosophy of law aims at understanding the ultimate significance of the juridical aspect of man, it is, by necessity, associated with the concept of man. Above all, it is an aspect of moral philosophy, in as much as it is in the ambit of the activity and responsibility of man, precisely that of law. The philosophy of law, for this reason, assumes the totality of the aspects of man, on his existence as a human person, on his freedom and responsibility, on his knowledge and on truth, on conscience and on law.

That is why it is necessary to distinguish between the negative moral norms and the positive moral norms. The negative moral norms prohibit the actions that destroy moral value while the affirmative moral laws command the realization of the value itself. The prohibitive positivistic law only obliges man, and in this manner, he can never in any case act against the law. It only settles down on the fact that one must obey and respect the law. The law interpreted in this way suggests an inhuman mode to appropriate one's being/life. This interpretation of law, therefore, robs man of his dignity since it does not conform to the universe of moral values. However, the just attitude to law is one in which it obliges man, but not in the sense that any single moral value is to be actualized by every single man. What is the point of focus here? Is it to prohibit the actions that destroy moral values or to command the realization of the values themselves?

It is worth noting that overstressing the coercive aspect rids the law of its morality in that people obey the law only because of the fear of the punishment attached to its transgression. In such a situation, people do not respond with love and human respect to others but only because they are practically being forced to respect others, making them slaves to law. This is the error in most contemporary legal systems: the assumption that the force of law is sufficient to deter recalcitrance and transgression. Have punishments ever stemmed the tide of transgression and recalcitrance in societies?

CONCLUSION

In this essay, we have elaborated an argument against the errors of juridical or legal positivism, that is, the approach to law that does not accord any ulterior significance of the law, the moral imperative, other than its enforcement. This notwithstanding, the law is always necessary for peaceful coexistence because even in the so-called well-ordered and peaceful societies the coercive powers of the legal system are to some degree necessary for the stability of social adhesion.

Owing to this conviction, we do not intend to disclaim the role of law for the pursuance of the common good, since the laws themselves derive their efficacy and legitimacy from the general acceptance that people perceive them to be because of the rationality of their essence. However, laws cannot be ascribed any legitimacy in the sense of an authoritative pronouncement, since their function is to state when a pronouncement is morally authoritative.³² Hence, law (the just law) has to contain in its very essence a moral imperative. However, let us remember that law by itself is incapable of bringing this morality into being, except where the law is conceived and interpreted as a service to humanity. If we accept this necessary link in the

³² Lon L. Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart", in *Law and Morality*, 91

existence of the law, our discussion of law should first be a discussion of the subject of law, the human being himself. Our concept of law, therefore, ensues from our concept of man.

It becomes evident from here that the fundamental question to which we should address any law discourse is the question about man, the subject and object of law. It is therefore from our concept of man that we construct a concept of right and law. If we conceive of man as solely an economic being, then all the rights we endow him and the laws we enact shall gear towards the promotion of his economic pursuits. In addition, if we conceive of man as a being whose primary scope is pleasure, then hedonism shall champion the rights and laws we promulgate in society. And if we conceive of man to be a utilitarian being we clamour for rights and create laws championed by utilitarian principles. In such situations the law can permit the "non-useful persons" (*persona non grata*) to be disposed of. And if we conceive of man as a mere physical or biological being, we uphold rights and create laws which we interpret in a positivist way, thereby reducing him to a mere material and immanent being, robbing him of any recourse to transcendence. All we need therefore is a well-guided anthropology. Thus, the positivistic vision of life and law which anchors on the phenomenological vision of given data, does not pose any ulterior question that suggests that law may have an inherent significance, what we call in the classical vision of philosophy *causa ultima*, the ultimate essence of law.

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