



REINSTATING LEGAL POSITIVISM: FOUNDATION, PHILOSOPHY AND CRITERIA

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Abstract

This article argues that seeing legal positivism as a political tradition that supports the Separation thesis is the best way to comprehend it. For long, that tradition was devoted to dismantling the conceptual framework that the common law tradition and its line of reasoning operated under the premise that morality and law are not intrinsically linked. A genealogical reconstruction of the tradition shows that positive judges operate in that area and must adapt their own ways of thinking to fit within certain constraints. The bulk of contemporary positivists' attempts to refute these conclusions reveal significant problems with the theory, problems that result from the attempt to divorce positivism from its political past. The new neoBenthamite renaissance in legal theory, which reproduces the moral-legal rift, is thus criticized for both restoring positivism to its political heritage and for providing a platform for a fruitless debate between positivism's critics and adherents. "As for the philosophical approach, which was so dynamic and influential, it sometimes seems a little tired and demonstrates its methods by trying to find revivification through absurdist flirtations. The fascinating problems with legal theory endure, and if these articles contain any important insights, it's that studying legal organizations throughout history may be able to resolve these problems more effectively than is currently acknowledged.

Key words: Reinstating; Legal; Positivism; Foundation, Philosophy; Criteria.

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Introduction

Legal philosophy was founded on metaphysical conjectures, which positivism rejected. These conjectures amounted to the assumption of truths that were outside the purview of knowledge and observation. Comte used the term positivism to describe his own philosophical system, which was composed of philosophic attitudes. "Derived from a belief that adequate knowledge could be attained only by employing the scientific method of investigation and subjecting its theories to empirical observations."¹ One facet and consequence of positivist thought is legal positivism. It is a response to natural law theory, which rose to popularity as the preeminent source of law (whether it is natural, philosophical, divine, or reason-based), which gives legitimacy to laws created by humans. "A method of examining man-made law which has been set down by men for men or posited," is how legal positivism is defined. It also implies the study of law in its current form, as opposed to law in its ideal form. Legal positivism, as defined, encompasses a fairly broad area. Nevertheless, the purpose of this study is not to defend the entire spectrum of legal positivist concepts. A facet and a byproduct of positivist philosophy is legal positivism. It is a response to natural law theory, which rose to popularity as the preeminent source of law (whether it was natural, philosophical, divine, or reasonbased), which gives legitimacy to laws created by humans. "A method of examining man-made law which has been set down by men for men or posited," is how legal positivism is defined. It also implies the study of law in its actual form, as opposed to law as it should be."² Legal positivism, as defined, encompasses a fairly broad area. Nevertheless, the purpose of this study is not to defend the entire spectrum of legal positivist concepts. As will be evident in a moment, this will lead to the delimitation of the paper's area of concern. Legal positivism has come to meet different contentions each of which has its firm believer and advocates. Professor H.L.A. Hart³ list five different meaning of it in his *The Concept Of Law* to utilitarian, Bentham and Austin, it means three different contentions:

- 1) The claims that human beings are the ones who make laws
- 2) The argument that morality and the law—or the law as it is and should be, are inextricably linked
- 3) The argument that studying the meaning of a legal concept through analysis or study is (a) worthwhile, (b) distinct from historical research into the development or history of law, from sociological research into the relationship between law and other social phenomena, and from criticism or evaluation of the law, whether it be with regard to morality, social goals, functions, or other factors (known as analytical jurisprudence)³

This essay aims to refute the second argument, which holds that there is no essential link between morality and the law or between the laws as it is and should be. At this point, it is important to distinguish between the two since accepting one of the arguments does not automatically mean accepting the others. As a result,

¹ Lloyd ; *The Idea of Law*, Penguin 1976, p.106

² Finch, *Introduction of legal Theory* (20th ed.) London: Sweet & Maxwell, 1974; P. 41." ³Hart, *The Concept of Law*, Oxford: Oxford University Press, 1979. P. 253, hereinafter referred to as "Concept".

³ Hart, "Positivism and the Separation of Law and Morals" in Dworkin. *The philosophy of Law Revisiting Good Old Positivism*

although Kelsen accepts the second and third arguments, he rejects the first and instead develops his pure theory of law, which bases a legal system's legitimacy on a ground norm and flows in a pyramidal fashion.⁴

In contrast, Hart bases his theory of law on the union of main and secondary rules, all of which are identifiable by the rule of recognition and subject to change by the rule of change. But like

the utilitarian, he supports keeping morality and the law apart. The necessity for this distinction becomes clear if the confusion that normally results from “*the belief that the falsity of any one of these doctrines in the utilitarian tradition showed the other two to be false,*”⁶ is to be avoided. This sort of confusion is present in Obilade’s “*The Decline of Legal Positivism: A Critique of Two Tenets*”⁵ where he alternately addressed two distinct topics: Hart’s conception of law as a set of rules and the legal positivist’s argument that morality and law should be kept apart. Legal positivists themselves may have contributed to this tendency by indiscriminately incorporating these theories into one another. When opponents grasp this distinction, they will be able to see that legal positivism does not reject the idea that laws and legal conceptions are not developed for society or history, nor does it dispute that rights do not take precedence over aims (as utilitarianism contends. When opponents grasp this distinction, they will be able to see that legal positivism does not reject the idea that laws and legal conceptions are not developed for society or history, nor does it dispute that rights do not take precedence over aims (as utilitarianism contends). The next question is what is meant by the contention that there should be a separation of Law and morals? The law generally consists of prescriptive patterns of behaviour that is, “*models of conduct to which people ought to conform and by which actual behaviour is judged.*”⁶ This means that laws do not state fact situations but perceptions. To adopt the words of Lord Lloyd:

(A) rule of law that murder is prohibited and punishable by death does not state of fact as to the behaviour of persons subject to the law, who may continue to commit the acts described in the law as murder.. what the law does is to lay down standards or norms of conduct for citizens or officials and (usually) to indicate what sanctions should or ought (as a matter of Law) to follow a breach of the provisions. Such a law therefore does not state an facts as such but neither is it in any way refuted (as is physical law) by its breach or non-observance .⁷

Positivists also accept that moral statements are couched in ought propositions as well. They however, insist that only those precepts or “ought”, are law which has undergone the normal conditions for validity prescribed under any given system. Kelsen puts it is this way: In opposition to theological or natural law doctrine, the pure “Theory of law as a positivistic theory does not see the reason for the validity of positive law (manmade law) in a divine or

⁴ Kelsen, *General Theory of Law and State* (1946) ⁶Hart, note 3 at P. 18.

⁵ Obilade’s *The Decline of Legal Positivism: A Critique of Two Tenets* cited by Wendel

WB. “The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations” 2017;30(2):Canadian Journal of Law & Jurisprudence. 443-465. doi:10.1017/cjlj.2017.20 ⁶ Dias, *Jurisprudence* (London: Butterworth 1964) p. 352. ⁷ Lloyd, note1 at PP. 96-97.

natural order different and above the positive law. It rejects the view that a positive law is valid only if its content

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corresponds to a divine or natural law order, that is valid only if the positive law is just. It considers every positive law ... as valid without regard to its justice or injustice".⁶

Legal Positivism does not, and has never denied the connection between law and morals. In fact, it accepts the truism that many rules of law are based on morality. But it asserts that there is no 'necessary connection' between law and morals. Law needs not have a moral base. "A rule of law may be valid even if it is immoral."¹¹

The conflict with the natural law doctrine however, lies in the demand by that doctrine to add another separate test to formal validity in determining what law is. It is the test of morality. Thus, to natural law philosophers, "an immoral rule would thus not be 'law' however much it satisfies formal requirements."⁷ This additional test is what legal positivists reject. Austin puts the rejection this way:

the existence of law is one thing, its merit or demerit is another. Whether it be or be not is one inquiry: whether it be or be not conformable to an assumed standard, is a different inquiry. A law which exists is a law, though we happen to dislike it or though it varies from the text by which we regulate our approbation and disapprobation.⁸

We may illustrate the above with practical examples. In Nigeria, it may be considered morally right that every Nigerian be either a

Christian or a Moslem. However, there is as yet, no law making it compulsory that Nigerians must belong to any of these religious groups. Instead, a constitutional provision exists declaring Nigeria a secular State.¹¹ That provision is law and just because every Nigerian believes that Nigerians should either be Christians or Muslims will not make that provision illegal.

Thus, legal positivists will contend that the law is still that Nigeria is a secular state but every Nigerian remain free to hold unto his religious opinion. If, Nigeria however decide to adopt a law that is in line with their morality, and go ahead to amend the constitutional provision to the extent that Nigeria then becomes a theocracy or a state in which every citizen is required to be either a Christian or Moslem, then legal positivist will have no difficulty in accepting the naturalist already do that the law promote religion or corresponds with the prevailing morality.

One more issue that needs to be looked at before proceeding further is the issue of whether a legal system according to legal positivists' opinion, should comply with some moral standard. Almost without exception all legal positivists agree that a legal system must necessarily have a major of moral approval to ensure its survival. Kelsen or instance says: "As a matter of fact,

⁶ Kelsen: "What is a Pure Theory of Law" (1959) 60, Tulane L. Rev. P. 269 at 276 ¹¹Obilade, note 7 at p. 94.

⁷ Dias, note 8 at p. 353.

⁸ Austin, *The Province of Jurisprudence Determined* Library of Ideatedn., (1954) P. 184. ¹¹ S.10 of the Constitution of Nigeria, 1999. ¹⁵Kelsen, Note 5 at p. 27

each legal order corresponds more or less to a definite moral order prevailing within the lawcreating process.”¹⁵

Kelsen even goes further to insist that even his own theory of law must be ‘effective’ which is itself, an implication that it must, more or less, correspond with the value of the society. Bentham and Austin also believe that a legal order must have some element of moral worth. This is the driving force behind their formulation of the concept of utilitarianism. To Hart, a legal system, to survive, must have a minimum moral content. Further, his ‘rule of recognition’ must be accepted by the officials who apply it and must have a minimum of effectiveness. They all however insist that a legal system can, at any time, be said to exist even without its laws having a moral content. The question of how long it can exist and whether it merits existence they prefer should be kept separate from the recognition of its formal validity. They, it is contended however, will gladly join the natural law theorist in wishing that such a system does not exist but that if it does, it should be immediately aborted or corrected.

Separate of Law and Morals

The call for separation of law and morals has its reasons. R.W.M. Dias identifies three reasons: it says

The reason for excluding ethical considerations from the criterion of validity are (a) the practical necessity of being able to identify ‘law’ precisely at any given moment, (b) the process of reasoning and argument differ in relation to what ‘is law’ and what ‘ought to be law’ e.g. in providing, applying or distinguishing it. (c) the separation between the legal and moral ‘ought’ will enable the latter to serve as a standard by which to criticize the former.⁹

The first reason can be clearly illustrated by the foreign journalist who confronts his Nigerian journalist, a legal positivist will say, “oh yes, we have the Press Council Decree but it is not compatible with our morality as journalists. We have thus refused to enforce its provision which unlike other decrees regulating other professions, provides for a disciplinary tribunal consisting of non-journalist members to be appointed by the government.” This, the positivist insists is surely better than refusing to accord the decree, the little ‘law’. The need to precisely identify law, is made clear by Dias, when he says “otherwise, the task of lawyer in advising client and of teachers in instructing their pupils would break down.”¹³ To these tasks, one may well add that of a judge in finding and applying the law.

This leads to the next reason. If only morally just laws were law, how is the lawyer to prove law before the Court? Whose standard should be used to determine morality?: That of the judge, the lawyer himself, or the client? Will the lawyer not be contradicted by the other side projecting its own opinion of morality? Thus, there is a need for precision and universality in a definition of what is law.

Time was, when Nigerians convicted of drug offenses were executed. This was opposed by Nigerians vehemently until the Babangida regime abolished the death penalty for drug

⁹ Dias: “The value of a value study of Law” (1965) 28 *MLR*. 397 at 415 ¹³

Dias: Note 12 at p. 355.

offenses. Nigerians opposed the law but remained complacent over providing for the death penalty for murderers and armed robbers because, there was a moral standard used to measure the law providing for the death penalty for drug offenses to which it fell short of but which the law providing for the death penalty for the offenses of murder and arms robbery passed. If the law had it self been appropriated into an ethical standard, to which ethical standard, would it have been compared with then? There would have been none. It may be necessary to quote Lord Lloyd Dennis here:

The great advantage claim for this method was that it made for clear thinking distinguishing between law and moral obligation. Where these conflicted to a decisive degree, then the citizen could bring the whole weight of moral argument to bear to promote a change in the law.¹⁰

An illustration with the position in formal apartheid South Africa, will surely be apposite here. It would be amore reasoned argument to accept that the country's apartheid law were legal but immoral than to contend that because they offend against morality, they were illegal.

Another argument in favour of the legal positivist position is that it removes the veil of sanctity from the law. A claim that law is morality, may eventually lead to the belief that in every law, there is morality and that the law is thus sanctified and thus put above criticism. One of the greatest English natural law layers, Blackstone even fell into this error. After stating in his *commentaries in the law of England*, the natural law position on positive law, he went on to justify all law as being the product of absolute reason. Thus, "Blackstone appear to conclude that a positive law or legal institution give right to no reason for criticism, so long as the law of nature does not have anything to say against it. Any test of moral worthiness therefore to which he might appear to submit part of the positive law turns out in reality to be totally vacuous."¹⁹ Contrary to this position, taken by Blackstone, Bentham and his fellow legal positivists are in fact known to have through censorial jurisprudence, fought for a change of the law for the happiness of the greatest number.¹¹ One further reason for separation of law and moral is the question of the application of the law itself. In applying the law, whose sense of morality should the judge adopt?

It is met that it should declare that in so far as the law failed to comply with what he considers moral, he should proceed to set it aside. According to Lord Lloyd, should he (the judge) "declare himself ex-cathedra as an authoritative exponent of natural law and to decide that its decrees compare him to ignore his municipal laws?"¹⁶ This being impracticable, legal positivists will expect him to sit in judgment and apply the law as it is. This is because of two reasons. (a) As pointed out earlier, standards of morality differ for as Kelsen said:

"each legal order corresponds more or less to a definite moral order prevailing within a ruling group whose interests determine the law-creating process and hence is considered from the point of view of this moral order as just. But at the same time, it

¹⁰ Lord Lloyd, note 1 atp. 101 ¹⁹Finch, note 2 atp. 39.

¹¹ Morrison, "Some Myths about Positivism" (1958) 68 *Yale Li.* p. 230.

¹⁶ Lord Lloyd, note 1 at p.104.

may be more or less contrary to a moral order prevailing within other groups even of the same society for which the legal order is valid.¹²

- (b) The judge is in any case appointed and paid to apply the law as it is, not to indulge in or to apply his speculations as to systems of higher law. A judge who therefore feels that the law as it is contradicts his own sense of justice, has the choice of either resigning or applying the law as it is, subject to situations where he can exercise discretion.

Rebuttals to the Doctrine

As was previously said, positivism is a response to the natural law hypothesis. As a result, natural law theorists, have heavily criticized it. We shall now take these criticisms into account. Obilade's critique, is the first to be taken into account. Obilade challenges the concept of law put forward by legal positivists. He claims that the line separating morality and law, may be deceptive, especially when it comes to legal regulations that are based on moral precepts. He continues, saying that "the prerequisites that must exist prior to what is known as Except in an abstract sense—that is, to describe the existence of law—the positivist understanding of law is not helpful in explaining the legal endeavor. ”¹³

It is argued that the divergence is genuine, not just abstract and illusory. Legal positivists concur that the law may not be value free in and of itself, as Oblade himself noted. They also concurred with him that, "when deciding what to declare to be law, judges sometimes consider what the law ought to be." However, it's also true that they take into account the facts when deciding what should be made into legislation. This in no way equates the law with the reality. Thus, the law is that which the court finally declares to be law. Until it is overturned, the final ruling is enforceable even if it was made in an unethical or flawed manner.

The point could be demonstrated with a real-world example. At the warn I Area Customary Court, two watchmen, identified as accused A and B, and a lady were charged with theft and receiving stolen merchandise with knowledge that it was stolen. The complainant had a close friendship with the court president, who was also the accused woman's brother's professional colleague and close friend. Accused A admitted in their evidence, as did the woman, that she received the stolen table from Accused A in return for garri. The sole dispute that existed was that the woman went to collect the table herself whereas the lady maintained that Accused A delivered the table to her at home and that she was unaware that it was stolen, from the complainant's property. Nevertheless, they both testified in open court that Accused B was unaware of the theft.

The court sentenced accused A and B to N300.00 fines or three years in prison; despite the fact that the woman's offense was more serious, the court cautioned and released her on the tenuous grounds that the evidence used to convict her was her own. The court's decision to find all three accused—including the seemingly innocent accused B—was reportedly influenced by the complainant. As a result, she was an honest witness. This is an obvious instance of immorality being used to dictate the law and morals

¹² Kelsen, note 5 at p. 273

¹³ Obilade, note 7at p. 108.

In addition, the abuses of authoritarian governments, have added insult to injury. The accusation is that legal positivism promotes and shields tyranny by the state. In actuality, Obilade took this post. To address this argument, it is important to emphasize that legal positivism, by putting the rule of law under a formal validity test, actually promotes the rule of law rather than tyranny. Furthermore, their claims support the preceding observation that people detest unjust laws. The fact that almost any regime may be justified using any theory or legal school as support is another important point to consider. Because of this, there are despots who claim to be the earthly embodiment of God or to possess divine laws that supersede all other laws with the laws of God to which none else can claim superiority.

Xunwu, Chen. A Chinese Scholar speaking about the relationship between natural and positive law stated thus:

A key tenet in Han's philosophy is his concept of the relationship between positive law and the law of nature or natural law. Contrasted to how it is often labeled by some scholars, Han's legalism is not a strong form of legal positivism. It may be an overstatement that the Archimedean point of Han's philosophy of law is the concept of the universal Dao—the law of nature. Still, a salient feature of his legalism is that positive law necessarily reflects the natural principle of things that must be commensurable to the universal Dao. Admittedly, Han Feizi advocated that positive laws were as they were publically published in book or other forms and were conventional in nature; their public publication not only announced their authority and validity, but also defined the totality of their existence.²⁴

This sounds like using natural law principles to explain positive law. Understanding the nature, foundation, source of legitimacy, and purpose of positive laws requires an understanding of the subject matter of the link between positive law and natural law. Its stock value is increasing these days due to the intense discussions around the authority, reason, and validity of global justice. We return to the subject matter with the simultaneous appeals to international law and natural justice, as well as the legislation in those arguments. The question of a normative defense of the Slavery for example, is a deeply complex and multifaceted institution, and has been the subject of intense scrutiny and criticism from various philosophical and ideological perspectives. Two such approaches: positivism and naturalism, offer distinct lenses through which to analyze and critique the institution of slavery.

A positivist perspective on slavery would typically emphasize the importance of objective, empirical observation and analysis. Positivist thinkers might argue that the criticism of slavery, should be grounded in quantifiable data and verifiable facts, rather than abstract moral or ethical considerations. They may advocate for the use of rigorous social scientific methods, such as surveys and statistical analysis, to understand the economic and social impacts of slavery. From this viewpoint, the critique of slavery would be based on demonstrating its inefficiencies, contradictions, or negative consequences, rather than making moral

judgments.¹⁴ For instance, a positivist critique might highlight the economic costs and logistical challenges of maintaining a slave-based labor system, or the ways in which slavery undermined social stability and productivity.

Another objection, which is mostly based on Dworkin's rights theory, holds that legal positivism cannot handle difficult circumstances in judicial decision-making, such as those in which there is no relevant norm or when competing principles or policies exist. He distinguishes between policies and principles as social objectives (what the utilitarian would want to promote through legislation). For him, policies are always subordinated to ideals. When principles clash, the one that best protects an individual's rights is chosen, and in the absence of a relevant regulation, principles are applied. Rules are "applicable in an all or nothing fashion," in his opinion. When a rule's facts are disclosed, either the rule is legitimate, in which case the."¹⁵

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Views based on standards like "reasonableness," "good faith," and fairness rather than facts, are invalid as principles because they are not consistent; that is, the outcomes of any given application cannot be repeated because the standards they are based on cannot be independently verified through empirical observation. As a result, using them requires assessing each case's specifics in light of the anticipated value. According to Dworkin, the legal protection of individual rights, is based on three ideasnamely, the "criterion-dependent", the "natural" and the "interpretative"¹⁶Contrary to the legal positivist belief that the judge is not exercising discretion, such rights are already in place between the parties and the court. It is his responsibility to uphold the parties' implied rights. Moreover, he claims that these valueladen principles or standards are even before their application by courts, deemed to be part of the law.

Regarding the first argument, it is important to keep in mind that all rights are legally protected since, in Bentham's words, "a national right is a son that never had a father and a right was the child of law." This is the rationale behind the inclusion of fundamental rights in the majority of contemporary constitutions. They are acknowledged as legal rights and judge-made even in England.²⁸Moreover, when the court renders a morally repugnant decision such as the one previously mentioned, it is definitely not just stating the parties' latent rights. It is hence the positivist's satisfaction that the judge may apply the law in cases where there is a rule of law. The judge's decision, which is final unless it is overruled by a legislation or a higher court in the legal hierarchy, applies where there is no clear law on the subject.

Regarding the second argument, it is true that moral principles and standards are followed, which equates morality with the law. Julius Stone has disagreed with Atiyah's assertion that the courts no longer uphold principles or regulations. Rather, the court uses pragmatism

¹⁴ Nazmul, Hasan."Positivism: to what extent does it aid our understanding of the contemporary social world?"*Quality and quantity*, 201

¹⁵ Dworkin "The Model of Rules" (1962) 35 *Chicago L. Rev.* 14.

¹⁶ Pildes, Richard H. "Dworkin's Two Conceptions of Rights." (2000) 29 1 *Journal of Legal Studies*, pp. 309–15. JSTOR, <https://doi.org/10.1086/468073>. Accessed 8 Sept. 2024. ²⁸See A.V. Dicey, *supra*.

(principles) to provide both parties in court fair treatment without establishing any binding legal rules. Stone believed that the court's application of these pragmatisms is just defining and progressively modeling potential future regulations. Thus, whatever is being presented, is for example, the practical substance of the "good faith" criterion has been refined to the point of rule by court precedent. Accordingly, obtaining an interest in "good faith" under contract law denotes that the buyer made their purchase knowing nothing of any title defects or earlier interests held by the vendor. Furthermore, the majority of principles now have legal definitions that diverge from their common or moral meaning. For example, the definition of "malice aforethought" under criminal law, is very different from what a moral person would associate with the term. Therefore, while malice does not need to be demonstrated in order for the idea to be used to murder, those who uphold moral principles, may need evidence that malice existed prior to suggesting killing someone or punishing them.

Lon Fuller is a significant opponent of the idea that morality and the law should be kept apart. According to Fuller, loyalty to the law is drawn by a particular belief in the sacredness of the law. He distinguishes between two standards for morally acceptable rules, which he referred to as "good order": internal and exterior morality. The rules must be obeyed and respect is the outward morality. The morality of laws themselves is a prerequisite for these considerations. He enumerates the following as the components of internal morality: Laws ought to be broadly applicable, appropriately enacted, prospective rather than retroactive, simply understood, consistent throughout time, and consistent with official actions and legal requirements. He views these as the prerequisites.¹⁷¹⁸

They're wonderful agreements, and most civilized nations' legal systems do, in fact, fulfill the most of the requirements. The argument that most nations' constitutions impose limitations on the method and manner of legislating to guarantee that laws be passed in a way that upholds moral principles inside the nation, is another one. Though they also hold that disobedience cannot compromise the formal legitimacy of a law, legal positivists certainly support these goals. For example, a person facing allegations cannot use the defense of ignorance of the law since the law has changed.

It appeared as though Fuller himself accepted the possibility that a legislation may remain in effect even if it did not meet his own moral standards. It seems that he accepts that anybody who wrongly applies the terrible rules of Nazi Germany in post-Nazi Germany may be subject to penalties under a regulation that becomes effective retrospectively.³⁰ Nonetheless, it is evident that the bad laws themselves were accepted as laws since a law had to be established to proclaim those laws to be invalid.¹⁹ A moral argument for the legislation may also be guaranteed by constitutional provisions governing legislative process, but they do not in and of themselves create one. For the reason that a law might be unjust even if it satisfies all of Fuller's standards.²⁰ Ultimately, the legal positivist stance, is stronger than the natural law

¹⁷ Fuller: "Positivism and fidelity to law A Reply to professor Hart" (1958) 71 Harv. L.R. rev.

¹⁸ Revisiting good old positivism ³⁰See Fuller: op. cit.

¹⁹ Dias, note 8 at p. 521

²⁰ Collins v. Minister of Interior (1957) 1 A. 552 (A.D) ³³Hart, note 3 at p.24.

theorist's. Thanks to the issue "whose justice?" How far does the law have to go in order to guarantee justice? Based on his belief that survival is universally accepted as the value of human existence, Hart has proposed a minimal moral standard for legislation.³³ As was previously said, Professor Lon Fuller believes that laws have inherent morality. What additional moral argument has to be included in the legislation than these? It is expected that opinions will vary inside each nation as well as between nations. So the question is, whose sense of fairness and whose moral code should take precedence? Which belongs to the judge, the legislature, the intellectuals, the impoverished, or the people's natural ruler? For this reason, according to Kelsen, "there is no justice, but many different and even contradicting the idea of justice," so the formulation of law must not entail any value judgment."²¹

Conclusion

The natural law theorist's and legal positivist's respective perspectives on law do not appear to be incompatible. This is due to the fact that, as Dias has stated, natural lawyers acknowledge that there will always be a difference between the law as it is and the law as it should be, and that this difference will serve as a benchmark for assessing and criticizing positive legislation. Perhaps, as Dias went on to say²², Whether a law that is ruthlessly indifferent to justice and the well-being of people may continue to be in place is a central question in Fuller's critique of the separation of religion and law. Natural law theorists will undoubtedly have legal positivists on their side when responding to this query.

²¹ Kelsen, note 5 atp. 273.

²² 27 Dias, note 8 at pp. 419-20.