An Analysis of 'the Law': Legal Positivism

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Abstract

The study of law is not just confined to accepting the rules as they are and applying them to factual circumstances. This article attempts to bring some contrast to the various legal theories from a legal positivism perspective in exploring, in broad terms, the justification for obedience to the law and whether such obedience is justified. One of the ever-pervading issues revolves around the interpretation and reception of what constitutes '(im)moral' and 'justice'. In this article, how the 'law' views '(im)morality' and 'justice' is examined in the light of Nazi Germany during World War II vis-à-vis legal positivism. Whilst it is never meant be a treatise, it is hoped that by examining the legal theories and eminent jurists alike here, there will be some clearer understanding of what is understood to be the 'law'.

Introduction

Legal positivism[2] is an approach of analysing law through description, viz. it is concerned with explaining what the law "is". This is distinct from the question of what the law "ought" to be, which approach is that of natural law. Hence, our question on legal positivism may also be approached descriptively. Nonetheless, to describe or think *about* positivism in clarifying thinking of/about law may be an external approach in evaluating positivism. Given that we are concerned with understanding positivism as a *whole* and to gauge the *extent* of its contribution towards the understanding of law, it is preferable to adopt an internal perspective towards it. More importantly, if we were to take the question from an external perspective, it seems that positivism is a subject in determining/affecting how we, an object, think of/about law. Instead, the internal perspective would be better as we, the subject, will be analysing positivism, the object, in thinking *of* law. Without adopting any particular reasons as with Hart's "internal point of view" of law, this approach is to show that the proper study of positivism itself would avail us a clearer understanding of law.

Besides, the word "clarify" necessitates clarification in our context. In relation to *explaining* law, positivism has put forward three renowned theses of separability, pedigree and discretion. Thus, all three theses will be explored to test their tenability. This article shall present some points to substantiate the theses, particularly the submission of an alternative way of looking at Hart's obligation to obey law. Additionally, this article will suggest the criteria to determine when a valid law becomes invalid. Secondly, the word is

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[2] Hereinafter substituted by the term "positivism". This is not to be taken to mean or include "logical positivism".

taken in another sense in the final section where the functions of law according to positivism are discussed. This serves to clarify why positivism stands firm on the theses in analysing law. Thirdly, semantically, the word is aptly used to *measure* the success of positivism in its approach of describing law for our *understanding* of it and the law analysed.

In this article, discussion will be made more on positivism as a whole, though less on individual positivist theories. Therefore, concentration is on the width rather than depth of this branch of legal philosophy. This will help to prove the general self-sufficiency of it without the contribution of morality. Finally, attempts will be made to answer the benefits of the stands taken in this piece of work, rather than presenting a debate over labelling or categorisation.[3]

Law as Rule & the Obligation to Obey Law

Besides the mention of the descriptive nature of positivism above, we may also distinguish that classical positivists like Austin, focus on the negative proposition of description in promulgating a command- or coercion- based theory – it concerns the consequence of the violation of law. Conversely, modern analytical positivists could be seen to be more interested in the positive proposition in describing the various possibilities inherent in the law, e.g. Hart's derivation of law from rule which in turn is derived from social practice.

Two objectives are intended in this section. Firstly, it is suggested that as an alternative dimension to comprehend Hart's assertion, that there is a general obligation to obey the law. Secondly, following the discussion, at attempt is made to answer "what is law?".

If we were to dissect Hart's thinking of law as rule and the resulting obligation to obey the same, we may arrive at three elements, namely (i) rule, (ii) obligation (to obey) and (iii) legality (attached to such rule). Rule is Hart's important concept as distinguished from habit.[4] Under this concept, the elements of the "internal aspect of law" and the "critical reflective attitude" are elaborated. There are also what are known as "primary rules" and "secondary rules", and the "rule of recognition" is an integral one of the latter and as a whole. Obligation, on the other hand, stems from the immense social pressure for its conformity. This is distinctive vis-à-vis Austin's command theory.[5] Obligation, as Hart claims, is important so as to maintain the social life and denotes that the required conduct may sometimes conflict with the wishes of individual(s), thus sacrifice is necessary for compliance. The final element of legality relates to the forms of *support* given to the rules by the society and its pressure. Normally, legal rules are supported by *physical* punishment.[6]

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3 This is inspired by the suggestion of James Allan in his recent article "A Modest Proposal" (2003) 23 (2) *O.J.L.S.* 197.

4 It suffices to mention here that according to Hart, deviation or attempts to deviate from a rule is itself a good reason for social criticism. Deviation from behaviour does not attract the same criticism.

5 Or more vividly described by Hart as "threats of the gun-man".

6 For a more detailed account on the aforementioned three elements, please see Oladosu, A., "H.L.A. Hart on Legal Obligation" (1991) 4 (2) *Ratio Juris* 152.

The three elements mentioned above may be seen in stages. The first and second stages relate to the contribution largely by the society in the later formation of a law. Relatively, officials play a larger role in the final stage which is resemblance of law-making by the legislature, the courts or the Executive with delegated authority. This stage may be seen as an endorsement of the prior "socio-formulation of law" by attaching sanction.

Therefore, it is submitted that there is a general obligation to obey law due to the social contribution in its making. Here, the obligation is to conform to the consensus of the majority, just as where one claims one is under social pressure not to deviate. This may serve to counter Raz's argument that there is no general obligation to obey law because such obligation is purely a moral one and consent or voluntariness is required for such obedience.[7] For, obligation is a result of a social phenomenon, rather than a moral gesture, and it is impossible to have a unanimous consensus to have a regulation in place, particularly in a complex society. It will equally be irrational to argue that one violates a law because one disagrees with the law.

Conversely, although Finnis states that there is an obligation to obey law, he justifies that on moral ground. As such, he claims that there is no general obligation to obey unjust laws.[8] It might be argued that the question of legal validity of law depends on the recognition and endorsement of officials, while the question of obligation and obedience rest on the subjects or society. Where there is a *total* absence of contribution by the society, the law is still valid but with no entailing obligation to obey it, not because it is immoral but the disregard of social circumstances.[9]

Moreover, the importance of social contribution as the determining factor for obedience could explain changes or reforms in law, for as the society changes the law has to be altered to reflect the needs and new perspectives of the society. This explains why slavery was legitimised some time ago in America but was later criminalised.

Besides, it has to be noted that sometimes social contribution in a sophisticated legal system may be unobvious, indirect or even trivial. This is particularly the case of laws on logistics regulations. But, generally speaking, the society would press for a governance or system to be well coordinated and efficient. Hence, the necessary regulatory frameworks, such as road traffic regulations, are made with such objectives in mind.

Here, analogy could be drawn with Rousseau's concept of law. Fundamentally, Rousseau sees the organisation of a state as a *social contract*. For him, the construction of such organisation is in two stages namely, first, a *unanimous social contract* and, second, law-making according to the *majority rule*. The link between the two stages may be explained using Hart's rule of recognition in that the society unanimously accepts or recognises the majority rule as the rule for law-making,[10] with the result that the rule replaces the principle of unanimity in law-making. His distinction between "legislator"

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7 Batnitzky, L., "A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law" (1995) 15 (2) *O.J.L.S.* 153.

8 Batnitzky, ibid.

9 e.g. practical impossibility or incapability of the subjects to meet certain standards stipulated by the law.

10 or they may recognise that it is generally impossible to have unanimity in law-making and so the majority rule is recognised to be the replacement.

and "legislative power" also correspond with the three stages mentioned above. His claim that the legislator determines the *content* of the law is akin to stages one and two wherein the *society* plays the larger part. Then, the law is sealed by the "legislative power", which resembles the point at stage three wherein the officials are predominant.[11]

On the above foundation, it is suggested that a concise answer to "what is law?" is *ideally* a legal rule of obligation. The word "ideal" is used for a law is valid when the rule of recognition endorses it with the necessary legality, while the obligation to obey it is another thing which is dependent on the part of the society, but is essential where the law is generally representative of the social practice.[12]

Legislative Intent vs. Judicial Discretion

In order to avoid misunderstanding of the contemporary perspective of modern positivists[13] as regards the discretion thesis, it has to be made clear at the outset that, first, the positivists' claim of the competence of the legislature in law-making is not absolute, viz. that the judiciary does have niches to do the same, although very much limited relatively[14], and, second, that even so, it does not mean that law is intertwined with morality[15].

To understand the room for judicial discretion under positivism, one could well see that through Hart's idea of the "open-texture" of law. It is argued[16] that such an idea stems from our relative ignorance of facts as well as indeterminacy of aim. Moreover, language is sometimes capable of different interpretations due to its ambiguity and uncertainty. Also, the legislature could not reasonably foresee all the empirical circumstances that the law is intended to regulate.

In reply to Dworkin's criticism, Hart[17] argued that judicial discretion in a limited scope is good on the ground of efficiency in avoiding the alternative of having to refer to the legislature whenever they are faced with unclear statutory provisions. He also argued that such mechanism is analogous to that of the delegation to the Executive and hence it is perfectly democratic. Moreover, the limited discretion would operate, most likely, outside the core of settled law.[18]

In the eyes of the positivists, judicial discretion is justifiable where a statute expressly provides for such discretion to be exercised[19] and/or where there is a "penumbra of

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11 Wintgens, L. J., "Law and Morality: A Critical Relation" (1991) 4 (2) *Ratio Juris* 177 at 183-184.

12 In other words, as positivists would claim, ascribing a law as valid is different from endorsing its content.

13 For instance, Hart and Kelsen rather than Austin and Bentham.

14 As a results, the judge "*makes new law*"; Hart, 1994, The Concept of Law, 2nd Ed., 1994, Clarendon Press, p. 272. This also explains the criticism by James Allan against Kramer's article wherein the latter seemed to attempt to exclude moral consideration altogether in judges' exercise of their discretion; see Allan, J., "A Modest Proposal" (2003) 23 (2) *O.J.L.S.* 197.

15 Hart, H.L.A., "Positivism and the Separation of Law and Morality", (1958) 71 *Harvard Law Review* 593 at 614-615.

16 Morrison W., *Jurisprudence : From the Greeks to Post-modernism* (1997, Cavendish) 381.

17 Hart, 1994, op. cit., at pp. 275-276.

18 Allan J, "A Modest Proposal", (2003) 23 (2) OJLS, at 198.

19 E.g. the use of phrases such as "good faith", "reasonableness"; see for instance s.11 of the Unfair Contract Terms Act 1977 where certain exclusion or limitation clauses in contracts might be valid if they satisfy the test of reasonableness.

doubts"[20] in the statute.[21] The former is rarely disputed by critics but the latter is criticised as unparallel with the positivist stance. It is thought that Freeman[22] provides a fine answer to this.

He suggests that the courts should be regarded as a *collaborator*[23] or partner to the legislature in achieving the democratic aim, as well as in reconstructing the society towards a more genuine democracy. The fact being that the legislature and judiciary have different characteristics[24] which allow the legislature to make law in general while the courts to do the necessary "*refinement*".[25] Following his argument, judges could make law by contemplating what the legislature would enact if seized with the same problem. Nonetheless, Bix is right in stating that the problem will then be how the courts are to discover the legislative intent.[26] Perhaps, the change in 1993[27] that allows consultation of *travaux preparatories* makes such discovery easier.

At any rate, we should be aware of the fact that even if the judiciary has exercised its limited discretion "wrongly" or inconsistent with the legislative intent, the legislature can "overrule" or "reverse" the ruling. It may be recalled that this was the effect of the passing of the War Damage Act 1965 on the House of Lords' decision in *Burmah Oil v Lord Advocate*.[28]

An alternative way,[29] which the positivists may claim, to see the role of judicial discretion in light of legislative supremacy is the use of Dworkin's model – that the basis of adjudication rests on *principle* rather than policy.[30] Principle, in short, justifies a decision by upholding that such decision respects or safeguards the right of individual(s) or group(s). Policy is concerned with the collective goal of a community as a whole. Given that principles can be found *within* the law and legal rules, judicial discretion could be justified in utilising principles which is within the confine of the legislative will.

Much has been said about the supremacy of the legislature. An obvious doubt against this is where the state is a member of a supra-national entity, like the case of the UK being a member of the European Union (EU).[31]

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20 The famous example given by Hart is where a judge is to interpret the rule "no vehicles in the park".

21 Where there is a penumbra of doubts, it does not necessarily follow that the judge will have the discretion to decide for a statute may provide otherwise. Hence the conjunctive "and".

22 Freeman, M., "Positivism and Statutory Construction: An Essay in the Retrieval of Democracy" in Guest S. (ed.), *Positivism Today* (1996, Dartmouth Publishing) 11.

23 This should be taken to mean as a "deputy to the legislature" rather than as a deputy legislature which denotes subordination.

24 The courts are reactive, they have to justify their reasons and maintain a level of consistency in their judgements. Conversely, the legislature can do all in the opposite, although it is constrained by time to legislate in detail.

25 Freeman, Positivism Today, (1996, Dartmouth Publishing), p. 16.

26 Bix B., *Jurisprudence: Theory and Context* (2nd ed 1999, Sweet & Maxwell) 42.

27 As a result of the case of *Pepper v Hart* [1993]1 All ER 42.

28 [1965] A.C. 75.

29 as suggested in Marshall, G., "Positivism, Adjudication and Democracy" in Hacker P.M.S. and Raz J. (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (1977, Clarendon Press) 132 at 143-144.

30 Distinctions between principle and policy are well illustrated in Marshall, ibid., pp. 136-137.

31 This issue is of greater importance now since the EU Member States are in the midst of forming a "European Constitution".

Pursuant to the enactment of the European Communities Act 1972, the laws of the EU are now regarded as superior to the UK legislations.[32] Nonetheless, both Lord Denning[33] and Lord Diplock[34] explicitly noted that the UK parliament can at any time legislate to regain its supremacy in law-making. It is only evident that this is not done due to the benefits of membership.[35]

Apparently, the best case to prove the erosion of legislative supremacy is *ex parte Factortame*[36]. Nonetheless, it is important to note the statement made by the Solicitor-General in the course of the passing of a related amending legislation[37] which suggests that the "subordination" is consciously made and limited. He said:

> "*…this case involved no erosion of sovereignty over and above that which we accepted in 1972-73*"[38] (emphasis mine)

Therefore, voluntary membership of states in a supra-national body does not absolutely affect the positivists' view on legislative supremacy.

We now turn to the "collaboration" between the European Court of Justice and the EU. If the EU is regarded as a valid legal system,[39] it is surely an infant one in terms of its development. The observation on the operation of the ECJ is that it has been in the forefront in settling many matters not provided for by the EC Treaty and the Treaty is normally later amended to give "statutory effect" to these rulings.[40] This signifies the importance of the judiciary in giving prior effect to the intendment of the legislature where the latter has yet spelled out the same in authoritative form.

Additionally, positivists' emphasis on the supremacy of the legislative will greatly reflects empirical need, especially in a democratic system where "*legislation is almost always the exercise of moral or political judgement*".[41] This is because what is morally right or wrong is often a personal value judgement, and is thus mind-dependent. In a

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32 See for instance Art. 10 and Art. 234 of the EC Treaty and cases like *Costa v ENEL* (6/64) [1964] ECR 585, *Internationale Handelsgesellschaft* [1974] 2 CMLR 540 (Germany) and *Simmenthal v Commission* (92/78) [1979] ECR 777.

33 In *Macarthys Ltd. v Smith* [1981] 1 QB 180.

34 In *Garland v British Rail Engineering* [1982] 2 CMLR 174.

35 Hoffman J (as he was then) in *Stoke City Council and Norwich City Council v B & Q plc* [1993] 1 CMLR 426 stated that "*…partial surrender of sovereignty was seen as more than compensated by the advantages of membership*".

36 *R v Secretary of State for Transport, ex p Factortame Ltd.* (C-213/89) [1990] ECR I-2433.

37 Merchant Shipping Act 1988 (Amendment) Order 1989.

38 Turpin C., *British Government and The Constitution: Text, Cases and Materials* (5th ed 2002, Butterworth-LexisNexis) 384.

39 As Austinian legal practitioners would doubt.

40 See, for example, *Parliament v Council (Chernobyl)* case C-70/88 [1990] ECR I-2041; this case recognised the "semi-privileged" standing of the European Parliament in relation to bringing of action under Art. 230 of the EC Treaty. This was later written into the EC Treaty by the Maastricht Treaty 1992 and a full standing was recently granted by the Nice Treaty 2001.

41 Waldron, J., "*The Irrelevance of Moral Objectivity*" in George, R. (ed.), *Natural Law Theory*, Oxford: Claredon Press, 1992; quoted Allan, J., "Positively Fabulous: Why It Is Good To Be a Legal Positivist" (1997) 10 *Canadian Journal of Law & Jurisprudence* 231 at n. 42.

democratic system, diversity of views about moral value is just a norm. Therefore, it is justifiable that social policy-making and moral decision-making be assigned to the elected representative of the people and the role of judges in these respects is limited. Preference for legislative supremacy vis-à-vis judicial law-making also ensures greater certainty of outcome. It is noteworthy a fact that certainty is also a form of justice.[42]

Law & Immorality?

The reason for posing morality in the negative is twofold. Firstly, it describes better the common perception of idealists that positive law is prone of verging onto immorality without the use of morality as yardstick of its validity. Secondly, due to reason of space and the fact that discussions on "law and morality" are present in other parts of this article, this section will dwell rather into the instance of "bad times" to explore whether positivism does "survive" immoral or wicked legal regimes. Hence, some discussions will draw their points from those made elsewhere in this article.

It is perhaps banal but necessary to emphasise that Austin's claim that "*the existence of law is one thing; its merit and demerit is another*", which represents the central tenet of positivism, does not deny the importance and relevance of morality as an independent discipline. It is noted that law may even "*co-exist*"[43] with a belief in moral absolutes, but the central strand remains that morality is not to be involved in the analysis and study of positive law.[44]

The separability thesis draws a line between law and morality so that, on one hand, the law will not be value-laden, and, on the other hand, a law will not simply be regarded as (morally) right if morality is regarded as an integral part of law.[45] Being value-free means positivism introduces *relativism*, rather than absolutism, in our thinking of law and recognises *prudence*[46] in both the enforcement of and compliance with the law.

Relativism stems from the analysis of law from facts which in turn provides us with many options and alternatives to proceed henceforth, which benefits are considered further in this article below. On the other hand, prudence means that the enforcement of and compliance with morality is not an endorsement of the rightness of the law but may be due to other reasons such as self-interest, shared interest or even for the fear of punishment or ostracism. A case in point is the restitution laws passed in many Central European countries in the nineteen-nineties. However, the laws, especially those of

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42 See Kramer M., *In Defence of Legal Positivism: Law without Trimming* (1999, Oxford University Press) Chapter 1.

43 Cotterrell R., *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (1989, Butterworths) 143.

44 Of late, positivists like McCormick and idealists like Finnis concur that although law may be linked to morality, there is still a distinction between legal validity and moral obligation which means that an immoral law can still be law [Capps P., "Being Positive about Positivism" (2000) 63 (5) *MLR* 774 at 774]. Also, Hart himself acknowledges a "minimum content of natural law" in *The Concept of Law* [Hart H. L. A, *The Concept of Law* (2nd ed 1994, Clarendon Press), pp. 193-200].

45 This was indeed a claim made by Nazi writers that the fusion of law and morality had been achieved by the German National Socialism. See Cotterrell, loc. cit., p.143.

46 Kramer, 1999, op. cit., p.3.

the Czech Republic,[47] which are supposedly "moral" laws to "undo" past injustices, are discriminatory towards the Jews and Germans. Pogany stated that such policy was "*essentially for political and ideological reasons*"[48] and condemnations on such laws come from various commentators[49]. But, such are still the laws of the day and so to claim that justice and the rule of law are essentially concepts of morality *per se* may not be factually true.

The discussion on law and immorality will deal mainly with the case of Nazi Germany during World War Two (WWII), coupled with the conversion of Gustav Radbruch and his subsequent concept of justice. Additionally, some focus will go to similar issues arising from the 1989 Velvet Revolution.

The immeasurable atrocities committed by the Nazis led Radbruch to subsequently comment that "*legal positivism has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal*".[50] It is claimed that Radbruch was very much pro-positivism in his pre-WWII writings wherein he emphasised greatly on legal certainty as compared to justice and utility of law[51]. His post-WWII writings[52] signify "shifting [of] the accent", as he claimed, with the focus now on justice rather than legal certainty. Nonetheless, such a "shift" was claimed to be a correction of his earlier overemphasis on legal certainty.[53] Be that as it may, one has to see his theory in the light of "*ordinary times*" and "*extraordinary times*".[54]

In brief, legal certainty should prevail in "ordinary times" and morality should not be the determinant of the validity of law. It is only in times of the extraordinary that *collective* morality is allowed to determine the validity of law. However, it must be noted that he confined his "extraordinary times" to situations where there is an "*intolerable*" deviation from justice or where there is not "*even an attempt at justice*".[55] In a 1947 writing, he further qualified that legal certainty "*may be relaxed only in altogether exceptional, indeed, unique cases, only in cases rivalling what we have experienced in the Nazi period – and hope never to experience again*".[56]

It may be deduced from the above that morality is only pertinent in deciding the validity of law in cases of *gross* injustices. A conclusion at this point may be that there

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47 The Law on the Mitigation of the Consequences of Certain Property Losses (October 1990), The Law on Extrajudicial Rehabilitation (February 1991) and The Law on the Revision of Ownership Relations to Land and other Agricultural Property (May 1991).

48 Pogany I., *Righting Wrongs in Eastern Europe* (1997, Manchester University Press) 150.

49 See e.g. Pogany. Ibid., Conclusion; Elster, J., "On Doing What One Can", *East European Constitutional Review*, Summer 1992, pp. 15-17; "Forum on Restitution" in *East European Constitutional Review*, Summer 1993, pp. 30-39.

50 Leawoods H., "Gustav Radbruch: An Extraordinary Legal Philosopher" (2000) 2 *Washington University Journal of Law and Policy* 489 at 497. also available at <http://law.wustl.edu/journal/2/p489leawoods.pdf>

51 Note that the latter two concepts are also within his "idea of law".

52 Most notably his *Five Minutes of Legal Philosophy* and *Statutory Non-Law and Suprastatutory Law.*

53 See Paulson, S. L., "Radbruch on Unjust Laws: Competing Earlier and Later Views?" (1995) 15 (3) *O.J.L.S.* 489 at 493-494.

54 See generally Leawoods, op. cit.

55 "Gesetzliches Unrecht und ubergesetzliches Recht", *Suddeutsch Juristen-Zeitung* 1 (1946) 105-8 at 107; in Paulson, op. cit., p.491.

56 Radbruch, "Gesetz und Recht", *Stuttgarter Rundschau* 2 (1947) 5-6 at 6; in Paulson, op. cit., p. 497.

is a link between law and morality but to say that it is a necessary connection might be flimsy because the application of morality is subject to numerous qualifications. Here, it is submitted that our discussion on why and when obligation to obey law may cease corresponds with Radbruch's explanation of "extraordinary time" and his firm emphasis on *collective* rather than individual morality in such time. Particularly, Rousseau's majority rule and Hart's rule of recognition denote that there would unlikely to be gross injustices if the law is duly *representative* of the people.[57] There might be injustices to some quarters but, still, that might fall under "ordinary times". Nonetheless, gross injustices in "hard cases" and as a result of arbitrary law-making are acknowledged and considered below[58].

Furthermore, it must be considered whether positivism was indeed present in and practised by the wicked regimes so that the idealists' claim that positivism is an accessory to the atrocities is justifiable. In relation to Nazi Germany, Rottleuthner[59] suggests that the right question to ask is *why* the judiciary functioned since the Weimar Republic. Ott and Buob[60] state that after Bismarck was appointed Chancellor in 1878, he introduced radical judicial reform[61] which led to the instrumentalisation of the courts according to the political needs. This was exacerbated by Hitler after 1933 by his amalgamation of all German judges into the Association of the German National Socialist Jurists. These themselves crippled the independence of the judiciary and, to answer Rottleuthner's "why", the judiciary was in effect made a *tool* to further the political aims of the ruling party rather than to dispense justice.[62] Hence, there arose principles like the Fuhrer-principle and Volkische Rechtsidee (the popular notion of law), and "laws" were drafted in unclear terms e.g. "*healthy popular sentiment*".[63] All the autocratic, anti-democratic and anti-liberal stance towards law and the interventionist approach adopted by the Fuhrer and Nazi officials in judicial decision-making point astray of positivism. Fundamentally, for positivism we speak of the hierarchy of formal sources of law, but for the wicked regime, they conveniently subordinate the law and put themselves above the law.

Similar arguments apply to the communist regimes in Central Europe pre-1989. The Communist Party exercised legislative functions without the necessary legitimisation in issuing directives. They even went beyond their constitution. As Morawski stated, free elections and political rights were provided for in the Polish Constitution but were never

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57 It may generally be inferred from the two rules that justice is inherent in law, irrespective of their content, as it is based on the consensus of the majority.

58 Please see the discussions on the former in the section of "*Law & Justice*" and the latter in "*What makes Positivism – a Science of Law – Special*?".

59 as noted in Ott, W. and Buob, F, "Did Legal Positivism Render German Jurists Defenceless during the Third Reich" (1993) 2(1) *Social and Legal Studies* 91 at 92.

60 Ibid.

61 it has to be noted that the qualifications to be a judge was imposed onerous requirements e.g. the lengthy training period of at least 12 years without pay and the need to deposit a considerable amount of money. These made the selection of judges confined to the upper-middle class and the thinking of judges moulded to the ideology of the ruling party. See Ott and Buod, op. cit., pp. 92-94.

62 Similar claims were made by Neumann and Kirchheimer. Neumann stated that "*the National Socialist Legal System is nothing but a technique of mass manipulation by terror*" and Kirchheimer stated that the aim of adjudication was to execute given commands "*so as to have the maximum effect in the shortest possible time*"; both quoted in Cotterrell, op. cit., pp. 133 and 134 respectively.

63 In s. 2 of the Penal Code in the version of 28th June 1935.

practised. Nor was there a constitutional court as a check and balance on the legislature and executive vis-à-vis the constitution.[64]

Moreover, there is a forgotten dimension when positivism is linked to wicked regimes. All the forgoing sections would have obviously suggested the importance of democracy in the minds of the positivists. The insistence on the obligation to obey law is in fact only one side of the coin. The reverse side is the insistence for the sovereign to enact good laws. However, the former is a pure matter of law while the latter concerns also with that of politics. As such, legal philosophers are promulgating only the legal duty of the governed rather than the political duty of the legislature. These explain Bentham's "division of labour"[65] on the respective duty of the society and legislature, and his staunch support for democracy.[66] Besides, the social nature of the above-mentioned rules of Hart and Rousseau should connote that democracy is not a presumption in positivist theories but a necessary *by-product* or *goal*.

Law & Justice

Having discussed the relationship between law and (im)morality, the notion of justice cannot be left unattended. In fact, this notion is one that really pushes positivism to verge on morality. The questions that require attention are whether justice is a concept of morality, therefore there is a connection between law and morality in this respect, and whether it could affect the validity of positive law.[67]

In Hart's opinion,[68] justice is not a concept of morality. In brief, his explanation is that whether something is just or otherwise is not *equivalent* to whether that thing is morally right or wrong. The concept of justice lies on fairness or equality. His claim is that equality "*is plainly not coextensive with morality in general*".[69] Equality is concerned with proportionality and balance, hence the principle of "treating like cases alike and different cases differently". The problem, as he stated, is to determine the pivotal or fundamental resemblances or differences. There are clear-cut cases that pose little difficulty but some others do and in such instances, there might be a "shifting or varying criterion"[70] used in the determination. He further claimed that morality may sometimes make such "distinction" that is discriminatory.[71]

Guest,[72] conversely, brilliantly points out that the positivists' stance on justice would fail in "*genuine situations of injustice*".[73] He noted that the principle of promissory

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64 Morawski, L., "Positivist or Non-Positivist Rule of Law?: Polish Experience of a General Dilemma" in Krygier M. and Czarnota A. (eds), *The Rule of Law after Communism* (1999, Ashgate Publishing) 39 at 43-44.

65 That, it is submitted, also explains Raz's distinction between the "*deliberative*" and "*executive*" stages of law which is discussed below.

66 See generally Lee K., *The Positivist Science of Law* (1989, Avebury) 185-186.

67 i.e. the concept of *lex iniusta non est lex*.

68 See Hart, The Concept of Law, 2nd Ed., 1994 Clarendon Press, at pp. 153-167.

69 Ibid., p. 158.

70 Ibid., p. 160.

71 Ibid, at p. 162; he gave the example where a society may have the moral perception that human are naturally of different classes, which therefore justifies slavery of certain groups of men.

72 Guest, S., "Why the Law is Just?" (2000) 53 *Current Legal Problems* 31.

73 Ibid., p. 35.

estoppel,[74] the law of restitution etc. are products of judicial activism when confronted by injustice. These are also what Dworkin described as "hard cases". Guest claims that real equality is a concept of morality[75] and, more insightfully, that the pivotal or fundamental common ground for treatment lies on *humanity*.[76] He emphasised on equality of *treatment* and asserts that the positivists, more particularly Hart, are only concerned with equality of outcome.

As such, real equality means "*first person equality*"[77] for what is just is to be determined in the specific by putting oneself in the other's shoes.[78] That said, Hart's assertion that Apartheid is "formally" just and Kramer's[79] claim of justice as constancy (of outcome) seem unconvincing here.

It is submitted that equality could be seen either in the general or specific. General equality applies to clear-cut cases so that judges can take into account not only the interests of the litigants, but also those of the community as a whole – say, in imposing more severe punishments in order to deter certain crimes. As regards hard cases, specific equality of treatment must be upheld on the common ground of humanity. Given that hard cases are normally where there are no legal rules or principles requiring, or constraining, the judge to decide either way, he could thus exercise his discretion. So, justice (both general and specific) falls with the embrace of the limited judicial discretion.

A point of disagreement with Guest's model is that if justice means equality of treatment solely on the common value of humanity, then justice seems unable to justify positive discrimination in favour of certain disadvantaged groups.[80] It is submitted that prudence may play a part in determining what is just as well, as the prudence for positive discrimination may well be to avoid the possibility of social conflict due to social, economic or educational gaps.[81]

In sum, Guest's proposal in relation to hard cases, coupled with the fact that positivists, Hart himself at least, do not seem to provide any good solution to them, should lead positive law to give way to moral value of equality (or justice) in these instances. It seems that in hard cases *per se* and within the confine of limited judicial discretion, there is a clear relationship between law and morality. Arguably, this relationship is constrained

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74 As established by Lord Denning in *Central London Property Trust Ltd. v High Trees House Ltd*. [1947] KB 130.

75 It is submitted that Hart does not seem to deny this *absolutely* by merely stating that equality is not "*coextensive with morality*", as mentioned above.

76 Op. cit., p. 39.

77 Op. cit., p. 40.

78 This could also serve to criticise Hart's internal aspect of law which claims that one could comment or criticise the practice of a participant by assuming his perspective. If one really understands the perspective of the participant, it is doubtful that one would claim it as being irrational.

79 Kramer, 1999, op. cit., at footnote 42, Chapter 1.

80 For example positive discrimination in favour of Roma/Gypsy in many European countries.

81 An empirical case was the social conflict in Indonesia after the Asian economic crisis in 1998. Atrocious crimes were committed by the native Indonesians on the Indonesian Chinese due to the vast economic gap between them which caused resentment in the former. Note also that Aquinas and Finnis also acknowledge the obligation to obey unjust law for "common good" i.e. where greater injustice or disorder is avoided by such compliance.

as it falls within the scope of judicial discretion. It follows that in such cases, the judge *could*, in exercising his discretion, disapply the unjust law.

What makes Positivism – a Science[82] of Law – Special?

In this section, the very fundamental issue of legal positivism as a science of law is dwelled upon. It is submitted that many merits, and demerits if any, of positivism can be "derived"[83] from the scientific understanding of law conferred by this school of thought. Discussion will be made in regards to the advantages in thinking of law with a positivistic mindset.

Of positivism in general, Lee stated that:

> *"... for the positivists, to study [law] philosophically is to study exclusively its logic, and to ignore all other aspects of it which cannot be fitted into the deductive structure or which cannot be expressed in terms of the relationship of derivability or deducibility."*[84] *(emphasis mine)*

The concept of (logical) derivability or deducibility is taken to mean that such study would involve the presence of three requisite elements, namely prediction, explanation and conclusion.[85] Amongst them, the first element of prediction is of the utmost importance as most positivists[86] infer this to offer the possibility of control. Noting these similar points, Halfpenny[87] described positivism as a science grounded on *observation* and stated that it "*progresses by conjecturing hypotheses and attempting to refute them, so that false conjectures are eliminated and corroborated ones retained"*.[88] (emphasis mine)

Given the need for derivability or deducibility, the validity of laws must be capable of being reduced to some basic source and as such the ultimate source of all law-making is the legislative will. Also following the above premise, valid laws must be capable of being subject to empirical observation and verification. It seems, therefore, that law-making by the legislature qualifies best under the above tests. The most obvious advantage of this is that such law-making is open to public scrutiny as it is a "*declaration of public event*"[89] and, thus, "mind-independent".[90]

This positivist's pedigree thesis is particularly prone to attack by the naturalists by mentioning wicked regimes like Nazi Germany. Nevertheless, positivists like Austin and Bentham in fact encapsulated, as expressly quoted and discussed by Fuller in the Hart-

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82 Therefore, legal positivism is to be contrasted with Aristotlean metaphysical and Tomist theological approaches towards law.

83 This in fact is a word of scientific importance which will be used more commonly hereafter.

84 Lee K, The Positivist Science of Law, (1989, Avery), p. 76.

85 The word "conclusion" is better described as "testable conclusion" by Lee, op. cit., p.76.

86 e.g. Comte as noted by Lee, op. cit., pp. 43-52.

87 *Positivism and Sociology: Explaining Social Life* (1982, Allen and Unwin, London); quoted by Lee, op. cit., p. 36.

88 Ibid.

89 Op. cit., p.144.

90 see generally Allan, 2003, op. cit, pp. 197-210. The author even went as far as to describe moral evaluation of law as being similar to "*ice-cream flavour valuing*", at p. 204.

Fuller debate that "*when a law is sufficiently evil, it ceases to be law*".[91] Fuller claimed that they did not provide sufficient clarification to the statement and it was in fact a "running away" from the problem.

It is submitted that the criterion for determining when a law is "sufficiently evil" so as to be devoid of validity is whether such a law is capable of being subject to "scientific undertakings" viz. whether it is capable of being logically and reasonably predicted, explained or justified and concluded. The decrees under the Third Reich might be validly passed, but would likely fail under these scientific undertakings – the law and its operation will be difficult to be predicted as they are determined by the whims and fancies or arbitrariness of the Fuhrer or Nazi officials and discriminatory law could hardly be capable of reasonable explanation or justification, especially when it is based on ethnicity, not to mention whether all these decrees are capable of being concluded. Even if they are alleged to be, the conclusions would likely to be *non-sequiturs* for the elements of logic and reasons, both being omnipresent elements in science, are likely to be absent.[92]

This suggestion seems redundant where laws are duly representative of the social norms. Therefore, perhaps this second "test" should be used in addition to the positivist criterion of validity only when a wicked law is in question. The assumption that goes along with the suggestion is that wicked laws are rare and therefore the "test" will only be vital in "extraordinary times", in Radbruch's sense.[93] While this test may not determine whether the content of a law is just, it helps to determine whether the law is made, and practised, arbitrarily and without proper exercise of legislative authority.

It is noted that Fuller's criticism against positivism in relation to Nazi Germany is stronger, that positivism led to the silence and passivity of the legal profession which in turn enabled the rise of Nazism. Also, positivism did not encourage resistance against the regime. All these, he claimed, were due to the "black-letter law mindset" inculcated by positivism as it promotes rule-following without reason.[94]

The reason the discussion on Fuller's criticism is presented last is to prove in advance that positivist was in fact not *directly* culpable for Nazi's atrocities. So, we now have to consider Fuller's assertion that positivism contributed *indirectly* to the crimes.[95]

Having dwelled into the scientific nature of positivism, it could be said that Fuller's claim is unreasonable because the very *intendment* of it is to promote reason in the analysis and understanding of law. The *result* is that all the positivist theories assert claims with tenable reasons attached. The claim[96] of the obligation to obey law is clearly

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91 Fuller, L. L., "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630 at 655.

92 Also, applying our discussion on the obligation to obey law, we could say that the regime "leapfrogged" to "stage three" in law-making without going through the process of "socio-formation of law".

93 see *supra*. This in no way suggests that moral values, even the notion of justice, should be applied in such circumstances but that in such times, the second "test" could well be used to determine whether the law is devoid of validity or not.

94 See generally Cotterrell R, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (1989, Butterworths), pp.143-144.

95 Fuller's famous eight principles of legality are accepted as tenable but often criticised as being merely amoral. This line of criticism will not be expanded in this essay. For a structured criticism of Fuller's eight principles, see Kramer, 1999, op. cit., pp. 53-71.

96 Especially those of Hart's and Rousseau's.

based on reasons, viz. for one is obligated to do so premising upon a norm that is legally determinable or recognisable. No obligation is claimed where such norm is absent. Where one is acting under such circumstance, he may likely be acting under coercion instead. Conversely, when one acts under a legal authority (vis-à-vis power), he is acting under a similar legally determinable norm, thus he is authorised to determine the conduct of others.[97] In sum, there is an "obligation" to obey law because it is passed by an "authority".

It is merely true that positivism does not positively emphasise that an unjust law must be disobeyed. However, it has gone a long way in reasoning why and when the obligation to obey arises, persists and ceases. As regards Nazi Germany, positivism would say that the (legal) obligation to obey law had ceased but there is no (moral) obligation to disobey the law. Additionally, it may be argued that the Germans actually followed Nazi laws with reason, rather than according to their herd instinct of solely taking the law it was. Perhaps, for the fact that millions had been massacred, it was reasonable to submit obedience. Fuller's idealism suggests the possibility of toppling the regime through assertiveness or revolt, but it was another use of force, thanks to the Allied force,[98] that ended the regime. Thus, for reasoning why and when the obligation to obey ceases *and* acknowledging prudence for rule-following after that point, positivism at least helped to mitigate the death toll in Germany.

On the other hand, the advantages of having a positivist mindset in the understanding of law are numerous. The most vital one being pragmatism in that one will be "clear-headed"[99] in one's evaluation of legal issues. One would see a legal problem more clearly, and even more "honestly",[100] when s/he can dissect a problem into distinct issues and have each of them settled in steps. It also begs the critical thinking in us as to how an unjust law could be reformed or abolished.

On the other hand, merely holding that an unjust law simply is not law leads, at worst, to anarchy,[101] or, at best, to an oversimplification of certain complex moral conundrums. Being pre-occupied with moral judgements of law blinds one towards hard reality. It is perhaps more important to accept the ugly reality that besets us and then contemplate means to remedy it. The advantage is that one then knows well the terrain on which he is to proceed from, and thus all efforts and resources can be channelled and altered to suit the circumstances. As for law, positivism is handy as it provides the best description it can of the legal problem for our further action. As a strong advocate for a more just Central Europe, Elster[102] provides an insightful point in saying that,

> "*To abstain, as some did, is morally admirable-but can one really say that it is morally required? .... Perhaps in the end, they did more harm to themselves than to anyone else*."[103] (emphasis mine)

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97 see generally Kramer, 1999, op. cit., pp. 75-76.
98 i.e. the alliance of the American, British and Russian forces.
99 Hart, The Concept of Law, (2nd Ed., 1994 Clarendon Press), p. 210.
100 Hart, The Concept of Law, (2nd Ed., 1994 Clarendon Press), p. 207.
101 As feared particularly by Austin and Bentham.
102 In his arguments against restitution and retribution in the post-communist Central Eastern European countries.
103 Elster, J., "*On Doing What One Can*", East European Constitutional Review, Summer 1992, p.16.

It is not that positivism helps to ensure that one survives longer but it encourages rationalism so that a rational thing is done at an appropriate time.

Furthermore, it is submitted that the descriptive nature of positivism, as compared to the prescriptive nature of natural law, is itself a strength. In a modern and pluralistic society, there ought to be constant reconfigurations of human community and as such these configurations cannot be premeditated. Hence, it is unrealistic to prescribe something "good" in advance. Positivism is distinctive for it lays down the current state of affairs and therefrom we project our way to the *general* goods or goals of the society. Premeditation implies that some standards are to be achieved but descriptive approach emphasises on *relativism* and focuses on the present capabilities and resources to advance, thus it does not attempt the impossible. It follows that the latter requires constant reflections and alterations of its value and allows more, and even better, possibilities of achieving human goods to flourish.[104]

Concluding Remarks: Positivism – Coordination, Order & Reform

Perhaps, to speak of positivism wholly in an essay is ambitious. But, it is at least vital to note what positivists generally regard the functions of law as because that shall clarify why positivism takes the stands as described, and as distinct from other philosophies, especially those of natural law and Dworkin.[105] In short, the functions are social coordination, order and reform.[106]

The first function of law explains why positivists stress extensively on the supremacy of law and the legislature. Following this line, individuals in a society do not relate to each other personally, but law stands between them to regulate their conducts. This, strictly speaking, means that a man is not accountable to another but to the law, which in turn is accountable to the other man. Amongst the positivists, Raz promulgates most clearly the role of law in social coordination. He opines that the law or the legislature knows best what is right to be done by an individual and the society as a whole. In simplistic terms, he claims that the legislature "decides" (by issuing authoritative decisions i.e. laws) and the society "performs"[107]. The rules of Hart and Rousseau could be handy here in explaining that the society, in the first place, acknowledges the impossibility of organising itself without having a restricted group of people to whom they confer authority to. And, this is the group of people chosen because of their (or expected) higher level of knowledge, expertise and understanding of what is the best for the people.[108]

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104 I derived some of the ideas in this paragraph from Leora Batnitzky's discussion on the exchange between Finnis and Raz on the obligation to obey law in Batnitzky, ibid.

105 note that Dworkinian idea of the function of law is the settlement of disputes (in courts).

106 Although Fuller also sees the law as a means of social coordination when he describes law as "*the enterprise of subjecting human conduct to the governance of rules*" [Fuller L. L., *The Morality of Law* (revised ed 1969, Yale University Press) 39], positivism has two other distinctive functions in mind which cause the differences in their stands.

107 More accurately in his words are the two distinct stages of "*deliberative*" and "*executive*".

108 Raz explains the need for coordination in society by drawing the analogy with the coordination of a large and complex society; Raz J., *Ethics in the Public Domain* (1994, Clarendon Press) 203.

The second function, namely order,[109] is in fact the underpinning reason for the birth of positivism. Instead of promoting order by non-reasons, like the theologists and metaphysicians, positivists press for the thinking of law through scientific reasoning. It follows that positivism is able to control and coordinate the society through the study of the behaviours of law and the society, and their intertwinement. It may be recalled that one of the tenets of positivism is that law is posited by men solely,[110] and with that in mind it is a *means* to achieve and further social goals, of which a fundamental one is social order.

As for the function of reform, Bentham put it aptly that, "*obey punctually; censure freely*".[111] This is synonymous to Hart's claim that by taking law as it is and having our own evaluation of it ensure a real examination of and progress in law. Where the officials and society understand the need to obey law as essential and that the need to progress through planned reform is no less vital, a transition will be successful. It is submitted that this was the case of the 1989 Velvet Revolution. The reasons being the reformers could have declared the wicked regimes "void" for being unjust and wrestled the governing power easily with the support of the people. But that would make them no less wicked than the wicked regime. Instead and rightly, extensive "round-table talks"[112] took place between the reformers and the communists. Compromises were made and resolution reached, most importantly, on the new constitutions which led to a "velvet" transition to social democracy.

In this article, discussion on positivism and some positivist theories have been made but the latter in rather general terms due to the aim of providing a larger picture of the former. More crucially, it has been shown that the individual theories can complement each other to perfect positivism as a philosophy. Also, as observed, the submissions on why and when the obligation to obey law ceases and a valid law may become invalid are consistent with the pedigree thesis. Since both submissions are derived from the analysis of positivism and if they are plausible, then they show that positivism is self-contained to develop more analyses from within itself. It is submitted that the question on the extent positivism clarifies thinking about law could thus be answered as *infinite*. There may be flaws in individual theories, but positivism as a whole have provided equally good, if not better, clarification in thinking of law vis-à-vis non-positivists. Unlike other schools of thought which underlying theme may only be one, positivism is all-embracing as it contemplates coordination and order of society and reform in law, plus endeavouring towards more democratic law-making. It matters little which function is the most fundamental one for most of the important ones are pursued after *together* by positivism, and that is its beauty.

Finally, it may be observed that this essay is "regressive" in description as it touches more preliminary points about positivism as it flows, especially in discussing the very

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[109] see generally Lee, op. cit., Chapter IV.

[110] i.e. laws are commands of human being.

[111] As quoted in Lee, op. cit., p. 185.

[112] For an account of the "round-table talks", please see Elster, J., "Constitutionalism in Eastern Europe: An Introduction" (1991) 58 (447) *The University of Chicago Law Review* 447.

scientific nature of positivism at the end. The objective is to prove that many criticisms against positivism miss the ideas of it, which, respectfully, seem to be miscomprehension of its thoughts. A holistic understanding would have prevented that, so it is hoped that this article has provided a clearer description of positivism in clarifying thinking of law.

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