What is positivism in legal analysis?

Preprint · May 2021

CITATIONS
0

READS
28

1 author:

Damian Wayne Williams
University College London
22 PUBLICATIONS **3** CITATIONS

SEE PROFILE

DAMIAN WILLIAMS

17 May 2021

What is positivism in legal analysis?

Legal positivism emerged in response to natural law, as an indictment on the latter's metaphysical predilections. Natural law dominance created a yearning for empiricism, or even a 'hard scientism' in approach to understanding socially constructed phenomenon, including legal praxis. From its Benthamite origins, it has since been developed, with recent, spirited debate still undertaken among towering legal scholars. Although its validity is contested to some, it remains as an analytic point of view of the law. Yet, within its design, there is quite a bit of subject matter put out of view of the positivist, even though it is observable phenomenon within the sphere of legal praxis. This creates a void in which certain problems are unsolvable by the theory of law embodied in positivism. Rather than adjust the theory, the positivists either designate the void as the province for legal decision-making based on an internal morality in hard cases; or it criticises systems that do not strictly adhere to the positivist account as crude in the case of the international legal system. What follows is an account of HLA Hart's brand of positivism, as it has remained dominant and perhaps the easiest to understand. I then identify subject-matter put out of view of positivism, with reference to Kelsen's account of 'authority'. I conclude that the positivist project is incomplete given its limited account of decision-making in hard cases and the international legal system.

Legal positivism is the view that law is socially constructed,[1] and that it may be understood through the observation of social facts.[2] It posits that law can be understood without reference to moral criteria.[3] That is, it separates what law *is* from what it *ought* to be morally,[4] as any particular valid legal system is "closed," and logically deducible from predetermined rules.[5] It also posits that the content of the law is not morally constrained, save for in hard cases where there is no clear law to apply and judges have discretion to decide on *extra-legal* bases.[6] Rules that underpin the legal system are those that are accepted as 'law-making' by officials of the

[1] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th ed, Oxford University Press, 2017)
[2] ibid
[3] ibid 72
[4] ibid 73
[5] ibid 72
[6] ibid 94

system.[7] Ambiguities in the law are not due to an unobservability of social facts, but instead because language is of a necessarily "open texture" nature, capable of multiple meanings and requiring some level of linguistic interpretation.[8] Thus, certain outlier cases where it is unclear whether a certain meaning of language applies will occur.[9]

This variability results in a state of affairs where not every case can be determined by predetermined rules.[10] Rules are either primary or secondary: primary rules are those established by the designated manner within a given legal system; these are operationalised by secondary rules of change, adjudication, and recognition. The existence of a legal system is predicated on general adherence to primary rules and reliance on secondary rules by system officials.[11] In other words, secondary rules are validating rules of primary rules.[12] The rule of recognition is said to occur from an "internal point of view," of the law,[13] and is the singular test of a legal system's validity.[14] It creates the bindingness in primary rules that are compliant with it.[15] While it is normative in that its nature establishes the manner in which the system *ought* to operate,[16] it is also social: its existence arises from system officials' use of it as a validity criterion, and its acceptance as a global standard to all adherents of a legal system in question.[17] It is not moral however.

The rule of change allows for malleability within the law by conferring power to officials of the system to create and modify it, e.g., the Parliament;[18] the rule of adjudication confers power to compel rule compliance separate from rule validity, e.g., the Judiciary.[19] Both rules are legitimately operationalised by secondary rules that regulate change and adjudication;[20] and are contingent, in that their validity—as are all rules—are dependent upon conformity with the rule

---

[7] ibid 96
[8] ibid 97
[9] ibid
[10] ibid
[11] ibid 98
[12] Scott Shapiro, 'What is the Rule of Recognition (and does it exist)?' [2009] 181 Public Law & Legal Theory Research Paper Series, 4
[13] *Wacks* (n 1) 98
[14] *Shapiro* (n 12) 4
[15] ibid 8
[16] ibid 4
[17] ibid
[18] ibid 6
[19] ibid 8
[20] *Wacks* (n 1) 99

of recognition.[21] That is, the rule of recognition compels those with conferred power to compel others to adhere to rules in exercising that power.[22] It is fundamental in that its validity is unquestionable, but the positivist does not place its origins in a pre-existing moral precept, but instead in it being globally adopted and practiced by those empowered to undertake an 'internal point of view' of the law[23]—a socially constructed rule.[24]

This does not strip away its normative content, but separates the norms of the system from what is considered moral norms, and does not make claims on the nature of morality that may be relevant. Rather, it is normative in that it establishes the manner in which rules maintain validity, and the manner in which system officials must act to retain legitimacy relative to the system.[25] It is a social fact because its existence is due to it being practiced, though it lends validity to other rules, which may or may not be practiced.[26] Thus, a legal system's validity is not predicated on its effectiveness in an outcome determinant sense; rather a system's validity is predicated on its conformity with the rule of recognition.[27] An ineffective primary rule is capable of being perfectly valid under the positivist view.[28]

What about 'hard cases', where there exists no clear rule to apply or where existing rules appear vague? According to Hart, here is where Judges employ discretion to decide what the law is;[29] indeed, it is where the positivist believes existing law has run out,[30] requiring judges to engage in the creation of law.[31] The implication is that judges employ internal moral justifications so as to resolve disputes in 'hard cases'. This does not present an encroachment of morality onto law, but rather, by virtue of judges employing extra-legal reasoning in hard cases, the practice is said to be socially constructed.[32] This use of extra-legal means to decide difficult

[21] ibid
[22] ibid 99-100
[23] ibid 100
[24] ibid 101
[25] ibid
[26] ibid 102
[27] Ibid 103
[28] ibid
[29] Ibid 104
[30] Ibid 104-105
[31] ibid
[32] Ibid 105

disputes are valid despite not being sourced in primary law, so long as they do not violate other, primary sources of the law.[33]

And what about 'international law'? The positivist view is that international law lacks adequate legislative and judicial structure to give rise to a developed legal system; this does not negate the existence of international law, as it is plain that it exists and is practiced. However, it is underdeveloped, and therefore primitive in comparison to domestic legal systems. Hart doubted that there existed any identifiable secondary rules in the 'international legal system',[34] including an applicable rule of recognition.[35] Thus, while international law appears to comprise of a set of rules, there is yet to emerge a 'closed, rational' legal system.[36] The present system is a shell of a valid legal system, and is thus far not yet fully formed.[37] It maintains some sense of rudimentary positivist validity in that it is separable from notions of 'international morality'.[38]

As positivism takes the formal view of law, it neglects consideration of the values underpinning legal rules or reasons why a legal system is perceived as valid beyond its existence from practice.[39] Further, the authority to compel adherence to law is said to be 'neutral', akin to the rules of a game—devoid of questions of morality. Yet, in hard cases, it is accepted that judges employ morality to decide disputes. This seems to suggest that while it is claimed that morality has no necessary connection to law, there is a large body of legal practice in which morality is the basis for consideration. This is curious, as the positivist seems to ignore this moral content, despite it manifesting as 'practice' in the same sense that the form of legal practice is claimed to.[40]

Further, positivism does not take into account observable realities that emerge out of a legal system, such as interprofessional relations between system officials, interinstitutional relations between the legislature and judiciary, or democratic practices that give rise to legal systems.[41] Yet, these phenomena are observable, emerge out of practice, and are therefore social facts. Further, positivism maintains a blind eye to deducible "moral conclusions" that emerge

[33] Michael B Williams, 'Assessment of the Dworkin-Hart debate' [2005] 5616 University of Montana Graduate Student Theses, Dissertations & Professional Papers, 16
[34] Mehrdad Payandeh, 'The Concept of International, Law in the Jurisprudence of H.L.A. Hart' [2011] 21 EJIL 975
[35] Ibid 977
[36] ibid
[37] Ibid 975
[38] Ibid 976
[39] *Wacks* (n 1) 41
[40] Ibid 42
[41] ibid

from an operationalised legal system.[42] Out of a legal system, an underlying *telos* is suggested: to subject human conduct and relations to general rules.[43] This in turn amounts to an "internal morality" of a legal system.[44] The pure positivist's antipathy towards morality appears to prohibit consideration of or acknowledgement of such a morality's existence.

Positivism also offers an account of consistent practices that amount to the inherent authority within a system, but does not speak to why or how system officials perceive that authority constituted in them.[45] This suggests an exceedingly thin view of the authority inherent in law, despite it being a power wielded by system officials so as to effectuate operation of the relevant legal system.[46] Broadly, positivism also ignores myriad social and political factors implicated in the establishment and operation of a legal system.[47] This seems to necessitate a very narrow view of a legal system's origins, where social and political factors may be most implicated. This is not to say that positivism is invalid for a limited account of a legal system's origins, but again it appears to ignore quite a bit of content in the search for a general theory of law. This seems to arise from a fetishization of distilling systems into a ubiquitous maxim.

Early positivists placed origins of inherent power in the sovereign; Kelsen replaced this with the *grundnorm*.[48] Yet the power flowing from either is neither uncontested nor subjected to scrutiny in positivism. By this, positivists appear to take originating power within a legal system, save for categorical 'authority', for granted. Similarly, Kelsen places great import on the sanctionability of legal rules to account for its authority; however, this does not account for the existence and variability of laws that impose duties without sanctions or sanctions without duties.[49] It also defines a system's origins myopically: the fact of a system's emergence into existence factually determines system operation in practice.[50] There is a peculiar circularity to this, and it ignores a necessity that a *grundnorm* be totally engrossing, all-encompassing, and ubiquitously flexible to accurately reflect all purported valid law in retrograde.

---

[42] ibid
[43] Ibid 43
[44] ibid
[45] ibid
[46] ibid
[47] Ibid 126
[48] Ibid 125
[49] Ibid 110
[50] Ibid 125

This could be seen differently from a socio-historic viewpoint, which may better account for a changing *grundnorm*, but is nevertheless kept separate in the positivist endeavour. It follows from the pursuit of a *pure*, strict conception of a legal system's logic, that the *grundnorm* must maintain accuracy in the face of later-emerging rules, whose validity presently appear globally accepted as legitimate by a community. Also, in Kelsen's conception of the *grundnorm*, there is little account for policy aims or principles[51]—a substantial portion of the law in fact, yet unaccounted for in positivism.[52]

In this regard, it is suggested that positivists focus on form without regard to content, again suggesting an incomplete view of law-in-fact, as is socially practiced and therefore amount to social facts. Yet, it is plain that form and content are interdependent. What may reside in content may in fact be moral in nature, which undermines the positivist endeavour. There is an alternate view that there exists a "diffuse" morality that influences decision-making, and therefore remains in artifact form at least, within law.[53] Such a diffuse morality would pre-exist decisions on the creation of a legal system, and is therefore put outside of considerable phenomena by positivists. Similarly, positivism does not consider whether certain rights of the individual pre-exist a legal system, as this would undermine the view that rights emerge out of a legal system in practice so as to amount to law-in-fact.[54]

For all the scientism encompassed in positivism, it appears to employ faith in an exceedingly "rationalistic" view of human behaviour.[55] This may provide a sufficient device for holding the 'political' in suspension while noting the characteristics of a legal system, but it nevertheless adopts a fictional account of the political as it occurs in fact relative to the formation of law. The certainty that this provides is illusory, given the realities of political inputs that go into establishing legal systems and rules.[56] This is not to declare political inputs legitimised, but to point out that its existence is put out of the view of positivism. This suggests an ideology within positivism towards 'hard' scientism—obsessive controlling for variables not to be accounted for or designated as irrelevant. Yet, in the realm of social facts, variability that manifests in behaviour (or 'practice') is observable and *ought* to be undertaken in an established

[51] Ibid 126
[52] ibid
[53] Richard Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), 5
[54] Ibid 6-7
[55] Ibid 4-5
[56] Ibid

way when devising a general theory. This again at once suggests dispensing with both factual and normative content so as to adhere to a predetermined tenant of positivism rather than an approach for observing a system, to include all salient features that demarcate the system as a legal system.

At a minimum, the above suggests that positivism is blind to different complexities that arise out of the operationalisation of any given legal system, suggesting that the approach to legal understanding remains underdeveloped and incomplete in giving a full account of law. These include the values that underpin legal rules; judicially-employed moral viewpoints in deciding hard cases; interprofessional and intra-institutional relations; a legal system's democratic origins; deducible moral conclusions arising out of an operating legal system; telos of legal system design and its resultant internal morality; constituted authority; social and political factors; *grundnorm* fallibility; policy aims and principles; the interdependency of moral content with legal form; pre-existing rights; political inputs into legal systems; and, behavioural variability. Any problem arising from legal practice and requiring consideration of the above, viewed in the positivist sense, seems unsolvable when employing a positivist approach. This seems to suggest quite a bit of material put out of view towards establishing a general theory of law.

Key among the problems above is that positivism does not adequately address the resolution of ‘hard cases’ or account for the system of international law. These seem devastating to the positivist endeavour because the law in large part resides in ‘hard cases’ and matters of international law. Yet, in hard cases, positivists seem to yield to leaving judicial discretion unexplained where there is no clear predetermined rule for a judge to apply. Rather, it is suggested that within that discretion, morality is part of legal decision-making, and because it occurs in that instance, it is a practice and therefore a social fact. Yet no analysis follows on the content of morality employed in judicial decision-making. This does not occur for lack of a want of explanation, but rather due to a strict adherence to a system intent on stripping away moral content from analysis—even in face of a deficient, incomplete analysis. The law does not seem to operate this way in hard cases. In a very real sense, judges, considering all relevant circumstances, render opinions based on precedent, even where precedent is departed from. Perhaps there is an underlying legalism or an internal moralising for purposes of deciding, but to a certain extent this remains outside of view to all. There is simply little empirical evidence for

its existence; rather, there are theories, e.g., rational choice, for explaining why diverse judges decide the way they do with little evidence to support them.

For example, what if deep down within a judge, s/he makes decisions according to chance. It does not follow that an opinion written in the language of precedent, taking careful note of the law's development, and accounting for decisions historically made would successfully suppress the use of chance to decide legal disputes (save for when a well-reasoned opinion is chosen by chance). That judge must answer to other judges and to future law. Therefore, an account for conformity imposed on judges that arises out of system officials being part of a group is also absent in positivism.

Similarly, the positivist view does not adequately account for the international legal system. The positivist view is that it bears crude, quasi-institutional forms typical to a legal system because the power to compel is overridden by the primacy of state sovereignty. Yet, the international legal system does in fact exist in practice—a social fact. Further, it has developed precedent, and customs and conventions have been well developed into various treaty articles and codes. Positivism's accounting of law's coercive nature (or 'authority') seems to require strict adherence so as qualify as a legal system as though it pre-exists law, rather than being devised as an observational device for identifying operationalised legal systems. This inevitably presents the problems of uncertainty, variability and complexity not foreseen within the closed system of positivism, to be left beyond positivism's remit, therefore rendering associated problems beyond comprehension within positivism, save for labelling these problems as peripheral or outlier. Yet, as suggested above, hard cases and the international legal system can hardly be described as peripheral or outlier. Therefore, problems presented with hard cases and international law are beyond that which positivism addresses.