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Positive Law

Contributors: Tom D. Campbell
Editors: David S. Clark
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Following the original work of Jeremy Bentham (1748–1832), John Austin (1790–1859) popularized the term *positive law*, thus marking the emergence of classical legal positivism, which traces back to the work of Thomas Hobbes (1558–1679) and the origins of the modern state.

John Austin

Austin defined positive law as “the laws, properly so called, which are set by men as political superiors or by men, as private persons, in pursuance of legal rights” (1955: 9–10). He distinguishes positive law from the law of nature, that is, the laws set by God or divine law. Positive law (and positive morality), but not divine law, come into existence “by position” or human action. Positive law and positive morality both “flow from human sources,” but positive morality is distinguished by being “set by men, but not as political superiors (nor in the pursuance of a legal right).” Austin wrote, “The science of jurisprudence is concerned with positive law, or with laws strictly so called, as considered without regard to their goodness or badness” (1955: 126).

Austin modeled his scientific approach on geometry to the extent that he was concerned to establish a set of interlocking definitions. Thus, a law (in the broad sense) is “a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.” A rule, on the other hand, is a species of command. A command exists if there is: “(1) a wish…by a rational being, that another… shall do or forbear, (2) an evil to proceed from the former, and be incurred by the latter, in the case of disobedience, and (3) an expression or intimation of the wish by words or other signs#” A sovereign (and a political society or state) exists when “The *bulk* of the given society are in the *habit* of obedience or submission to a determinate and common superior.” A law (strictly so called) is a “general command of a sovereign backed by sanctions” (author's paraphrase), and a sanction “the power and purpose of inflicting eventual *evil*,” by which he meant inflicting pain or suffering (1955: 17).

However, it is noteworthy that all these interlocking definitions, as far as they relate to positive law, relate to observable facts that one can empirically test, such as expressed wishes, inflicted pains, and the habit of obedience. It is clear that in articulating the

concept of positive law, Austin was seeking to found an empirical science of law, in terms of what ordinary state law is, rather than what it ought to be. This is what historically connected legal positivism to the idea of positivism used to distinguish empirically based science from more speculative activities.

H. L. A. Hart

H. L. A. Hart (1907–1992), the dominant legal positivist of the late twentieth century, introduced revisions to break this connection between legal positivism and scientific positivism, or empiricism. His groundbreaking book *The Concept of Law* (1961) criticized Austinian positivism for not being able to explain the "obligatoriness" of law. Hart argued that such an explanation requires us to distinguish between what he called *primary rules*, which govern and facilitate ordinary conduct, and *secondary rules*, which determine which primary rules are officially binding. In particular, Hart argued that for a developed legal system to exist there must be a combination of primary and secondary rules. His most important secondary rule was the celebrated "rule of recognition," which officials use to identify the authoritative rules within a particular territory. For a legal system to exist, Hart maintained, there must be a single rule of recognition, **[p. 1153 ↓]** and one can identify this rule by observing the conduct of officials in selecting the first-order rules that they apply.

This so-called hermeneutical explanation gives meaning to the idea of legal obligation without a full foundation in empirical observation. Some have pointed to its similarity to Max Weber's (1864–1920) conception of formal rationality and to Hans Kelsen's (1881–1973) more metaphysical concept of a *Grundnorm*, which is the presupposed base of a legal system as a hierarchy of norms.

Contemporary Positivists

However, there remain, as currently definitive of legal positivism, two quasi-Austinian tenets. These are, first, the *separability thesis*, namely an insistence on the distinction between what law is and what it ought to be, usually summarized by the statement that there is no necessary connection between law and morality. Second, the *sources*

thesis, that all positive law has its origins in a social fact or event, so that it is artificial or conventional. Such views are common to such contemporary positivists as Jules Coleman and Joseph Raz, who all carry on the Hartian objective of analyzing the concept of law in an evaluatively neutral and largely conceptual manner.

The principal point of disagreement between these *analytical* legal positivists is whether a rule of recognition, itself identified by its social source, can contain criteria for the recognition of rules as binding laws that require courts to make evaluative judgments in their application. Inclusive or *soft* positivists, such as Hart himself or Wilfrid Waluchow, allow for evaluative criteria such as fair and just in the rule of recognition, although exclusive or *hard* positivists, such as Raz and Scott Shapiro, reject these. One can view the dispute between exclusive and inclusive positivists in different ways depending on whether one thinks that the issues are mainly conceptual, empirical, or normative.

Scholars often debate the matter as purely conceptual, about the correct analysis of *the* or *our* concept of law. This is the position Hart maintained to the end, presenting himself in 1961 as doing “descriptive sociology” (1961: vi), using the ordinary language method of philosophy dominant in Oxford at the time, to argue that conceptual analysis can help to make social phenomena more intelligible. This is largely a barren debate as to whether, for instance, law must conceptually be capable of possessing legitimate authority, but it is significant for those who think that it is important to establish a distinctive terrain for legal philosophy. Its problem is that it relies on appeals to intuitions and linguistic practices that are subjective and culturally variable. However, it can be helpful to say whether it is exclusive or inclusive positivism a researcher has in mind when conducting legal and sociolegal research.

A second approach seeks to render the Hartian tradition more sociological by building on Hart's functional assumptions that legal systems developed to avoid disorder, inefficiency, and instability in increasingly complex societies that could no longer operate well, based on primary rules alone. Raz echoes this in his thesis that the function of law is to guide conduct. He sometimes uses this to argue for exclusive legal positivism because using moral criteria to identify law does not provide the sort of definitive guidance that societies require. Raz himself takes this to be a conceptual point, but others have developed it in a more empirical direction.

Thus, Brian Tamanaha, noting the factual differences between Hart's model and actual law, particularly in colonial regimes, suggests that a general jurisprudence should seek to uncover the variety of rules of recognition that occur in actual legal systems. It is then a matter for investigation whether official laws are in any sense generally followed in a society or mirror social norms. Tamanaha calls his approach sociopositivist. Scholars wait, however, to see whether the identification of positive law as an empirical phenomenon is attainable within the social sciences. An ongoing subtheme in this approach is the unsettled debate as to whether legal positivism produced legal systems that perpetrate great iniquities, such as in Nazi Germany or apartheid South Africa.

A third approach, as Tom Campbell showed, is to stress the normative aspect of positivism. To what extent did the classical positivists, and indeed to some extent Hart himself, have a prescriptive agenda that involved encouraging a certain version of the rule of **[p. 1154 ↓]** law, as a system of governance that put high reliance on general rules that can be understood, applied, and followed without recourse to moral or other speculative judgments. He argued that this is both efficient and fair, while being neutral with respect to the actual content of the law. Here the empirical aspect remains to the extent that the prescriptive legal positivist has to demonstrate that the positivist ideal is feasible, but the dominant purpose is to commend a style of governance that makes democracy possible.

The practical issues affected by the debate about positive law include: (1) identifying the methodology appropriate to sociolegal studies, (2) analyzing the democratic propriety of judicial review of legislation under a bill of rights, and (3) determining what version of the rule of law should be required of governments and upheld by judiciaries.

Tom D.Campbell

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See also

- Bentham, Jeremy
- Hobbes, Thomas
- Kelsen, Hans
- Kelsen and Legal Sociology

- Legitimacy
- Morality and Law
- Obedience
- Positivism and Legal Science
- State, Law and
- Weber, Max

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