

# Simply speaking legal positivism philosophy essay



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Simply speaking legal positivism is synonymous with the positive norms as against the principles of natural law. Legal positivism is often contrasted with Natural law. Going by the natural law school of jurisprudence, most written laws must be or are usually informed by, or made to comport with, universal principles of morality, religion, and justice, such that if not considered fair, it loses the very basic premise for being termed law. For example, persons engaging in peaceful protest through civil disobedience often appeal to a higher natural law in denouncing societal practices that they find objectionable. Legal positivism acknowledges the existence and influence of non-legal norms as sources to consult in evaluating human behaviour, but they contend that these norms are only aspirational, for persons who contravene they suffer no immediate adverse consequences for doing so.

By contrast, positivists emphasize that legal norms are binding and enforceable by the police power of the administration, where persons who disrupt the law may be made to face serious consequences which may include fine, custody, loss of property, may end up with death. Legal positivism is based on the ways in which laws have been created and does not demand justification for the content of law or a decision for or against the obedience to law. As such emphasis is mostly on the way laws have emerged over time through practicing, deciding or tolerating certain ways of creating a law. Positivism is based on the framework that issues of legal validity must be strictly separated from questions of morality. What is ought to be has nothing to do what the law actually is.

Legal positivism finds its roots way back in ancient Christianity. It is believed that the Ten Commandments held sacred and pre-eminent values. When

ancient Greeks intended for a new law to have permanent validity, they inscribed it in stone or wood and displayed it public for all to see. Prior to the American Revolution, English political thinkers like John Austin and Thomas Hobbes came up with the command theory of law. This philosophy model said that the only lawful establishments that the Courts should recognize are the commands of the sovereign. This was because only the Sovereign is entrusted with power over the military and police force. Three varied schools of thought emerge in discussion of legal positivism.

## **1. The Pedigree Thesis:**

The pedigree thesis asserts that legal validity is a function of certain common truths. Deriving profoundly from Jeremy Bentham, John Austin<sup>[1]</sup> contends that the major characteristic feature of a legal system is the presence of a sovereign who is habitually obeyed by most people living in the society, but not in the routine of observing any specific human superior. Austin's assessment, a rule R is lawfully binding (that is, is a law) in a society S if and only if R is directed by the sovereign in S and is backed up with the danger of an approval. The severity of the threatened sanction is irrelevant; any general sovereign imperative supported by a threat of even the smallest harm is a law.

For Austin's command theory of law there is a need for the existence of identifiable sovereign in self-governing civilizations. In the United States of America, for instance, the final political power appears to belong to the common people, who pick leaders to represent their welfares. The chosen leaders have the authority to compel the behaviour but are regarded as servants of the people and not as repositories of independent power. The <https://assignbuster.com/simply-speaking-legal-positivism-philosophy-essay/>

polling population, on the other hand, seems to be the source of the final political authority, yet it lacks the immediate power to coerce behaviour. Thus, in democracies like that of the United States, the final political authority and the power to coerce behaviour seems to reside in different entities.

However according to the reputable H. L. A. Hart[2], every legal system must contain so-called primary rules that regulate citizen behaviour, a system consisting entirely of the kind of liberty a restriction found in the criminal law is, at best, a elementary or nascent legal system. The Pedigree theory focuses on the specific rule, namely that necessitates citizens “ to do or abstain from certain actions, whether they wish to or not. On Hart’s view, Austin’s stresses on powerful force that leads him to overlook the presence of a second kind of primary rule that confers upon citizens the authority to produce, alter or extinguish rights and obligations in other persons. Hart lays down, the guidelines for leading the creation of contracts and wills cannot plausibly be characterized as restrictions on freedom that are backed by the danger of a approval. These directions allow people to structure their legal relations within the coercive framework of the law-a feature that Hart correctly regards as one of “ law’s greatest contributions to public life.” The concept relates clearly to a complete monarchy, but it is not vibrant when applied to a society where some group is the sovereign. L. A. Hart argues that the command theory cannot distinguish between a legitimate government and an armed robber (“ give me your cash or else”). The above-mentioned philosophy is completely based on compulsion.

Therefore, on Hart's opinion, there are two basic situations that are necessary for the existence of a legal system: On one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.

Hart's view is vulnerable to the same criticism that he levels in contradiction of Austin's. Hart discards Austin's interpretation as the official application of coercive force can no more give rise to an obligation than can the application of coercive enforced by a gunman. Nevertheless the condition is not unlike that, if the gunman takes the internal point of view towards his authority to give rise such to a hazard. Regardless of the gunman's confidence that he is permitted to make the threat, the victim is grateful, but not obligated, to obey the gunman's commands. A gunman's behaviour is no less coercive because he believes he is entitled to make the threat.

## **2. The Separability Thesis:**

Legal positivism also finds its explanations in the Separability thesis. In its universal form, is the Separability thesis asserts that law and morality are conceptually distinct. According to this theory only an object-level claim is made about the existence of conditions for legal validity. More commonly, the Separability thesis is interpreted as making only an object-level claim about the existence conditions for lawful legitimacy. For example H. L. A. Hart[3]defines it, the Separability thesis is no more than the " simple contention that it is in no sense a necessary truth that laws reproduce or

satisfy certain difficulties of morals; however in detail they have frequently done". Insofar as the objective level of understanding the Separability thesis denies it, it's a necessary truth that there are moral constraints on legal validity, it suggests the presence of a conceivable legal system in which there are no moral constraints on legal validity.

### **3. The Discretion Thesis:**

Another theory commonly associated with positivism is the discretion thesis, conferring to which judges resolve problematic cases by making new law in the exercise of discretion. According to this theory a set of valid legal rules is exhaustive in nature and if any persons case is not covered under such a rule, then that particular case cannot be decided by applying that particular law. This gives the judges a quasi-legislative power to create or promulgate a law in circumstances where a case is not covered by a rule and hence the case cannot be decided by interpreting by applying an existing law/rule. Though often associated by positivism, the discretion thesis does not fit into the positivism's hypothetical idea. The pedigree and Separability theories mean to be conceptual claims that are true of every possible lawful arrangement. These two entitlements jointly proclaim that, within in every possible legal structure, the intentions of law are lawful in virtue of having been manufactured according to some set of social agreements[4]. In this regard, there are no ethical restraints on the content of law that hold in every possible legal system. There could be three different senses in which a judge might be said to have discretion: (1) a judge has discretion when she exercises judgment in applying a legal standard to a particular case; (2) a judge has discretion when her decision is not subject to reversal by any other

authority; and (3) a judge has discretion when her decision is not bound by any legal standards. Going by these, the discretion thesis is inconsistent with ordinary legal exercise. Even in the greatest problematic cases where there is no clarity appropriate law, lawyers don't request the judge to adapt the relevant issue by making new law. Each lawyer cites cases favourable to her client's position and argues that the judge is bound by those cases to decide in her client's favour. As a practical matter, lawyers hardly, if ever, acknowledge there are no legal morals governing a case and ask the judge to legislate in the exercise of discretion.

#### **4. Conclusion:**

I conclude by saying that the modern rules in relation to particular place or people were mostly traced or taken from the past rules or from another lawful organization. All the contemporary laws have its individual creation, the issue of conflict of positivists' view and historical interpretation is not as real as it thought. The most influential criticism of legal positivism all flow from the suspicion that it fails to give principles it's due. The law has significant tasks like bringing harmony and peace in our lives, preceding the common good in safeguarding human rights, or to rule with honesty and therefore it has more relevance with our morals. A. Lon Fuller denies the separation of law and morality. He considers that all the good qualities and characteristics flow by clear consistent and open practices, which can be found not only in law but also in all other social practices in which those features including custom and positive ethics prevail. Further he reproaches that if law is a matter of fact then we are without an explanation of the duty to obey. If amoral law is made there is an obligation to obey.