

The Separability Thesis: A Comparison Between Natural Law and Legal Positivism

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Introduction

The purpose of this paper is to examine the separability of law and morality within an analytic jurisprudential framework. The paper is comprised of four parts. First, the separability thesis will be discussed and defined. Second, Hart's legal positivist account of law will be presented, which defends the separability thesis. Third, two objections from a natural law perspective (classical and contemporary) will be proposed against the legal positivist position, thereby rejecting the separability thesis. Each objection will be accompanied by a possible Hartian reply. Finally, I will offer a novel analysis of the arguments as well as state why I find the Hartian approach preferable to the natural law theorist's in regard to the separability thesis.

The Separability Thesis

The separability thesis concerns the relationship between law and morality and whether a necessary connection exists between the two. It is necessary, however, to further clarify what is meant by the term *separate*, as some have described it as *misleading*¹. There are various formulations of the separability thesis and what exactly is meant by the idea of law and morality either being separate or

1 Green, L. (2008). Positivism and the Inseparability of Law and Morals. New York University Law Review (1950), 83(4), 1035 at page 1036.

connected. Two common formulations of the separability thesis are as follows:

The Social Thesis: What counts as law in any given society is a matter of social fact.

The Value Thesis: Laws do not necessarily have moral value².

The social thesis proposes that law is premised on what are termed social facts. Social facts can be understood as propositions that accurately reflect the culture or society in which they are situated. For example, in Canada it is a social fact that Justin Trudeau is the current prime minister. In more technical terms, Moauta writes, “The social thesis is the claim that *the truthmakers*³ for legal propositions are social facts”. What exactly those social facts are will be addressed later. In contrast to social facts are moral facts; facts about what can be considered right or wrong, moral or immoral. The social thesis denies that moral facts are necessary properties of law.

The value thesis is a broader claim and can be understood in a variety of ways. For example, one could interpret the value thesis to be making a claim regarding one’s moral obligation to obey the law, or whether law possesses moral value in and of itself⁴. For our purposes here, the remainder of the paper will center around the social thesis.

2 Morauta, J. (2004). Three Separation Theses. *Law and Philosophy*, 23(2), 111-135 at page 112 and 128. Morauta also proposes a third separability thesis, which he titles, the neutrality thesis.

3 Truthmakers are that which make various propositions true.

4 Morauta, supra note 2 at page 117 and 124.

The Hart of the Matter: A Defence of the Separability Thesis

Legal positivism, as a school of thought, is premised on two core tenets. First, as noted by the social thesis, law is a matter of social fact. Second, there is no necessary connection between law and morality⁵. H.L.A. Hart, a notable legal positivist, argues that law is composed of primary and secondary rules. According to Hart⁶, primary rules are the “basic type” of laws that govern citizens’ behaviour and conduct. Secondary rules, on the other hand, are laws that lay out how laws may be modified, enacted, or revoked. In addition to primary and secondary rules, Hart’s theory of law also includes what he terms the rule of recognition. The rule of recognition is often referred to as the “master rule”. It is the mode by which the primary and secondary rules are identified as valid law. In this sense, the rule of recognition can be understood as a social fact⁷ that demonstrates why certain rules and regulations are valid laws. Therefore, this description of what constitutes a valid law adheres to the social thesis. That being said, the rule of recognition can vary across legal systems and will often be fairly complex in modern legal systems⁸.

As one may have noticed, Hart’s description of a legal system makes no reference to, or use of moral facts or moral principles to account for what constitutes a law, but rather social

5 Patterson, Dennis (editor/s), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Oxford, Wiley-Blackwell, 2010 at page 228.

6 Culver, Keith. *Readings in the Philosophy of Law*, Second Edition. Broadview Press, 2007 at page 121.

7 It may be better to call it a social rule that is comprised of social facts. Adler, M. D., & Himma, K. E. (2009). *The Rule of Recognition and the U.S. Constitution*. Oxford University Press at page 238-239.

8 Culver, supra note 6 at page 129.

processes and social facts. Hart⁹ writes, “according to my theory, the existence and content of the law can be identified by reference to the *social sources* of the law”. In this statement, one can observe that Hart’s theory of law agrees with and defends the proposition proposed by the social thesis. This is not to say Hart’s theory of law does not accept or make room for the many “contingent connections between law and morality¹⁰”, but it does rule out any “necessary conceptual connections¹¹”.

If Hart’s legal theory is correct in its analysis, then moral facts are not necessary to explain law as a social phenomenon. Therefore, Hart’s legal theory can be understood as a defence in favour of the social value thesis as it robustly explains the nature of law without reference to moral facts. In response to Hart’s theory, two objections will be presented to demonstrate that moral facts are necessary to determine what counts as law in any given society. By addressing these two objections from a Hartian perspective, one begins to better understand how the legal positivist conceptualizes law as a social phenomenon as well as the connection between law and morality.

A Traditional Objection: Natural Law

Natural law is a robust ethical framework that is premised on the “ability of reason to establish moral truths¹²”. As a moral theory, natural law is not restricted to the realm of legal analysis. However, regarding analytic jurisprudence, natural law theorists

9 Hart, H. L. A. 1907-1992. (1961). *The Concept of Law*. Clarendon Press at page 269.

10 Hart, *supra* note 9 at page 268.

11 Hart, *supra* note 9 at page 268.

12 Soper, P. (2007). In *Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All*. *The Canadian Journal of Law and Jurisprudence*, 20(1), 201-223.

often contemplate the relation between human law¹³ and a ‘higher law’, whether that ‘higher law’s’ basis is theological or nomological. According to natural law, the validity of a human law is in part determined by the degree that it conforms to the ‘higher’ natural law.

Referencing Augustine, Aquinas¹⁴ writes, “*a law that is not just, seems to be no law at all*”. Taken at face value, such a proposition appears to contradict the social thesis. The necessary sources for what constitutes a law under the social thesis are social facts. However, Aquinas’ statement refers to *moral facts*, an additional condition not contained within the social thesis. To demonstrate that law is premised on moral facts, the natural law theorist can make an argument based on institutional justification. As Soper¹⁵ writes, “Legal systems, if they are not to collapse into coercive systems, must admit in short that all standards tentatively identified as law...will only count as valid law if they are not too *unjust...*”.

According to Soper¹⁶, legal systems need to justify their intrusion into our lives. This argument appears to be teleological in nature, in that if the purpose of the legal institution is not realized then the “law” is not legitimate. MacCormick¹⁷ describes this idea by writing, laws “...are fully intelligible only by reference to the ends or values they ought to realise...”. In this

13 Kretzmann describes human law as “legislation devised by humans”.

Kretzmann, N. (1988). *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience*. *The American Journal of Jurisprudence* (Notre Dame), 33(1), 99-122 at page 107.

14 Culver, supra note 6 at page 45.

15 Soper, supra note 11 at page 213.

16 Soper, supra note 11 at page 211.

17 MacCormick, N. (2007). *Institutions of Law: An Essay in Legal Theory*. Oxford University Press at page 302.

sense, if laws become so unjust and egregious and the legal system can no longer justify their intrusion into our lives, then such laws fail to be laws. As one can see, this argument demonstrates that law is not only a matter of social fact, but also a matter of moral fact. Therefore, if this argument succeeds, the social thesis is mistaken.

Response to Objection One: Evil Legal Regimes & Essentialism

It seems to me that Hart may respond to a classical natural law theorist in a variety of ways. First, he may wish to point out that even if Soper's argument is successful, it only demonstrates that the unjust legal system is a coercive system. However, if coercive systems are in fact *legal systems* that produce laws, then it seems that morality is not a necessary component of what constitutes law. In this regard, the argument appears to be missing a premise, that being, that coercive systems are not legal systems. This is an important premise because it is not obvious that evil governments or immoral military regimes (historical or present) are not actually legal systems with valid laws.

Hart may also respond to the argument by rejecting an "essentialist" conception of law. To clarify this point, Hart writes, "We must avoid...disputes about whether chess would be 'chess' if played without pawns¹⁸". In other words, one must be careful of essentialist presuppositions about what the nature of law is. As we saw earlier, the natural law theorist starts with a conception of natural law, and then measures the positive law against the natural law to determine its validity. Hart is skeptical of this sort of methodological approach, and therefore argues we should avoid

18 Hart, H. L. A. 1907-1992. (1983). *Essays in Jurisprudence and Philosophy*. Clarendon Press at page 79.

such essentialist understandings of the social phenomenon we call law. In this sense, Soper's argument is responded to by critiquing the methodological approach natural law theorists utilize in their analysis of what law is. It seems to me that either of these possible responses would be sufficient to respond to the natural law theorist, thereby defending not only legal positivism, but the social value thesis as well.

A Contemporary Objection: Dworkin's Integrity Model

Ronald Dworkin, who some consider a contemporary natural law theorist, argues that a fundamental aspect of law is the reliance of principles within the adjudication process. In Dworkin's model, a judge (akin to a novelist¹⁹) must look at the preceding story ("the pre-interpretive data²⁰") and decide the appropriate ruling based on rules and principles. However, to approach a decision and weigh competing principles, the judge begins to employ moral reasoning²¹. According to Dworkin, as Donnelly-Lazarov²² aptly puts it, "The necessity [between law and morality] is pervasive: in each and every act of adjudication, however simple, technical, or uninteresting, *the judge will exhibit a moral point of view*". In this sense, if *every* single act of adjudication exhibits a moral point of view, legal reasoning appears to be normative in nature²³.

19 Dworkin uses the metaphor of a novelist to describe the position that a judge occupies, as the judge must determine where the "legal story" is headed, based on the past legal decisions.

20 Patterson, supra note 5 at page 224.

21 Shapiro, S. (2011). *Legality*. Harvard University Press at page 264.

22 Donnelly-Lazarov, B. (2012). Dworkin's Morality and its Limited Implications for Law. *The Canadian Journal of Law and Jurisprudence*, 25(1), 79-95.

23 Dworkin appears to state that legal reasoning is normative in nature in Dworkin, R. (2017). *Hart's Posthumous Reply*. *Harvard Law Review*, 130(8), 2096-2130 at page 2097.

Therefore, in contrast to the social thesis, law is a matter of moral fact due to the moral dimensions of adjudication.

It seems to me that Dworkin's argument may be strengthened if he were to argue that only *some* judicial decisions exhibit a moral point of view, rather than *every* judicial decision. That said, to make *some* judicial decisions necessarily connected to law, one could attempt to demonstrate the necessity of hard cases in legal systems. If hard cases are necessary to the legal system, and if hard cases necessarily require judges to exhibit a moral point of view, then Dworkin's argument appears to still succeed in demonstrating the necessary connection between law and morality while also being able to explain why in some cases it appears that judges don't exhibit a moral point of view (cases of strict application of law). By demonstrating the necessity of how judges use moral reasoning in their adjudication process, Dworkin's argument rejects the social thesis by showing how laws are premised on moral sources.

Response to Objection Two: Conceptual Necessity

In response to Dworkin's argument regarding the necessary connection between law and morality, one should consider what Coleman has written on the issue. Coleman²⁴ states, "the claim [that law and morality are separate]...is true just in case a legal system in which the substantive morality or value of a norm in no way bears on its legality is *conceptually possible*. The truth of this claim seems so undeniable... no one really contests it". If conceptual possibility is the standard by which one is to determine

24 Coleman, J. L. (2001). *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford University Press at page 151.

the necessary criteria of law, which it appears to be²⁵, then Dworkin's argument appears to fall short. It may be difficult to imagine a legal system where judges don't exhibit a moral point of view via their legal reasoning, however, it is not conceptually impossible to imagine such a state of affairs. In this sense, Hart would likely respond to Dworkin's argument by stating that it fails in showing a logically necessary connection between law and morality and simply shows a contingent connection. As Shapiro²⁶ notes, "Hart's way out of this problem (that the normative nature of legal reasoning possesses moral dimensions) was simple: although he regarded legal concepts...to be normative concepts, he did not think that they were *moral* ones". Therefore, if one can divorce legal reasoning from moral reasoning (which appears to be conceptually possible), then the social thesis holds in its claim that law is only a matter of social fact.

An Analysis of Legal Positivism and Natural Law Theory: Two Preliminary Thoughts

How is one to determine the more "successful" legal theory regarding their approach to the social thesis? Depending on one's criteria of assessment, one may reach radically different conclusions. As MacCormick²⁷ writes, regarding the debate between legal positivism and natural law, "In truth, such dichotomies are rarely revealing of any important truth".

It seems to me that comparing natural law and legal positivism as antinomies in order to determine the more successful

25 Leiter addresses this point regarding the differing standards of conceptual possibility between hard and soft positivists in Leiter, B. (1998). Realism, Hard Positivism, and Conceptual Analysis. *Legal Theory*, 4(4), 533-547. My response assumes a soft positivist account regarding conceptual necessity.

26 Shapiro, *supra* note 19 at page 101.

27 MacCormick, *supra* note 16 at page 278.

theory doesn't account for their respective projects, as they are not only different in scope, but also in aim. The natural law theorist is working from a moral framework that considers broader questions regarding how law in its application must be aimed at the "common-good"²⁸. In contrast, legal positivism is primarily concerned with understanding the nature of law and determining the necessary features of it. In addition, the two approaches appear to have different methodological approaches. Natural law has a *top-down* approach, whereas legal positivism has a *bottom-up* approach. By top-down, I mean that there is an ideal type that is used as a reference point to determine whether the law under study is similar enough to classify it as the ideal type. In contrast, the bottom-up approach assesses and investigates the various instantiations of law, with no comparison to an ideal type. If the legal positivists do not accept the natural law theorist's "higher law" as a valid point of reference and method of assessment, then comparing these two schools of thought, as MacCormick opined, is unlikely to reveal "any important truth"²⁹.

Therefore, my assessment has led me to the conclusion that natural law and legal positivism might be better categorized as complimentary theories, rather than contradictory theories. As Green³⁰ allegedly stated, "one should not only be a legal positivist". I take this to mean that despite legal positivism's in-depth analytic description of the nature of law, one should then proceed to the question of *what law ought to be*. In this regard the natural law theorist's prescriptive account of *what law should be*

28 Finnis, J. (2011). *Natural Law and Natural Rights* (2nd ed.). Oxford University Press at page 23.

29 MacCormick, supra note 16 at page 278.

30 Brian Bix claims that Leslie Green made this comment on the *Dare to Know* podcast (episode 4 at 6:30).

can assist and compliment legal positivism's descriptive account of *what law is*.

Lastly, in regard to Dworkin's law as integrity model and Hart's model of primary and secondary rules, it seems to me that Hart's model is more conceptually successful in its defence of the social value thesis. Hart's primary and secondary rules as well as the rule of recognition all appear to be conceptually necessary to a legal system, whereas one can imagine a legal system that doesn't possess Dworkin's description of how moral reasoning is part of the adjudication process. That said, it is worth considering why the ability to conceptualize a possible world where a legal system implements laws only premised on social sources is given more weight than the empirical study of many legal systems around the world that demonstrate the influence of morality within the processes of adjudication. In this sense, depending on one's philosophical inclinations, one may be more drawn to either Hart's or Dworkin's model. If one is inclined to a pragmatic philosophical approach, where the purpose of discourse is "debating the utility of alternative constructs" rather than trying to "represent reality accurately"³¹, Dworkin's model seems to better explain and account for the recurring contingent connections between law and morality. In comparison, if one is inclined to an analytic philosophical approach, where the aim is to understand an entity's nature and necessary features³², Hart's descriptive analysis is difficult to beat. That said, despite both legal theories' insights into different aspects of the legal landscape, Hart's legal positivist account appears to successfully defend the social value thesis.

31 Rorty, R. (1999). *Philosophy and Social Hope*. Penguin Books at page 86.

Rorty also states that, "Pragmatism is the implicit working theory of most good lawyers" (p.93).

32 Shapiro, *supra* note 19 at page 13-15.

Conclusion

The social value thesis proposes that law is a matter of social fact. Hart's model of primary and secondary rules upholds this viewpoint. In contrast, the classical natural law theorist and Dworkin's contemporary approach both maintain that moral facts and moral sources are necessary to what can be considered law. In determining the more successful approach, I ultimately reached two primary conclusions. First, the debate between classic natural law theory and legal positivism might be better reframed as complimentary rather than contradictory approaches to the social thesis. Second, despite Dworkin's model being pragmatically useful, Hart's defence of the social thesis is more conceptually defensible, thereby, making it the more compelling legal theory under an analytic jurisprudential framework.