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Eerik Lagerspetz**The Limits of Legal Positivism**

Abstract: In his book *Advanced Introduction to Legal Positivism*, Kaarlo Tuori focuses on the legal philosophies of the two perhaps most important legal theorists of the 20th century, Hans Kelsen and H.L. A. Hart. Although Tuori's work is highly critical, he seems to share the fundamental theses accepted by his targets: (1) The Normativity Thesis, (2) The Social Thesis, and (3) The Separability thesis. What, then, are Tuori's complaints against the Kelsenian and Hartian versions of positivism? According to him, the positivist description of law is inadequate, not because of what it includes, but because of what it leaves out. It describes law as self-contained, autonomous and united system, leaving out law's relations to politics, questions of legal interpretation and argumentation, issues related to constitutional morality, and most of the questions related to rationality. I agree that the positivisms of Kelsen and Hart have very little to contribute to the discussions on the most important issues of the criticism of law. Nevertheless, they have something to offer. Although they were not successful in their attempts to solve the problem of legal normativity, they did a very important job by pointing out that there *is* a genuine problem.

Key words: Tuori, Kaarlo – legal positivism – Hart, H.L.A. – Kelsen, Hans

In philosophy, texts written mainly for introductory purposes may sometimes have a lasting value. For example, Herbert L. A. Hart's *The Concept of Law*, one of the most influential classics in the philosophy of law, was originally written "with English undergraduate readers in mind" (Hart 2012: 238). Kaarlo Tuori's new book *Advanced Introduction to Legal Positivism* (hereinafter AIP) is also much more than an introduction. It is a comprehensive and well-argued critique of legal positivism.

In his book, Tuori focuses on the legal philosophies of the two perhaps most important legal theorists of the 20th century, Hans Kelsen and H.L.A. Hart. For Tuori, "legal positivism" is the theory formulated by Kelsen in his numerous works, especially in the different versions of *Reine Rechtslehre*, and by Hart in his *The Concept of Law*. The titles of these main works of the two leading positivists tell something important about the nature of legal positivism. "Pure theory" and "the concept of law" indicate that these works do not address the political, social, historical, moral or theological questions discussed in the older traditions of the philosophy of law stretching back to Plato and Aristotle. The explicit aim of the works of Kelsen and Hart is to give a *minimalist* account on law, purified of all "unscientific", "metaphysical" or "nonconceptual" elements. In his earlier book *Properties of Law* (hereinafter PoL) Tuori describes this aspiration; indeed, both books jointly form a part of a larger project. According to him, the classical legal positivists try to describe law as a closed normative order, whose autonomy, its independence from both social facts and non-legal normativity, is guaranteed by law's hierarchical structure. Ultimately, this autonomy depends on the supposition that there is a Master Rule from which individual laws derive their validity (PoL: 4). It is this picture, attractive in its simplicity, that Tuori wants to challenge.

The fundamental philosophical theses shared by the legal positivists are enumerated by Tuori (AIP: 2-5). They are the following: (1) *The Normativity Thesis*: Law is inherently normative. It cannot be reduced to social facts. (2) *The Social Thesis*: All law has social sources. Even if law cannot be reduced to social facts, it is invariably grounded on them. (3) *The Separability thesis*: Moral acceptability is not among law's validity conditions.

According to the thesis (1), legal systems are normative systems. However, normativity is not an exclusive property of legal systems. We are norm-following animals. It means that we are guided by second-order reasons, not just by immediate impulses, desires, and inclinations. Besides legal and moral norms, there are many other types of norms. There are, for example, technical norms, rationality norms, epistemic norms, aesthetic norms, rules of games, etiquette, customs, norms regulating various organizations and so on. All these norms have (at least) two functions. They provide reasons for conduct, and standards of evaluation. Perhaps the most pervasive system of practices governed by norms is language. The use of language is governed by norms at every level: there are phonetical, syntactical, semantical and pragmatical rules. Although the actual *parole*, the spoken language, is in constant flux, languages can also be studied as normative structures. The legal positivists seem to think that the study of law could have somewhat similar character.

As systems of norms, legal systems have their specific properties. They have a *coercive* nature (more on this, see Lagerspetz 2001). The standard idea is the following: Law consists partly of obligations. There is a connection between the concept of sanction, or punishment, and the concept of obligation, or duty. A sanction – at least in the legal sense of the term – is not just a bad thing inflicted on an individual; it is inflicted because the individual in question has been found guilty of violating a

specific duty. Sanctions are not always of a coercive nature, but in legal contexts, at least, many of them are. Legally determined coercion does not always constitute a sanction, but quite often it does. Finally, although there can be a lot of unauthorised coercion in a society, in a legally organised society law has a monopoly of legitimate coercion in the sense that coercive acts can be legitimate only when they are expressly prescribed, authorised or permitted by law. This view is shared by the positivists and by most natural lawyers. Of the leading positivists, Kelsen thought that all laws authorize officials to use coercion in certain situations. According to Hart's view, although individual legal duties need not be correlated with sanctions, the existence of a *system* of duty-imposing norms presupposes the option of using coercive sanctions.

Although not all legal norms are related to coercion, all legal systems somehow regulate the use of coercive power within the respective communities. This is partly related to the general functions of legal systems. They have many possible functions but, minimally, one of their main roles is to regulate conflicts within communities. By regulating conflicts, they make human cooperation and coordination of actions possible. The general possibility to rely on sanctions and the mutual awareness of this possibility is psychologically important because it maintains co-operation in our social life by setting a framework for it. The possibility to rely on sanctions diminishes uncertainty. The law-abiding citizen knows that if others are, for some reason or other, not willing to follow the rules of social co-operation voluntarily, they will do so because they are afraid of sanctions. Moreover, even if law is often perceived as unjust, its claim of authority is based on a claim of justice. Coercive sanctions may be psychologically important for the maintenance of social co-operation because the sense of justice of most people in most societies requires that wrongdoers are punished, and one important reason for obeying the law is that it is regarded as being at least minimally just.

Modern (municipal) legal systems have many specific properties not shared by all legal systems. For example, they claim supremacy over territorially defined areas. Moreover, within each system there is a division of labour. The norms of a modern legal system designate some members of the communities as officials, whose task is to interpret, apply and enforce, and sometimes change the norms belonging to the system. The secondary rules constitute and regulate the conduct of officials in their official capacity. The function of these rules is to regulate the interpretation, change and enforcement of primary as well as secondary rules. A modern legal system is a combination of primary rules, addressed to all members of the respective community, and secondary rules, addressed to the officials. Using Kelsen's expression, modern legal systems create themselves.

The separability thesis (2) is slightly more complicated than people think. It is often claimed that in positivism, the fundamental claim is that there is a *semantical* difference between "legal obligation" and "moral obligation". The institutional separation of moral and legal practices is, however, socially contingent. In some societies it is impossible to draw the line. And all legal systems certainly embody at least some elements from the shared morality of society. "Law as it is" necessarily reflects at least somebody's opinion on "law as it should be". The basic distinction is *not* between two separate systems of norms (law and morality), but between two kinds of judgements. For Hartian positivism, the distinction between *critical* and *descriptive* judgements is fundamental. Probably all languages have a normative vocabulary: they contain words like "ought", "forbidden", "right" or "obligation". These words can be used to express (at least) two kinds of judgements, and these types of judgements are related to two different points of view. Firstly, they can be used in order to guide actions: to commend, criticize and evaluate them. Secondly, they can be used to describe how other people, including speakers themselves in another role, do commend, criticize and evaluate actions. Both types of judgements can be either moral or legal. Both legal and moral practices of a society can be

described “positivistically”. A Hartian positivist can consistently say that existing legal and moral practices are necessarily interconnected, indeed, that law is only a highly institutionalized form of morality, but that law and existing morality as they are and as they should be are different things. In order to find out what law requires or does not require one need not to form a critical moral judgement on the content of law.

In AIP, Tuori subscribes to the fundamental theses (1)-(3), at least in some form. He accepts the Normativity Thesis (e.g., AIP: 20-21) and the Social Thesis. Like Hart and the Hartians, he sees modern legal systems as a combination of primary and secondary rules (AIP 67: 13-14) and emphasizes the internal division of labour as an important property of modern legal systems (e.g. AIP: 143). Moreover, he admits (in PoL: 185), that he has not demonstrated the existence of any necessary, conceptual links between law and morals. Tuori himself says that “my approach could be classified as positivist, too” (PoL: 33).

What, then, are Tuori’s complaints against the Kelsenian and Hartian versions of positivism? In PoL (p. 33) he lists most of them. Positivism’s main problems are “bracketing of law’s sociality”, “non-recognition of law’s sub-surface layers”, “non-recognition of non-state law” and “a black-box view of law’s unity and plurality”. These are sins of omission, not of commission. Positivists’ description of law is inadequate, not because of what it includes, but because of what it leaves out. According to Tuori (AIP: 21), legal positivism leaves “the social aspect of law seriously undertheorized”. In another comment, he puts it even more forcefully: “Very little, if anything, can be learned from legal positivism about the role of law in contemporary modern society” (AIP: 70). This is a grave accusation, especially when made against views that see the social nature of law (thesis (2)) as central.

Although my priorities may be slightly different from those of Tuori, I agree that the positivisms of Kelsen and Hart have very little to contribute to the discussions on the most important issues of the criticism of law. When describing law as self-contained, autonomous and united system, they leave out, for example, law’s relations to politics, questions of legal interpretation and argumentation, issues related to constitutional morality, and most questions related to rationality. I am not saying that *positivists*, including Kelsen and Hart, have not contributed to these topics. Quite the contrary. For example, I have tried to show how Kelsen in his less known political writings formulates an interesting defence of liberal democracy (Lagerspetz 2017). I have also argued that some insights of Hart are relevant to the analysis of the notion of liberty (Lagerspetz 2011: 259-62). My claim is that Kelsen’s and Hart’s important contributions to ethics and politics of law are substantively independent of the skeleton-like picture of law drawn in their main works. Tuori’s own central concept, “legal culture”, may provide us an example of the self-accepted limitations of their version of positivism. Tuori argues convincingly that legal culture is as indispensable an element of a modern legal system as, say, the existence of a separate class of officials. It is difficult to imagine that Kelsen, Hart or their followers would deny this. Probably the reason why they have largely ignored legal culture in their main works is that the concept of “culture” is itself notoriously vague and open-textured. In a classical text the anthropologists Kluckhohn and Kroeber (1952) once counted 164 meanings of the term. But perhaps this vagueness is as it should be. Perhaps we also *need* imprecise and open concepts in order to capture our messy reality.

An immediate reply is that in their main works the classical positivists simply tried to do something else than Tuori. Ultimately, the skeleton-like picture painted by them resulted from a conscious methodological choice. The positivist legal theory and the more complex theories put forth for example, by natural lawyers, Dworkinian interpretivists, Kantian theorists of justice, sociologists,

critical theorists and so on, are about different things. They are designed for different purposes and might well be combined. The problem with this reply is, however, that Kelsen's and Hart's positivism seems actually to have little to offer to other research programmes. Hart's hope that his conceptual clarifications might form "an important preliminary to any useful criticism of law" (Hart 2012: 240) seems to be premature.

All this does not mean that the positivisms of Kelsen and Hart have *nothing* to offer. Although they were not successful in their attempts to solve the problem of legal normativity, they did a very important job by pointing out that there *is* a genuine problem. Legal normativity is neither the same thing as moral normativity, nor can it be reduced to social facticity. Some ideas introduced by Hart in this context, for example the distinction between internal and external points of views, his classification of rules, or the importance of social practices, are still potentially fruitful. So, I think that those studying philosophy of law should still read some Hart and some Kelsen alongside Tuori's excellent introduction.

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