EMPIRICISM AS A FOUNDATION OF LEGAL POSITIVISM: AN APPRAISAL

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ABSTRACT

Legal positivism is a scientific tradition within legal theory that endeavours to conceptualise legal concepts and systems around the world in a morally neutral description. The core of legal philosophy of all the positivists is a sharp distinction between law as it is and law as it should be. The root of this core lies in their epistemological basis that only empirically observable knowledge is worthy of pursuit. This led to a belief among positivists that law, essentially, has to be conceptualised on social facts which can be observed and recorded in the real world and not upon the vague and elusive ideas of rationality and morality. Hence, in this way, all the positivists are staunch empiricists and reject rationalism as a mode of inquiry in law. Hence, they rejected the theory of natural law as it was conceptualised upon rational terms accessible to man via reason and not through experience.

Keywords: *Legal Positivism, Empiricism, Social Facts, Rejection of Natural Law*

I. Introduction

THE OLDEST known legal code of the world is The Code of Ur-Nammu. It was codified in 2100-2050 BCE by the Sumerian King Ur-Nammu.[1] Thereafter, the most famous archaic written criminal law namely-The code of Hammurabi was promulgated by the divine king Hammurabi by getting it engraved on stone and clay tablets in the kingdom of Babylon.[2]Roman Emperors had the '12 tables', which exhibited the rights and obligations of a Roman citizen, written on the bronze tablets providing for Roman Law.[3] But these are few examples of earliest codified laws showing the existence of well-defined legal systems even before the dawn of the common era. There definitely existed legal systems regulated by

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[1]Code of Ur-Nammu | Laws, Discovery,& Importance *available at*: https://study.com/academy/lesson/code-of-ur-nammu-definition-lesson-quiz.html (last visited on Jul. 19, 2024).

[2]Code of Hammurabi: Laws & Facts, *available at*: https://www.history.com/topics/ancient-middle-east/hammurabi (last visited on Jul. 19, 2024).

[3]The Twelve Tables, *available at*: https://roman-empire.net/republic/the-twelve-tables/ (last visited on Jul. 19, 2024).

uncodified legal rules like customs, tribal dictates and pronouncements before the codification of law. Hence, it can be said that existence of laws and legal systems is not a recent phenomenon and, perhaps, its inception precedes the inception of a state for custom is not a creation of state.

It is very likely that the laws and legal systems must have come into existence when the civilisations began, and *homo sapiens*, instead of wandering from one place to another looking for food, water, and shelter, settled permanently.[4]At this point of time the agricultural revolution may have already kicked in and the legal concepts like possession and ownership must have emerged, thus laying down the foundation of civil law. However, there is a huge probability that customs regulating marriage, family and crimes must have existed even in a nomadic tribal society. But this co-existence of laws with societies raises many mysterious questions like, how does law come into being? What rules can be called law? Does law really need a state for it to be there? What essential conditions must any stipulation or rule fulfil in order to become a law? What are the basic essentials of a legal system to exist in any country or nation? These questions are fundamental to the law and legal systems.

Legal theory is a field within jurisprudence wherein the jurists endeavour to unravel these mysterious questions by providing concrete theories. Just like to understand the physical world we have theories namely-theory of gravitation, quantum mechanics and relativity. Similarly, for a proper and sound understanding of legal systems and laws, legal theories are required. There have been many attempts by a number of jurists to devise theories that may explain the legal concepts and systems around the world.[5]

These theories have led to formulation of schools of thought in legal philosophy on the basis of the fundamental commonalities and stark distinction they had among each other. These schools are Analytical School also known as Legal Positivism, Natural School of Law, Realists' School or also known as Legal Realism, Historical School and Sociological School of Jurisprudence. Although the jurists belonging to these schools have never expressly affirmed their affiliation to such schools, it is just that the theories contained in each of such schools are so logically interlinked that they have to be studied together in tandem and compared with the theories contained in other schools for a proper understanding of law.[6]

Most of the times the methodology lying underneath the origin of these legal theories is the one propounded by Hegal- Thesis, Antithesis and Synthesis. While studying these

[4]Yuval Noah Harari, *Sapiens: A Brief History of Humankind*66-68(Random House, 2011).

[5] N.V. Paranjape, *Studies in Jurisprudence and Legal Theory* 22 (Central Law Agency, Allahabad, 7th edn., 2001).

[6] *Ibid.*

theories one can often find a jurist philosophizing his own theory by criticising and attacking the theory of a former legal jurist. For instance, HLA Hart laid down his theory in his seminal book "the Concept of Law" by systematically attacking John Austin's work in Province of Jurisprudence Determined[7]. Notably, it took 129 years for anybody to dethrone the work of Austin. This trend is further carried on by star pupil of HLA Hart, Ronald Dworkin who in his book, "Law's Empire" criticised legal positivism as elaborated by Hart.[8]

Legal Positivism

Legal Positivism as the name suggests, focuses upon study of law as it is posited. Here the word "posit" means "to put forth" or "to formulate". Therefore, a positivist shall study the law as it is framed. He shall not go into ethical or moral considerations of law. Here, a positivist will focus upon what law is as against the ethical approach which is what law ought to be. The former is a descriptive study of law whereas the latter is a normative study of law.[9]

For a positivist, the moral content of law is immaterial. What is material for a positivist is an analysis of law and in true essence the descriptive analysis of law. Therefore, sometimes this school of law is called The Analytical School of Law. A positivist is more concerned with whether certain social facts have been fulfilled which transform a mere rule into a law. Essentially all the positivists agree that law is a social phenomenon. It is obliging certain social facts that result into law. For instance, for Austin a general command by a sovereign to his subjects for which a threat of sanction is there, is law. A positivist will not inquire into the morality or justness of such a law passed by the sovereign. For positivists, a law does not cease to be a law even if it is immoral or unethical. The fact that a king has promulgated it or a bill was duly passed in the parliament by a majority of votes, after which it received the President's consideration, is enough for there to be any law, notwithstanding the moral content of such a law.[10]

For instance, during Nazi's rule in Germany there were many laws passed by the totalitarian Nazi Government which systematically identified and persecuted the Jews and gypsies. Under these laws the Jews and gypsies were under legal obligations to produce the identification of their race and their basic civil liberties were abrogated by the State itself. Jews were legally bound to carry ID cards which showed their Jewish bloodline and their

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7 H.L.A. Hart, *The Concept of Law* (Oxford University Press, 3rd edn., 2014).
8 Ronald Dworkin, *Law's Empire* (Belknap Press,1988).
9 *Supra* note 5, at 23
10 What Is Legal Positivism, *available at:* https://www.youtube.com/watch?v=ATtqAjOkqwk (last visited Jul. 22, 2024).

passports were stamped with letter "J" to segregate them systematically. The Law for the restoration of the professional civil service passed on 7th April 1933 excluded Jews and other non-Aryan races from the civil services of the state. The Nuremberg Laws deprived Jews from the citizenship of The Reich and forbade them from entering into sexual or marital relationship from persons having German blood.[11]Ultimately, a lotof hardship and suffering was inflicted upon Jews through Nazi laws. Similarly, the Apartheid laws in South Africa aimed at prohibiting black native population from entering into certain specific areas like beaches, schools, buses and rail coaches which were exclusively reserved for the minority white population.[12]

There is not an iota of doubt that these laws brought havoc upon the subjects to which these laws applied. Also, there are no qualms in holding out that these laws were unfair, irrational, unjust and immoral in nature. The inhumane content of these laws is apparent from the explicit provisions contained in these laws. A question of jurisprudential significance annexed to Nazi and Apartheid legal systems is -were these systems actually legal systems? Were the so-called Apartheid and Nazi laws, were laws in fact?

For a positivist, these laws were actually laws irrespective of their immoral, irrational and inhumane content. Under legal positivism immorality in law cannot deprive the law of its legality and enforceability as it is not a legal criterion for the legality of law. However, a natural law theorist is strictly against such a rigid descriptive approach and for him these laws are *void ab initio* since these man-made laws violated the natural law. For a natural law theorist only, those rules are laws which are rational and moral. For him Nazi and Apartheid laws were never laws at first place when those were promulgated.[13] But this does not imply that the positivists encourage immoral and unfair legislations. That shall be a wrong understanding of legal positivism. Instead, what they simply say is legality and morality are two distinct and separate things.

II. Influence of Behaviourism in Legal Philosophy

There is a peculiar reason associated with legal positivism why the positivists term law as only a social phenomenon and denounce ethical or moral study of law. During the early 1900s a scientific method of studying any discipline became quite famous. This method was

[11] Anti-Jewish Legislation, *availableat:*https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany (last visited on Jul. 18, 2024).

[12] Laws from South Africa's Apartheid Era, *availableat:*https://blackandeducation.org/stories/2017/2/5/selected-laws-from-apartheid (last visited on Jul. 22, 2024).

[13] Stephen Mathis, *Philosophy and the Law: How Judges Reason*12-13 (Modern Scholar, 2008).

against the conventional and dogmatic study of any discipline as the conventional mode of studying was purely doctrinal, hardly observable in real world and most of the time elusive. The conventional study relied upon what the reason says to the man, an *a priori* method. *A priori*is the knowledge which is acquired without any sensory experience at all. A priori knowledge is universal and holds true due to necessity. Hence, Kant calls *a priori* as pure reason.[14]

The modern scientific method instead relied upon observation in the real world, which included collection of data and later its analysis. Hence, *a posteriori* method. *A posteriori* knowledge is acquired via sensory experience and is not the domain of pure reason. In 1900s, the psychologists started using *a posterior* method i.e. empirical method of studying human psychology as against the doctrinal method. A school of thought called behaviourism emerged. This school propounded that for any study of human mind and conclusion to be made on its working, the basis of such study and conclusion must be the evidence which can be observed and recorded in real world. For human psychology such evidence is human behaviour. Thus, the behaviourists put forth that human psychology must be studied on the basis of human behaviour either by observation or experimentation. It is only the human behaviour upon which sole reliance has to be made for any study in psychology and not any vague idea which is non-observable and stated to be available to human reason.[15]

The idea of behaviourism had its ramifications beyond the field of psychology and influenced legal philosophy. There is no surprise in such influence as after all law regulates nothing but human behaviour itself. Hence, the legal philosophers started conceptualising law and legal systems on the basis of observable and perceptual facts, and denounced vague and obscure ideas of natural law as a basis for such a conceptualisation. This is the reason that the legal positivists term law as a social phenomenon. This social phenomenon happens in the real world which is observable and can be recorded.

The fact that a bill entered Upper house first and majority of parliamentarians passed it by a vote of hand and thereafter it was passed in Lower house in a similar manner and finally assent was given to it by the President, is a social phenomenon which can be observed and recorded in real world. The fact that the King had promulgated a law by getting it engraved upon large monolithic stones which were thereafter placed at conspicuous places in the kingdom is a social fact which can be observed and recorded in real world.On the contrary, the fact that something is moral and rational as against another thing is not revealed to a

[14] *Supra* note10.
[15] *Ibid*.

human being by experience but by human reasoning. It is not something which can be observed and gathered in real world.[16]

III. The Conflict between Reason and Experience

The legal philosophy as like philosophy generally relies much on epistemology. Epistemology is a branch within philosophy which endeavours to explore the nature, origins, limits and validity of human knowledge. The philosophers in this branch of philosophy ponder upon some pivotal issues like how does a person get to know anything? Is all the knowledge gained from outside world via sensory experience or is there some unique blessing bestowed upon human beings that provides some innate knowledge with which every human being is born? What opinions and beliefs made on the basis of human knowledge can be conclusively established to be truths? What are the limitations upon human knowledge or is there something in the world which is, due to its intrinsic nature, unknowable? When knowledge of any object is acquired, is it acquired in totality of the object or in a corpuscular form of the tiny constituting parts of the object? Is a thing defined to be that particular thing by virtue of its structure or appearance or is it by virtue of its purpose that its serves? How can any knowledge claim be established as a truth?[17]

The above-mentioned issues are some of the pivotal issues which epistemology deals with. These questions are naturally linked with legal philosophy too. It is on epistemological basis that any legal philosophy can be made. At epistemological level, historically, there have been two schools of philosophy- empiricism and rationalism.[18]

Some of the notable philosophers of empiricism are- John Locke, George Berkely and David Hume. These philosophers gave experience as against reason the final authority to make any claim of knowledge. They were opposed to the idea of innate knowledge. Notably, John Lock famously propounded the theory of "*tabula rasa*" literally meaning blank slate. He put forth that human mind is a clean slate at the time of birth devoid of any rules, principles or ideas. All the knowledge about world is later on gained through the sensory experience. Hence, knowledge is stimulated in the human mind via an interaction between the environment and the sensory organs of the body. He expressly rejects that a man is born with some innate ideas available to courtesy to his rationality.[19]

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16 *Ibid.*
17 Professor Daniel N. Robinson, *The Great Ideas of Philosophy* 145-147(The Teaching Company, 2nd edn., 2004).
18 *Ibid*.
19 *Ibid.*

On the contrary the philosophers of Rationalism like Rene Descartes, Spinoza, Leibniz and ancient Greek philosophers like Socrates and Plato, believed that sensory experience is subject to suspicion and deception. No valid knowledge claim can be made on the basis of experience alone. They emphasised upon the intellect, the reasoning faculty of human mind which separates a human being from an animal. The School of Rationalism advocated the existence of innate ideas and concepts which a man is born with because of reason. Under this school of philosophy, the mode of inquiry is initially doubt upon sensory perceived data and discovering the truth via reason. This reasoning faculty which makes him accessible all these innates ideas is bestowed upon him by the god, nature or any other entity responsible for his creation.[20]

The best example of innate ideas as put forth by the rationalists is mathematics. One plus One shall always be two even if no human being had existed and taken any sensory experience. Pythagoras theorem, the fact that hypotenuse in a right-angled triangle shall always be bigger than the base and perpendicular of every right-angled triangle in this world is a fact, the knowledge of which can be acquired even without actually measuring the sides of every triangle on this earth. It is believed that Pythagoras never discovered Pythagoras theorem by actually measuring the sides of triangles. Moreover, how many triangles must be measured to conclude Pythagoras theorem and lay a claim that the same is true for every right-angled triangle drawn in this universe. Similarly, some logical syllogisms, that if A is bigger than B and B is bigger than C then the conclusion that A is bigger than C without actually manually comparing the lengths of A and C[21] are knowledge claims accessible to mankind without any need of sensory experience.

In legal philosophy too, the school of rationalism gave birth to the theory of natural law. To further elucidate upon principles of natural law being revealed to human being in virtue of his rational capacity and not from observation, an instance of principle of equality can be taken. No information or conceptualisation of equality among human beings can be made via observation in the world. One shall find people of different structures, height, skin colour, eye colour, hair colour and even mental aptitude. One shall find how unequal people are due to biological circumstances like gender variations and genetic disabilities are found. Similarly, the economic, social and cultural differences among people bring forth to our mind via observation that people are not equal in the world. Therefore, amidst all this experiential information coming to human mind only of differentiation and variation, how could the

[20] *Ibid.*
[21] *Supra* note 17 at 35.

concept of equality that all human beings are equal irrespective of their colour, cast, sex, creed and gender kindle human mind? There is only one answer and that is the core concept of equality is not an experiential learning but revealed to human being by his reason.[22]

It is truly an amazing yet an under rated fact that despite so much of diversity among human beings that our species came to the realisation and understanding of equality among all human beings. The fact that every man is born free and he has certain natural rights which are available to him by virtue of being born in this world, is not an empirical observation. The socialist idea that earth and it natural resources including land belong to all and not to a particular human being also took birth from rationalist epistemology.[23]

IV. Inductive Methodology in Legal Positivism

This rationalistic epistemology led to a methodology of deduction. The deductive method presupposes the existence of a general and universal rule, the validity and existence of which is not denied. Later, this rule is broken into as many parts as possible for a proper understanding so that each part could be analysed and studied separately. Thereafter, from this study, specific conclusions are made which are quite local and narrow in scope. Hence, in a deductive method of study espoused by a rationalist it is the discovery of a specific conclusion from a more general conclusion. The general conclusion is an overarching umbrella observation from which specific discoveries are extrapolated. A simple example of this is a famous syllogism, if all men are mortal and Socrates is a man, then it is definite that Socrates too is mortal. From a much general statement concerning mortality of all men, we came to a specific conclusion concerning mortality of Socrates.[24]

Similar deduction method could also be applied in legal philosophy. Once it is settled and agreed that there are universal, immutable and everlasting principles of natural law accessible to man via reason and bestowed upon him by the God or other creating being, specific rules could be made out of the general principles of natural law. Natural law is not created by human beings nor its principles like Equality and Right to life are creation of human made law. The right to life is bestowed upon man by God himself and no legislation can grant it. Therefore, when human beings legislate to make specific rules to regulate human conduct in various field of life like trade, commerce, family, crime, contract *et cetra*, these specific rules are to be deduced from more general principles of natural law. Thus, the jurists who believe in rationalism as a mode of acquiring knowledge espoused deductive method of legislating.

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22 *Ibid.*
23 Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford University Press,1st edn., 2006).
24 *Supra* note 17 at 127.

Since natural law philosophy has its epistemological root in rationalism, it relies heavily upon the tool of deduction as a mode of inquiry or discovery.[25]

Here examples can be taken of some provisions under Indian Laws. For instance, the fact that a charge is to be framed in a criminal trial and notice of the accusation must be properly formulated in the charge by mentioning important particulars like date of offence, place, time and manner of crime, section being invoked and even the name of the offence,[26] if the law gives it a special name, and framing of charge in this way is mandatory can be traced to a sacred principle of natural law- "*audialtrem partem"* which means no body can be condemned without being heard. Here, hearing the accused would be of no meaning if he is not informed of the accusation against him. So, the hearing would be rational only if he is apprised of the accusation against him. This purpose is served by charge. Thus, the parent principle behind charge is rooted in natural law philosophy.

But on the contrary the empiricists believe in inductive method as the correct scientific method for any mode of inquiry. The inductive method starts with gathering information and data via experience to come to any particular specific conclusion and it is only later on that this conclusion that could be generalised. Hence, the mode of inquiry proceeds from a specific to a general overarching conclusion.[27] However, to generalise any specific conclusion, the population size of sample and other safeguards is required to fulfilled to negate any erroneous interpretation. A simple example could be taken of a dog. One can have a sample size of 1000 or more dogs and if it is found that all those dogs wag tails, a generalisation could be made that all dogs wag tails. Here, the initial collection of data aided in reaching a specific conclusion that the surveyed dogs wag tails. It is later on generalised that all other dogs (un-surveyed ones too) wag tails. It is also remarkable that a conclusion reached via inductive reasoning cannot be absolutely true however it is most likely to be true. The only way to nullify such a conclusion is to just give one contrary instance upon which this conclusion is not applicable. In the abovementioned example, it could be done by discovering a dog who does not wag his tail.[28]

The positivists as are staunch believers in empiricism and employ inductive method as a mode of inquiry. HLA Hart uses a specific instance of gun-man theory to explain Austin's concept of Law. He dramatically asks the reader to imagine a situation wherein a gunman enters a bank and demands money from the staff of the bank else otherwise he will shoot at

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25 *Supra* note23.
26 The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), ss. 234,235 &236.
27 *Supra* note 17 at 137.
28 Induction Definition, *available at*: https://sociologydictionary.org/induction/ (last visitedon Jul. 27, 2024)

them. This situation can be expanded to a sovereign's reign at large in order to understand Austin's definition of law. The sovereign is just like the gun-man who issues commands like the gun man issued to the staff of the bank. The sovereign is free both internally and externally. Internally in his empire he is the supreme and not bound by any other person's will. Externally, he is not under the influence of some other kingdom. Similarly, the gunman is supreme as he has the gun in his hand and is not bound by the word of the people inside the bank. He is externally supreme too as nobody outside the bank is aware of any robbery happening inside the bank. Gun-man is sovereign in his own miniature system. Just like the gun-man backs the command of handing over of money to him with a death threat so does the sovereign with the threat of penal sanctions enforces his own command. As citizens of nation habitually and generally obey the sovereign under a threat of sanction so do the people in the bank obey the gun-man to evade death. Hence, an overarching and a general conclusion is induced that law is a command of sovereign backed by a threat of sanctions and to this sovereign people have a habit of obedience from a much smaller model.[29]

The positivists just like any empiricist believe in formulating a simple model of legal system and from this simplicity they induce more complex and overarching models applicable to the legal systems of real world. HLA Hart in his own theory of primary and secondary rules initially starts off with a basic model of a primitive society and thereafter scales it to a large legal system like those of nations.[30]Similarly, Sir Henry Maine too, though he is no a supporter of positivism, starts off with family system to explain the origin of state.[31] Hence, in inductive methodology which the positivists apply law is developed from specific instances to general instances whereas natural law theorists apply deductive reasoning to develop law.

A modern instance of induction as tool of development of law under positivism in Indian context is worthy of discussion here. The doctrine of '*stare decisis'* provides that law declared by the Supreme Court of India shall be applicable throughout India and all the Courts in India are bound to apply the law so declared by Supreme court in its judgments.[32] On similar lines, the same is true for a high court with in a state. The High courts and the Supreme court are different from other courts in India as these are constitutional courts whereas the other courts are constituted under statutes. While declaring the law via stare decisis the constitutional courts do not merely provide literal meaning but in that interpretative act develop the law too.

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29 *Supra* note13 at 10.
30 *Supra* note5 at 35.
31 *Id*. at 58-59.
32 The Constitution of India, art. 141.

So, the act of interpretation is not just transliteration or paraphrasing but a purposive development of meaning of the provisions of law in specific contexts and in that meaning lies the soul of implementation of the law.[33] This is an inductive process as the law is developed by a constitutional court in a particular matter before it, in a particular petition and in context of specific facts of a particular case. But the law so declared i.e. the *ratio* in it, shall be applicable throughout India and all the courts are bound to apply such an interpretation in the like cases coming before it. So, the Supreme Court generalises a conclusion arrived from a specific case to all the similar or like cases. Hence, law developed via stare decisis is an outcome of inductive process.

Conversely, as the non-constitutional courts are bound by the decisions of the constitutional courts, they deduce their decisions from the decisions of the constitutional courts. For the non-constitutional courts, the method of working is of deduction.

An Analytical and Empirical Method

For positivists it is an empirical, analytical and descriptive study of law which is important. The natural law theorists espouse a normative study of law. The distinction is "as it is" against "as it ought to be". The ideas of equality, fraternity, freedom and other natural law concepts don't become legal concepts by virtue of being called natural conditions for humanity. Nor do the positivists ignore their importance. To simply put, these natural concepts of law might be tools for aiding in formulation of law but by themselves these do not become law until incorporated in legislation. For positivists a law shall continue to be a valid law even if it does not conform to principles of equality or fairness subject to one condition which is fulfilment of those social facts, as against moral facts, which render a rule a law.[34]

This is where the whole dichotomy starts the positivists don't base their theories of law on the vague ideas of natural law. Austin rather said that the natural law conflated religion and ethics with law. What is ethically and religiously proper by itself does not become legal. The Legality of anything must come on the basis of social facts capable of being perceived and recorded and not on the innate things of mind which stay in the mind only. But this also does not mean that positivists encourage immoral and irrational rules to be laws. They don't ignore the importance of rationality, an innate nature of human mind which separate a human being from animals. All positivists say is what law should be and what law is are two

[33] Justice Asok K Ganguly, *Landmark Judgments That Changed India* (Rupa Publications India, 2015)
[34] *Supra* note 13 at 12.

different and distinct concepts. The former is of importance to a parliamentarian or to people at large, hence it falls within the field of science legislation as put forth by Bentham. But the latter is for judges and advocates in a court. Judges and lawyers are meant to apply law and not legislate. Therefore, for them the pivotal question is not what law should be rather what law is. Hence, they need an analytical and descriptive approach to law and not a normative one.[35]

V. Social and Separation Thesis

All the positivists notably agree upon two matters which establish a common thread among them. First, what law is and how just, immoral, rational or fair it is are two different and distinct questions. This is often called 'separation thesis' as is found famously in the works of John Austin.[36] John Austin says 'what law is' and 'what it ought to be' are two distinct questions and not intertwined. The significance of this separation is that it leads to following conclusions.[37] If some rule is just, rational, moral, fair and ethical, it does not automatically become law. The converse is true too if there is a rule of law, it does not become void by virtue of the fact that it is unfair, irrational or immoral. Thus, morality can neither supply legality nor can it seize it.[38]

The second matter upon which the positivists commonly agree is famously dubbed as 'the social thesis' as discussed earlier that law is a social phenomenon. All the positivists agree or rather propound that law is always posited i.e. created or formulated. It is not something that God has given to human beings or something that nature has bestowed upon us.[39] Nor it is anything *a priori* readily available to rational capacity of human beings. To put in other words, Positivists reject the existence of Natural Law. The jurists which subscribe to the ideology of Natural Law School believe that there is a law which is not made by man but revealed to man by the god either in form of reason or in scriptures. This law is immutable, universal and everlasting. According to Natural Law theorists all the human made laws or Positive laws (the name positive presumably as human laws were posited) must not violate the natural law as otherwise they shall cease to be laws. The Natural law theorist Saint

35 *Ibid.*
36 *Supra* note 10.
37 *Supra* note 5 at 29.
38 *Supra* note17.
39 *Supra* note 10.

Thomas Aquinas famously defined law is a rational human conduct.[40] Here the word rational needs emphasis. It is something related to innate nature of human mind. The human mind itself knows what is appropriate and what is mischievous. This rational capacity is bestowed upon him by God or nature. However, on the contrary, the positivists believe law to be a social phenomenon, hence the propound a social thesis of law as against the normative one.

Morality is not a Legal Criterion

The social thesis is the first step in understanding legal positivism which provides that it is the social facts of empirical nature that lay down the legal criterion. The separability thesis is the next natural step which provides that the criteria for legality i.e. the essential conditions for a rule to be a law don't lie in the moral substantive content of the rule. Now, this too has two interpretations- The Restrictive and the Inclusive construal. The Restrictive construal of the separability thesis says that it can never be a criterion for legality that a norm possesses moral value. Restrictive construal of the thesis completely eliminates morality as a criterion for some rule to be called law. The other construal of the thesis the more inclusive one bears the name Inclusive construal of the thesis. The inclusive one provides that it is not necessary that for a rule to be a law it must be moral too. '*It is not necessary*' implies in some cases it could be. But what could be these cases which allow morality to be a part of legal criterion and still continue to obey the overarching fundamentals of positivism.[41]

Recall that, the true essence of positivism is that the criterion for legality is not moral requirements. The criterion of legality rather is that essentially law is a matter of social fact and it is upon basis of these social facts and conventions that any rule transforms into law. This is what the social thesis provides for. We already took an example of a parliamentarian system in which law comes into being when a bill is passed by both the houses and assented to by the President. This procedure is mentioned in the most fundamental legal enactment of a legal system i.e. the constitution. But suppose the constitution is amended by the Parliamentarians and a provision is added by them that not bill shall become law even if assented to by the President unless it passes the touchstone of social morality of the nation.[42]

This shall result in complete convergence of law and morality yet the separability thesis shall still stand as not being violated. Hence, the inclusive construal of separability thesis

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[40] Mark C. Murphy, "Natural Law Theory" *The Blackwell Guide to the Philosophy of Law and Legal Theory* 15-17 (Blackwell Publishing Ltd, 2005); Brian Bix, "Natural Law Theory" in Dennis Patterson, *A Companion toPhilosophy of Lawand Legal Theory* 211-227(Wiley Blackwell Publications, 2nd edn.,2010).

[41] Jules L. Coleman and Brian Leiter, "Legal Positivism," in Dennis Patterson, *A Companion toPhilosophy of Lawand Legal Theory* 211-227(Wiley Blackwell Publications, 2nd edn., 2010).

[42] *Ibid.*

allow morality to be a part of law but that really is only if the social facts upon which legality is based allow it to be so. Therefore, it can be said that what separability thesis provides for is not how morality and law are not intertwined, linked or aligned but rather that the criterion for legality of law is not directly a moral criterion.[43]

Thus, one conclusion can be drawn here. The positivists don't say that law and morality are completely separate. In fact, some of the legal provisions may be based on upon certain moral values. It is also the fact that law must meet certain moral demands of the society. Hence, the positivists don't say that laws and morality don't overlap. In fact, they do provide a case and also provide conditions for this case when law and morality may get intertwined. What the positivists really want to convey through separability thesis, particularly in its inclusive construal, is that notwithstanding this intertwining and overlapping between morality and law, the criterion for legality of law stills stays meeting certain social conditions or facts which are empirical in nature. Morality could enter into legal domain only if it is agreed so via social conventions and facts which are observable in nature. So, one cannot say the legal criterion of law itself is morality though it could be intertwined with law.

VI. Conclusion

The true epistemological root of positivism lies in empiricism which espouses that the pursuit of sensory knowledge is worthy and not of vague innate concepts. This is the reason that the positivists rely upon social facts in laying down the jurisprudential theory concerning law. The school of behaviourism in psychology, which too has a root in empiricism, influenced legal philosophy and as a result positivists started theorising upon law on the basis of observable human behaviour. Austin observed the general obedience by subjects to sovereign's commands as a human behaviour capable of explaining a legal system. Similarly, for Hart it was the shared attitude and behaviour of majority of people that gave the legal content to law and when accepted from an internal point, it provided the people enough reasons to adhere it hence providing law the feature of normativity. Although positivists, differ among themselves about the kind of social facts which lead to formation of law, yet the core feature of positivism and the common theme which run among the works of all positivists is the social and separation thesis.

[43] *Ibid.*