

A Comparative Analysis of Legal Positivism and Natural Law Legal Theories

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Abstract

This paper conducts a comparative analysis of legal positivism and natural law legal theories. In accomplishing this, the researcher explores fundamental legal theories such as H.L.A. Hart's Legal Positivism, Hans Kelsen's Pure Theory of Law, John Finnis' Natural Law Theory, and Lon Fuller's Natural Law Theory. The researcher explores consistencies of the legal theories with the biblical perspective of law, as well as inconsistencies of the legal theories with the biblical perspective of law. The researcher also comments on the application of the legal theories to the analysis of current legal issues.

Keywords: Jurisprudence, Legal Positivism, Legal System, Natural Law Theory, Pure Theory of Law.

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INTRODUCTION

Legal theories have provided important foundations from which to understand both the development and application of law in legal systems and institutions. Professor Roscoe Pound proposes two chief elements of law: the enacted or imperative element and the traditional or habitual element, and comments that the enacted or imperative element is both the modern element and the predominant form of law today [1]. The power of the state or sovereign is the basis of the authority for the enacted or imperative element, while reason and conformity to ideals of right create the basis of power for the traditional or habitual element [2]. The former can be equated to legal positivism while the latter can be equated to natural law theories. This dualistic approach to understanding the evolution and development of legal theories has been used by jurists to give both meaning and value to law, as well as to foster ideological positions on the meaning of law and what law ought to be [3].

While Professor Roscoe Pound has taken such a simplistic approach to categorizing and explaining the philosophy of legal theory based on the two chief elements of enacted or imperative element and the

modern element [4], Professor Brian Bix has made it quite clear that legal theory has been made difficult to understand because the different theorists tend to focus on answering different questions and responding to different concerns [5]. The complexity of legal systems, making a theory of law capable of capturing only a portion of facts, has also contributed to the perceived difficulty in understanding and appreciating legal theories [6]. Legal philosophy or legal theory or jurisprudence has grown dramatically in the last century with hundreds of scholars and theorists from diverse fields adding to the body of knowledge and attention [7]. However, two categories of legal law theories that have been extraordinarily important and significant in explaining and understanding modern legal systems are legal positivism and natural law theories, both constituting for legal scholars and jurists, ideologies and philosophies of law or jurisprudence. We will explore these philosophies in the next immediate two sections and several pages of this paper.

¹ Roscoe Pound, *Theories of Law*, 22 The Yale Law Journal 114, 150 (December 1912).

² *Id.*

³ Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 Columbia Law Review 681, 709 (1951).

⁴ Roscoe Pound, *Theories of Law*, 22 The Yale Law Journal 114, 150 (December 1912).

⁵ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

⁶ *Id.*

⁷ Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (1986).

Legal positivism

Leslie Green states that “Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits” [8]. Green accredits its formulation to English jurist John Austin (1790-1859) [9], who writing in 1832 argued, “The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry” [10]. Green argues that legal positivism has an extensive history with vast influence and [11], and John Finnis believes the term was introduced in political and legal thoughts of the medieval era [12]. Among the philosophers credited the most for their contribution to legal positivism are Hobbes, Hume, and Bentham whose writings and ideas constitute most of Austin’s developments on legal positivism [13]. Predominant in modern conception of revised legal positivism since these philosophers are the views of Austrian jurist Hans Kelsen and analytic philosophers of law, H.L.A. Hart and Joseph Raz [14].

According to Professor Brian Bix, legal positivism asserts that law needs to be kept separate from moral judgement and must be an objective task [15]. In other words, legal positivism asserts the need for a morally neutral theory of law that is plainly descriptive; the question of what law is, is separate from analysis of what law ought to be. This was fully asserted by John Austin in *The Province of Jurisprudence Determined* (1832) [16]. Professor Bix states that legal positivism asserts that social institutions can be studied objectively, free of bias or ideology [17]. In other words, law is still valid and a legal system is still a legal system without the subjective underpinnings that those opposed to legal positivism and its banner of empiricism would advocate. Legal positivists believe that “Law constitutes

a domain of inquiry separate from morality in a manner analogous to the distinction between fact and value” [18]. When it comes to legal positivism, two of the most fundamental theories are H.L.A. Hart’s Legal Positivism and Hans Kelsen’s Pure Theory of Law.

H.L.A. Hart’s Legal Positivism

It is believed that H.L.A. Hart’s legal positivism emerged as a reaction to the command theory of law mainly advocated by John Austin and Jeremy Bentham, and which interpreted law as a sovereign’s command to subjects. Hart saw sovereigns as subjected to legal restraints and the reign of sovereigns as transient, and the threats backing commands to legitimize them as weaknesses of the command theory, which certainly created gaps and questions of discontinuation in law and legal systems [19]. Hart’s major problem with Austin’s command theory seems to be in the necessity to distinguish pure power from institutions and rules, and the need to understand rules and habits. Hart hence advocated a theory embedded in the need to account for participants’ understanding of social institutions and practices critical to any system, and therefore, Hart describes his work as “an essay in descriptive sociology” [20]. H.L.A. Hart believes that the authority of law is social [21]. For Hart, ultimate legal rules spell social norms [22]. Leslie Green elaborates on Hart’s conception of law:

For Hart, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced. Law ultimately rests on custom: customs about who shall have the authority to decide disputes, what they shall treat as binding reasons for decision, i.e. as sources of law, and how customs may be changed. Of these three “secondary rules,” as Hart calls them, the source-determining rule of recognition is most important, for it specifies the ultimate criteria of validity in the legal system [23].

Hart views the legal system as having some valued normative obligation necessitating obedience or conformance from individuals. In other words, individuals act, obeying the rules of law because they feel they ought to do so, and not only out of fear of consequences of threats. Hart argues therefore, that law

⁸ Leslie Green, *Legal Positivism*, Stanford Encyclopedia of Philosophy (Jan. 9, 2003, 5:00 PM), <https://plato.stanford.edu/entries/legal-positivism/>.

⁹ *Id.*

¹⁰ W.E. Rumble (Ed.), *The Province of Jurisprudence Determined – (1832) John Austin* 157 (1995).

¹¹ Leslie Green, *Legal Positivism*, Stanford Encyclopedia of Philosophy (Jan. 9, 2003, 5:00 PM), <https://plato.stanford.edu/entries/legal-positivism/>.

¹² John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law* (Robert P. George, ed., 1996).

¹³ Leslie Green, *Legal Positivism*, Stanford Encyclopedia of Philosophy (Jan. 9, 2003, 5:00 PM), <https://plato.stanford.edu/entries/legal-positivism/>.

¹⁴ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

¹⁵ *Id.*

¹⁶ John Austin, *The Providence of Jurisprudence Determined*, Lecture V (W.E. Rumble, ed., 1995).

¹⁷ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

¹⁸ Alexander Passerin d’Entreves, *Natural law: An Introduction to Legal Philosophy* 6 (2017).

¹⁹ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

²⁰ *Id.*

²¹ Leslie Green, *Legal Positivism*, Stanford Encyclopedia of Philosophy (Jan. 9, 2003, 5:00 PM), <https://plato.stanford.edu/entries/legal-positivism/>.

²² *Id.*

²³ *Id.*

is characterized by “multiplicity” because there are existing, rules that confer power, rules that impose duty, rules that apply directly to citizens, and rules governing the operation of the rules system itself. Furthermore, there are also rules of change, rules of adjudication, and rules of recognition [24]. Hart’s “rule of recognition” is overly important and refers to a set of criteria by which officials determine which rules are inclusive and which rules of exclusive of the legal system. This involves justification for official actions; standards are either written down in official texts or clearly expressed [25]. Hart also speaks of the “internal aspect of rules” as stemming from social construct consisting of a “hermeneutic” approach of understanding how people perceive their situation, and a “scientific” approach relying on objective data that observers agree on. However, Hart notes that the “scientific” approach or an empiricism of law is inadequate in fully understanding the law [26]. As Professor Brian Bix notes, from such a perspective, “Law is a social institution set up to achieve certain human purposes, and also give guidance to citizens” [27]. Another important construct in Hart’s legal positivism or theory of law is that of “open texture” to denote that there are often gaps in the law that must be dealt with or where legal situations fail because of such gaps; that is, there is always certainty and uncertainty characterizing rules as situations change [28]. Finally, while Hart claims a separation of law and morality, he advocates a “minimum content of natural law” to demonstrate the social construction underpinning legal norms.

Han Kelsen’s Pure Theory of Law

Legal theorist Hans Kelsen is credited with developing a Pure Theory of Law employing neo-Kantianism or application of Immanuel Kant’s ideas to questions of social and ethical theory [29]. Kelsen’s Pure Theory of Law is one of cognition focused on law alone [30]. Kelsen’s idea was to conceptualize and explain law free of reductionism and not reducing the law to a “legal science” or any other type of domain. In that, Kelsen view legal normative meaning as formulated from legal norm. Kelsen views law as legitimated by the creation of legal norms that act as the basis for creating other legal norms. Kelsen believes that law as a system of legal law can be traced to basic norm; that is, “basic norm is the content of the presupposition of the legal validity of the (first, historical) constitution of the

relevant legal system” [31]. Thus, central to Hans Kelsen’s Pure Theory of Law is the idea of basic norm which has three main theoretical functions: (1) it grounds a non-reductive explanation of legal validity; (2) it grounds a non-reductive explanation of the normativity of law; and (3) it explains the systematic nature of legal norms [32].

Kelsen describes his theory of law as “*reine Rechtslehre*” (“pure theory”) as it only focuses on the description of law, eliminating anything that is not strictly law [33]. Thus, Kelsen opposed moral judgements, sociological explanations and conclusions, and political biases from the description of law. These are deemed improper in a “scientific” description of law as a social institution. Kelsen argues for a foundational argument for each legal statement – perhaps his basic norm. There is in Kelsen’s eyes a normative chain of justification that leads to a foundational link of that chain that makes it legally valid. A basic norm is legally valid because people follow it [34].

Natural law theories

John Finnis argues that, “a natural law theory of (the nature of) law seeks both to give an account of the facticity of law and to answer questions that remain central to understanding law” [35]. According to Professor Brian Bix, natural law positions generally and traditionally focused on the existence of a “higher law” consistent with Cicero’s view of the “True Law” that is in agreement with nature and is characterized by “universal application, unchanging and everlasting” [36]. Robert George believes that contemporary natural law theory provides a superior way of thinking about basic problems of justice and political morality [37]. According to the Seven Pillars Institute, “Natural Law Theory proposes that as physical laws of nature exist, so do universal moral laws. These laws disclose themselves to us upon close examination of the world and the nature of humans” [38]. Two prominent natural law theories are John Finnis’ Natural Law Theory and Lon Fuller’s Natural Law Theory.

³¹ *Id.*

³² *Id.*

³³ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

³⁴ *Id.*

³⁵ John Finnis, *Natural Law Theories*, Stanford Encyclopedia of Philosophy (Nov. 4, 2007, 12:00 AM), <https://plato.stanford.edu/entries/natural-law-theories/>.

³⁶ Brian Bix, *Jurisprudence: Theory and Context* 67 (4th ed. 2006).

³⁷ Robert George, *In Defense of Natural Law* (1999).

³⁸ Seven Pillars Institute, *Natural Law*, Seven Pillars Institute (Nov. 8, 2018, 12:00 AM), <https://sevenpillarsinstitute.org/ethics-101/natural-law/>.

²⁴ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Andrei Marmor, *The Pure Theory of Law*, Stanford Encyclopedia of Philosophy (Jan. 4, 2016, 11:00 PM), <https://plato.stanford.edu/entries/lawphil-theory/>.

John Finnis' Natural Law Theory

According to Professor Brian Bix, John Finnis focused on explication and application of Thomas Aquinas' natural law views embracing ethical questions and the problems of social theory in general and analytical jurisprudence in particular [39]. Finnis looks at basic ethical and meta-ethical questions such as "how one should live?" and "how can we discover the answer to ethical questions?" [40]. Finnis believes that intrinsic goods or "basic goods" or things we value for our own sake such as life and health, knowledge, aesthetic, experience, as well as practical reasonableness and religion. Furthermore, there basic goods for which we must establish principles of choice when options promote different goods [41]. Finnis believes that we move from the basic goods to moral choices through what he calls "basic requirements of practical reasonableness" where fundamentally required is one not acting against basic goods. Law comes in to effectuate "social goods" that require the coordination of people in order to uphold "goods" for everyone.

Lon Fuller's Natural Law Theory

Lon Fuller's natural law theory is highly oppositional in its response to what Legal Positivism asserts as Fuller states that there need not be any sharp separation of law and morality [42]. Fuller argues that law is not a "one-way projection of authority" as legal positivism would have it, but a process of cooperation and reciprocal obligations on the part of state or sovereign and citizens [43]. Lon Fuller believes that the idea of separation of description and evaluation advocated by legal positivists disavows the fact that the social practice of law and social institution of law are by nature heading toward such an ideal [44]. For Fuller, law is about subjecting people to governance of rules and is a means to an end where power, orders, and obedience are internal moral constructs of law. Furthermore, Fuller advocated that laws should be general and that citizens should understand and know its standards. Fuller also believes that law should remain relatively constant and consistent as in having congruency in pronouncement and application [45].

Comparative analysis of legal positivism and natural law theory

Legal Positivism tries to avow a principle of law separate from morality, while Natural Law Theory

inheres in a "higher law" that is universally applicable, unchanging, and everlasting [46]. It is the separation of law and morality that seems to represent the major differences between Legal Positivism and Natural Law Theory, as this separation, except for H.L.A. Hart's idea of "minimum content of natural law" implies necessitating some level of moral or non-scientific consideration [47]. We could essentially describe Legal Positivism as what is wrong with modern law and its approach and methodology of teaching and professional legal education when we consider Professor Harold Berman's designation of our legal system experiencing a crisis stemming from this kind of separation as religion is no longer an anchor for the values and moral standards law seeks to enforce [48]. On the other hand, Natural Law Theory seeks to preserve this by alluding to a "higher law" and morality as evident in the Law of Nature and Nature's God [49].

Kelsen's pure theory is exactly that, "pure" because it disavows the place of moral judgements, sociological explanations and conclusions and political biases in understanding and conceptualizing law. Nevertheless, legal systems and law are not separable or separated from these factors. Nevertheless, a "pure theory" application resonates Marxist and conflict theoretical criticism of "whose laws and whose morality?" Even in the realm of natural law theories, John Finnis' natural law theory and Lon Fuller's natural law theory represent differences on the spectrum of Natural Law Theory. As Professor Brian Bix notes, Finnis' natural law theory is "one type of natural law theory" and one described as "traditional natural law theory" [50]. While John Finnis seems to establish fundamental intrinsic goods and social good relevant to the creation of morality standards to secure people's interests, Lon Fuller goes straight to the heart of the matter by arguing against a sharp separation of law and morality [51].

Consistencies and inconsistencies with biblical perspective

Finnis' Natural Law Theory sounds more like rational-choice economic theory, especially as he talks about coordination and social goods. One thing becomes consistent with biblical perspective of law is the unity that it should promote as Finnis' coordination of people for social goods reflects biblical perspective of law functioning to bring order, peace, and harmony

³⁹ Brian Bix, *Jurisprudence: Theory and Context* 72 (4th ed. 2006).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

⁴³ Lon L. Fuller, *Human Purpose and Natural Law*, 53 *Journal of Philosophy* 697 (1956).

⁴⁴ Brian Bix, *Jurisprudence: Theory and Context* 80 (4th ed. 2006).

⁴⁵ *Id.*

⁴⁶ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

⁴⁷ *Id.*

⁴⁸ Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993).

⁴⁹ Herbert W. Titus, *God, Man, and Law: The Biblical Principles* (1994).

⁵⁰ Brian Bix, *Jurisprudence: Theory and Context* (4th ed. 2006).

⁵¹ *Id.*

between people or among men. This is well-noted in the Book of Isaiah: “My people will live in peaceful dwelling places, in secure homes, in undisturbed places of rest” [52]. This peaceful living, secure home, and undisturbed place of rest is achieved through the law of civil government that God created for man. For example, the Fourth Amendment of the U.S. Constitution conforms with this Law of God by guaranteeing Americans to be secure in their dwelling against unreasonable searches and seizures [53]. Lon Fuller’s theory of law also recognizes some general biblical standard by arguing against the separation of law and morality. The highest law is God’s Moral Law, and all other laws should be in accordance with this law.

The Legal Positivism of H.L.A. Hart and Hans Kelsen’s Pure Theory of Law are inconsistent with Biblical Perspective of Law because both tend to disavow the “highest law” which is by nature and virtue a moral law. God’s law is a moral law and it cannot be upheld by ignoring moral standards and seeing law as separate from the Law of Nature and Nature’s God. Separation of law and morality create only civil law and any law contrary to God’s law does not serve his people.

CONCLUSION

As we analyze legal issues and examine various challenges of modern society, we come to understand how extensive these issues are in terms of impact, prevailing and countervailing perspectives and requirements. Lawmakers or legislators and individuals alike seek to secure their interests, rights, and privileges in an increasingly complex, diverse, and competitive global society where the complexity of rights and morality are broadening and being affected by technology and modern progress. As this occurs, we recognize how Legal Positivism requiring a strict approach to law; a legal rational perspective focusing on pure law and objective factors can serve to strengthen uniform application of law across diverse groups of people. Moreover, we also come to recognize that a modern approach dominated by legal positivism can lead to stricter application of the law and strengthening of law as an objective application of rules to suppress and discourage the increasingly deviant behaviors of man. Gardner views legal positivism as sometimes being attached to a broad intellectual tradition with empiricism at its foundation or heart [54].

Natural Law Theories remind us of a “higher law” and the need to recognize that the civil government and manmade laws guiding us are subordinated to this “higher law”, which is a law for all

times and all people; universal and unchanging. Without morality many of the vices of man that affect peace, harmony, the decency of community and respect for others and normative obligations would certainly be lost. Thus, many laws are essentially moral by nature of the value consensus that create on community standards and values. Legal positivists insist on the separation of law and morality and thus explicate the concept of law independently of morality. However, Alexy believes that there are conceptually necessary connections between law and morality [55]. The separation of morality from law explains the chaos in much of today’s world.

⁵² *Isaiah* 32:18 (King James Version).

⁵³ U.S. Const. amend. IV.

⁵⁴ John Gardner, *Legal Positivism: 5 ½ Myths*, 46 *Am. J. Juris.* 199 (2001).

⁵⁵ Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (2002).