

Law as a Force v. Law as a Command

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Abstract

The age old question of what is law has seen substantial development on the jurisprudential level and the question of what makes us obey the same has always been seen under a psychological filter. The science, the art, the jurisprudence, the chief political and social theories, of the modern world have grown out of Greece and Rome – not by favour of, but in the teeth of, the fundamental teachings of early Christianity, to which science, art, and any serious occupation with the things of this world were alike despicable. The entire paper has a jurisprudential theme. Going out of the sight because of financially beneficial streams of law, this field has been gradually losing a great portion of its ground, but it's the power of the same that drives all the enquiries into law and here also the jurisprudential aspect of jurisprudence is attempted from its purest form. This time however, an enquiry into the latter question is taken from a legal aspect. The attempt to answer this question has been done not from the push that our brain gives us, but from the pull of the understanding of jurists and juridical or man-made decisions. The article has limited itself to the most compelling and vociferous thought schools of law, i.e. the Natural School and the Positivist School. The presentation initiates with realizing the problem of non-realization by the masses, driving into the core concepts of these streams of laws and finally seek for a convulsion of the two topics, if possible. The schools of law stand juxtaposed to each other in a few ways, however the same is not omnipresent, and such merging has been attempted to be identified.

I. Introduction

In the words of Dias, “power has two connotations. One is physical force, but this, however great, is inert in itself” and the other is compulsion from one's sense. Time and again the consideration was the unreasoned mandate behind the following of law. Law's empire is widely read and widely quarrelled, because it too, is undeniably important and annoyingly elusive. A reason behind this assumed mandate is attempted in the upcoming pages.

The positive or analytical law school has considered the face of law which has to be followed being a command which corresponds to the duty aspect of law. On the other hand the natural thought on law, even if it isn't a school of law, has the principles which considers a yet higher placed authority to dictate law upon us, and the source only has morality to persuade the humans to follow laws.

The conflict between the two thought streams is initiated by a basic reading into the nature of law, i.e. the subject and its codifications. Such codification has been justified in the form of the inalienable legal notion of 'punishment'. But this construct is of deductively reaching the conclusion, and it will be less effective if the same is not coupled with positive criticism of the idea behind the question of mandate of law, which has been provided next. Following this structure it's time to put both the jurisprudence thoughts and schools juxtaposed and then look into the distinction and convergence of the same. Lastly, a conclusion can be found.

³³²R.W.M. Dias, *Jurisprudence*, 24 (First Indian Reprint, Aditya Books Pvt. Ltd. 1994).

³³³Gregory C. Keyting, 'Justifying Hercules: Ronald Dworkin and the Rule of Law', *Law and Social Enquiry Journal of the American Bar Association*, Volume 12, Issue 2-3, April 1987, at 525.

II. The Two Classes of Law

As go the central claims of the two thought processes, they have particularly distinct origins and hypothesis and both of them recognize the presence of law under two classes: (1) Law of God and (2) Human Laws. Law of God is that force and abidance that flows in the human race by the virtue of it being endowed by a superior force. This superior force need not only be divine, but 'superior' in literal sense, for example it could be Austin's sovereign, Dworkin's Hercules or Kelson's grundnorm. Divine sources like the Holy Bible, The Holy Quran and Gita also come under this category. As it is one of human attributes to term the unexplainable or the unquestionable as divine, so the term 'Law of God' was used for naming. It even includes the teachings in the form of fables and principles that we have inculcated.

Human laws are those laws that can be traced back to a human invention fall under this category. Examples are constitutions, legislations, delegated legislations and non-statutory executive orders, in the descending hierarchy, and the judge made laws. According to G W Paton, law emerged and evolved in four phases, and it was the penultimate phase of Classical Phase which saw the emergence of heavy legislation and in turn arrival of the human law. The reason for the same was absence of stabilization of law to a substantial level.

Looking at scope of these two classes, it could definitely be said that the laws of God don't have an exhaustive character as against the Human laws. Human laws have a definite form and regulatory nature. The very reason that laws sprang up, as per the social contract theory, was that coherence of all beings could have been achieved only when everyone gave up certain interests which were hindrances to others and their acts be monitored properly and prohibited actions go punished. Hence, the laws that have been formulated since then are of a definitive character, i.e. one provision of law deals only with one aspect of unwanted occurrences, and one compiled text of law only speaks about the process and methods of dealing with a certain class of unwanted occurrences. On the other hand, Divine Laws are always ought propositions and give directions completely in morality with multidirectional application.

III. Punishment

The greatest way to embark authority is to sanction punishment for every substantial derogation to the symbol of authority. This theory makes 'punishment' to be the most important part of criminal structure of law. It is a well-established principle that the punishment for the crime must not be irrelevant and must conform to and to be consistent with the atrocity and

³³⁴Used interchangeably with cannon law. Cannon laws are such laws or rules that were laid down by the papal pronouncements in Rome in the 14th Century and the era following.

³³⁵See- Jonathon Burnside, 'God, Justice and Society, Aspects of Law and Legality', Oxford Journal of Law and Religion, Volume 1, Issue 2, 1 October 2012.

³³⁶See- Edward J McCaffery, Ronald Dworkin- Inside Out, California Law Review, Volume 85, Issue 4, July 1997, available at- <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?art.=1619&context=californialawreview>.

³³⁷According to Kelsen, in every country there is a hierarchy of legal norms, headed by what he calls as the 'Grundnorm' (The Basic Norm). If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail. Taken from Government Of Andhra Pradesh & Ors. V. Smt. P. Laxmi Devi, Appeal (civil) 8270 of 2001, para 32.

³³⁸Government Of Andhra Pradesh & Ors. V. Smt. P. Laxmi Devi, Appeal (civil) 8270 of 2001, para 33.

³³⁹See: G. W. Paton, A textbook on Jurisprudence 72 (4th ed., Indian Edition, Oxford University Press 2005).

³⁴⁰N.V.Paranjape, Jurisprudence and Legal Theory, 237 (6th ed., Central Law Agency, Allahabad,2011).

³⁴¹Joseph Kary, Contract Law and the Social Contract: What Legal History Can Teach Us About the Political Theory of Hobbes and Locke (1999). Ottawa Law Review, Vol. 31, No. 1, 1999 available at SSRN: <https://ssrn.com/abstract=2711536>

brutality of the event and it should respond to the society's cry for justice. Dr. William Paley's studies and as has been pointed by Austin and that there always is violation of all kinds of laws, and Dr. Paley only attributes it to the violent nature of the act. Providing his own proposition, Austin says that punishment is in the form of sanction against the obligation and is enforced only by 'conditional evil'. For its inalienable nature, punishment is present in all the jurisdictions and hence gives us the uniform, universal insight on the coax law implies.

The forms of punishment that the divine laws impose upon us are either of 'after-life' consequences or of moral guilt, or a sanction and human laws have a bearing, but that is in relation to the duty bound nature. As the social contract theory stands, humans took shelter of laws to achieve one and only one objective, and that was a chaos free environment. Taking the example of criminal codes, the very nature is that to punish.

"Punishment is the hallmark of crime and therefore, any study of criminal law without the study of punishment and sentencing is incomplete. In practice the public and the offender are more interested in the punishment given."

Punishment as per this theory is exactly what Manu, a believer of the natural law school, has remarked that punishment is only a tit for tat aspect, such as the wrongdoer shall be punished only and exactly as the harm he has caused.

IV. The Hypothesis of a Moral Sense

Moral senses, a common sense, a moral instinct, a principle of reflection, conscience, a practical reason are all one and the same thing. To start with an analysis under this head, firstly we shall base argumentation on the following two assumptions:

- Certain human actions are determined in positive or negative approbation for feelings
- The earlier assumption has divine and an unquestionable origin

It's imperative to discuss moral sense theory in this context. Moral sense theory as discovered by Anthony Ashley Cooper, the Earl of Shaftesbury, stood as the moral evaluation is the "affection" or motive behind the action. Such affections can, by reflection, become the object of a second-order affection. This principle of affection, speaking legally is attributed to the feeling of driving justice from all the actions that are carried forward, and about the nature of right or wrong actions and to differentiate between them. The same may be applicable to the common mass, but is relevant more so for the judges. This moral sense is innate, and is exhibited in small children as well as in adults. This theory of law was brought into light from the psychological point of law by psychologist Jonathan Haidt, which was documented in 2008.

³⁴²Kumar Askand Pandey, Criminal Law in India- Cases and Materials, 235 (5th ed., Central Law Publications 2014).

³⁴³Avtar Singh and Harpreet Kaur, "Introduction to Jurisprudence" (4th edn, Lexis Nexis 2015)

³⁴⁴Sovereignty in Fragment:, the Past, the Present and the Future of a Contested Concept, 42 (Hent Kalmo and Quetin Skimmer, Cambridge University Press 2009) .

³⁴⁵John Austin, Province of Jurisprudence Determined, available at <https://play.google.com/books/reader?id=yjXxxaeudh0C&printsec=frontcover&output=reader&hl=en&pg=GBS.PA10>.

³⁴⁶See- Stephan G Kuttner, 'The Natural Law and the Cannon Law'.

³⁴⁷Supra 11.

³⁴⁸Nicola Padfield, Criminal Law, 6 (1st ed., Oxford University Press, 2006).

³⁴⁹Supra 13.

Where the early psychologists gesture towards divine providence when it comes to explaining why we have a moral sense and why it approves of things like benevolence, Haidt's story appeals to evolution. He believes we are pre-programmed to respond to suffering with compassion, arrogance by subordinates with contempt, cheating with anger, and impurity with disgust, for example. Haidt has considered two systems running side by side within us, the first is the Intuitive system which runs involuntarily and continuously and the second one is the Effort system which is well thought and put into effort after a basic understanding of the matter at hand. So, the Intuitive system runs on the premise of the principles that are pre-installed in our brains, and the same can be hence attributed to the natural sense of justice. On the other hand, the moment an effort is made to reach justice, the yardstick to reach justice is sought, and the same is the positivist law.

Moral sense theory is hence a theory in moral epistemology and meta-ethics concerning the discovery of moral truths. Moral sense theory typically holds that distinctions between morality and immorality are discovered by emotional responses to experience. Some take it to be primarily a view about the nature of moral facts or moral beliefs.

The second assumption in this present case is that the human laws are always moral and fulfill all the criteria of being just, as they themselves articulate the yardstick. What the statute itself enacts cannot be unlawful, because what the statute says and provides is law in itself, and the highest form of law that is known to this country. In the law which prevails over every other form of law, and is not for the court to say that a parliamentary enactment, the highest law in this country is illegal.

V. Comparative Analysis of Analytical and Natural Schools

Natural school professes for a world order. It believes that nature is just no scattered heap of living material, but things take place in some definite pattern, as it is the reason unaffected by desires. It considers that even rule of law is subjected to each and every organ the state has, the state itself as well, and bestows all faith in the law that has been existing since the inception of order. Man-made laws are only an extension to the existing nature and definitely don't form a parallel system.

Another aspect of natural law is that it believes in the existence of a higher form of law. It says that law exists on different platforms and these platforms have a hierarchical placement. On the bottom are the laws properly so called. These laws derive their validity and existence from the laws placed over them and is used in the general walks of one's life. Placed over these are the ideas behind the formulations of these laws itself. Placed yet higher are the legal norms and principles and superseding them are constitutional laws and constitutional principles. In our Indian context there can be a question raised that if these laws found their source in some other law, the other law would automatically become a 'higher positive law', then as our Indian Constitution is derived

³⁵⁰See- An Essay on the Nature and Conduct of Passions, With Illustrations on the Moral Sense, A. Garrett (ed.), Indianapolis, IN: Liberty Fund, (2002), available at: http://files.libertyfund.org/files/885/0150_LFeBk.pdf

³⁵¹Steven Pinker, The Moral Instinct, available at: <http://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html>

³⁵²Moral Sentimentalism, available at: <https://plato.stanford.edu/entries/moral-sentimentalism/#MorSenThe>

³⁵³Also known as sentimentalism

³⁵⁴See- Frassen, Belief and the Will, The Journal of Philosophy, available at- <http://www.princeton.edu/~fraassen/abstract/docs-publd/BeliefWill.pdf>.

³⁵⁵Cheney v. Conn, [1968] 1 All E.R. 538.

³⁵⁶Supra 11.

from other constitutions of the world, do those other constitutions become a higher positive and moral obligations for us?

The answer to this can be given in a complementary affirmation and negation. Affirmative side would argue that natural law aims at a perfect world order, and hence such a higher positive law only means that the principle of humanity and righteousness are the same in all corners of the world and different countries just put it in different perspective and different words. This form even explains the presence of international law, which positivism fails to do.

The side to negate would contend that the laws are completely subjective and the reason of difference is inherited in naturalism as such compliance is completely against the principle to follow one's own law. The two sides over here are integral to the answer and they bring us to the principle on which common law countries work. In common law countries rights are recognized and not given, hence, the aspect of inseparability is present and this is the sole reason of following of naturalism.

Coming to positivism, it could be said that positivists are formal people who believe in the form of law and not the content of law. As per H.L.A. Hart positivism that exists in the modern era has the following five ground rules:

- A law is laid down
- A law is a command
- Moral judgments are not the same as rational arguments
- Deduction is always possible, and when they are not, the 'ought' considerations can be referred as they would turn out to be 'is' law in such conditions
- Analysis of legal concepts is
 - Worth pursuing
 - Not the same in all law schools
 - Not the same as analysis of merits of law

The Austinian form of positivism blatantly says that law is the command of the sovereign and hence there would be an imposition of penalties. But the beauty of law and order can be construed by this simple and practical statement

Completely syncing with the ideology that the ones who established law wanted to be laid upon us, it is a form of command that doesn't even allow us to foresee ourselves as walking freely after violating law. Violation in itself is a big bad thing to be done, and not only that the very idea of one not following the law or thinking of not following the law is dangerous to the entire system and the state itself. The sedition law even finds its origin in somewhere the same form. This statement in itself shows the importance that can be attributed to a system which works, and is the sole reason as to why positivists follow law in its form and consider that state is the system that puts everything into order and hence shall not be trifled with. Another explanation to this finds its acceptance in the idea that creation of a utopian system is impossible and because of the fact that such an extension cannot be provided is no ground of not following the law in the form it is functional and effective, where the degree of effectiveness is immaterial.

³⁵⁷Supra 1 at page 333.

VI. Convergence of the two schools

There is a difference in the two theories of understanding, but once when the natural law finds itself to be embodied in the legislator's mind and in the core of the soundest reasoning, there is no second opinion as to why naturalism not be positivism and why not the laws be in perfect resonance with all available understanding of legal theories.

Owing to the partial flexible nature of the positivists, it can be said that just because they believe in a working system and consider its criticism and appraisals to be a completely different forum of argumentation, the credits stay untouched and hence, the better the law, the better its acceptability for the natural law followers, and just because it has the characteristic of 'lawfulness', positivists will always find it to be acceptable. Natural law too has no clashes with positivism in this regard. As soon as the basic principles of natural law are embodied in the law laid down, there would be the availability of the most basic form of justice and satisfaction about the same.

Alternatively, every Constitution is also closer to the natural law than the positivist law. Constitution of the free countries which recognize the basic norm of equality consider and protect the natural fundamental rights of all the citizens, and these fundamental right are nothing else but the protected aspects of natural law, such as non-self-incrimination , equality and equity , res judicata , double jeopardy , audi altrem partem etc.

VII. Conclusion

A law is not law merely because it wears that label. It becomes law only when it satisfies the basic norms of legal systems of the country and receives the stamp of validity from Law Courts. The whole point in calling a thing law is to evoke a realization that obedience is called for and that force of authority lies behind it. This is why fidelity to laws is enhanced by just quality as much as it is weakened the lack of it. Even though there is complete reason in this statement, yet the point of view of positivists also needs to be taken and its appraisal is a must for it has carried the study and analysis of law for centuries and even are somewhere responsible for the efficient work done by the law systems. The questions of why we follow: because of positivism or naturalism, boils down to only one concern, that whether law is a command or a duty.

One school has a view that we follow law because it is a command and the other says that we do so only for ensuring that there is no chaos and hence the ultimate objective of cohabitation is achieved. Hence the final question that needs an answer over here is that whether we follow law because it is a command or we follow it because it is an inherent duty bound compulsion in our minds?

To answer this I feel it to be the aspect that it happens to be a duty, and hence, we follow law not because of it being a command, but it being a duty. The only answer that can be derived from hence is that of the aspect of violation of law. As per natural law school, laws are violated only

³⁵⁸Indian Const., art. 20(3).

³⁵⁹Indian Const., art. 14.

³⁶⁰Indian Const., art. 20(1).

³⁶¹Indian Const., art. 20(2).

³⁶²Indian Const., art. 22, Indian Const. provides for the same in effect.

³⁶³Jilani v. Govt. of Punjab, Pak. L.D. (1972) S.C. 139 at page 261.

³⁶⁴Supra 1 at page 89.

because of personal motives. For example: a civil wrong is done for (usually) a monetary benefit, and a corresponding duty would be overlooked because of the same gain.

It is more of the nature of a duty bound action than a command which is of obligatory nature because (1) a moral sense to follow what has been there is stronger than to follow what has been imposed upon and (2) the credit of law is actually based only on the evaluation by each and every organ of the state. Only when the person is satisfied with the usefulness and effectiveness of a law, he will have a higher moral push to comply with it or to not be in its consonance, yet follow it nonetheless. But the expression of suppression that the merit shall not be questioned and there must be a necessitated following of what a person with a club has said, will have some force, but a very meek one.

Following of law is attributed to the duty aspect of it, and hence we follow law because of the force of natural law concepts.

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