LEGAL POSITIVISM

"Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits." (Stanford Encyclopedia)

This whole proposition contains an opposition of propositions that involves a *suggestio falsi*. The first part amounts only to saying that the civil law applies in the external forum – no natural lawyer is denying this. In other words, it is simply referring to laws enacted and enforced by human legislators in human communities (which ultimately come from some common agreement or original social consensus). The natural or moral law is not so fashioned and operates in the internal forum so as to extend to all human behaviour, internal or external.

However, the civil law re-enacts (i.e. posits in the external forum) many a precept of the natural or moral law, e.g. with regard to homicide, theft etc., which obviously depends "upon its merits" as well as upon the force of the civil law, and involves the consequence that the civil law cannot override it (e.g. "posit" the legitimacy of murder).

Yet the exclusive type opposition expressed in the whole proposition suggests that it might, and still retain its properly legal character. Both St. Augustine and St. Thomas vehemently deny this, and the recent experience of Nazism has forced modern legal philosophers to re-affirm what they say. "Superior orders" from legal superiors (including the supreme legislator), as a "social fact", is no excuse for perpetrating grave injustices.

The second part thus intends to say that such human laws may be immoral and work injustice and still be rightly regarded as laws. That is the real issue; associating this with the first difference between what is externally produced and promulgated and what is internally expressed and known is designed (wittingly or unwittingly) to cloud the issue.

The issue might be better expressed as: “Are those civil legislators, who operate in the external forum only, bound by the natural moral law, which binds in the internal forum – that is, must they act according to their consciences, and, if they do not, are their demands “laws” to which anyone, their subjects or not, should give any legitimacy or force.

Indeed, more precisely, the matter should be first discussed at the objective level: as to whether the civil legislators can legitimately exact demands upon their subjects which conflict with the commands of the natural and moral law. Both legislators and subjects are, of course, more immediately governed internally by their consciences, be they correct or mistaken (if in good faith). The additional question then arises: Are their subjects bound to comply with “laws” enacted that in fact are morally offensive according to their own consciences?

The simple answer that the proponent of the natural law basis of all law makes in all three cases is: No. Much, however, still needs to be explained regarding the relationship between the moral law and civil law, including the degree of overlap, the limits of human legislative power and scope, the moral requirement to comply with the unjust law for other reasons, such as to avoid scandal or the risk of causing such social commotion as may be harmful to the society as a whole, and so on.

It is not the civil law's function, for instance, to make men moral in the sense of attempting to enforce all morality, on at least two accounts; firstly, in that they are concerned primarily with the common good of the particular community concerned, and with people's private affairs only in so far as these may touch upon matters of public concern.

Secondly, in that such legislators are not all powerful but always depend upon the co-operation of the community to some degree. Hence, they have to tolerate morally offensive behaviour whose prohibition might be futile or productive of other social evils. Depending upon the moral, or rather immoral, condition of the

populace, then, there may be quite a gap between what is morally permissible and what is legally permissible. On no account, however, can such laws demand, promote, favour or condone immorality.

The obligations on the subjects to obey are also affected by considerations other than the immorality of such laws. Depending on the nature of the moral obligation, one may be obliged to disobey or merely obey under suffrance. In no instance, though, is one obliged by virtue of the immoral or unjust law.

Most current legal academic discussion on this question tends to muddle all these considerations. As well as this, the general intellectual culture is such that there is an overwhelming need felt to give "scientific" status only to observable "facts" (in this case "social facts"), so that only the law applied in the external forum is thought capable of reasoned discussion. Moreover, as is unfortunately the case with moral and political discussions, whether public or private, they are driven more by "life style" preferences (increasingly characterised by more extreme kinds of immorality) than by dispassionate rational debate.

Wanting to "prove" the separation of legality from morality the article goes on to say: "Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law." Here again is the logical fallacy of *suggestio falsi* employed. It is suggested that the two cannot exist in the same subject, that the existential dependence of a legal system on "social facts", excludes the essential dependence of that system upon conformity to moral "ideals".

An analogous statement would be: "Whether a house has a systematic arrangement of its parts depends upon it having certain building structures, not on the extent to which it satisfies "ideals" of building design, architecture or the rules of building." The sophistry is subtle and deceptive, for there is a sense in which the statement can be taken as true, but it is not what is intended here.

What is intended to be said above is not equivalent to saying that the system may still qualify as a building even though it might fall short in some respect of the laws of design and the rules of building houses, but that it can still so qualify even if it ignores all the laws of architecture and building.

Notice that what is said is that there can be no dependence whatsoever of legal systems and their laws upon the natural moral law (which, if anything, is the system of basic rules setting out to how a good human being ought to be "made"). One can perhaps consider the possibility of a social code of behaviour that totally ignores this – but it will have as much chance of existing as a house built to no intelligent design.

One that preserves this dependence in fundamentals may perhaps survive, but every departure from any of the laws (of nature or design) or the rules (of rational behaviour or building) will be a fault to be eliminated as soon as detected, if possible or feasible. This is not to say that one can build a legal system (or house) by some sort of automatic application of these basic rules. There is still much scope to work within these basic rules, and that is the province of positive law.

We are not concerned at this stage to identify the aims and scopes of the moral (natural) laws and the legal (positive) laws, but to defend the dependence of one upon the other. They are obviously not the same kind of laws, but the question is not whether the civil law is different from the moral law, but whether it is dependent in some way upon it, <u>for its own validity</u>. The basic philosophical axiom: "Dependence does not argue identity", seems to have been forgotten in this argument.

"According to positivism, law is a matter of what has been posited ..." (SE) That statement brings out part of the whole truth of the difference, alluding to the difference in the immediate origins of the laws. A difference is had in the manner of production of the laws; the natural law arising "naturally" in one's own understanding of one's human nature and what is good for it (and recognised internally through conscience), the civil law arising from being "posited" externally by

human legislators within a community (and known by promulgation).

But a house needs more than a builder as someone who “posits” the building, or puts it together. It needs suitably prepared materials, a rational plan or design, an intelligent idea of what use it is to be put to, and so on. In aristotelian terms, the legal positivists talk exclusively of the differences in terms of one cause only, the efficient cause and ignore the demands of the others, especially the exemplary and final causes. It is in respect of these latter that the dependence of the civil law upon the moral law, or of positive law upon the natural is most evident.

The architect's design needs to be adapted in all sorts of ways to the actual conditions under which the house is to be built; such is the province of the builder and his decisions regarding problems of adaptation always arising during the process of building. Similarly, such is the strict province of positive law in relation to the general principles of natural laws governing human behaviour in a social context.

If all the citizens of a particular community were perfectly virtuous they would not need to be constrained by civil laws prohibiting murder, rape, theft etc. Nor would they need positive laws to ensure that they acted fairly and justly in their contractual relations with fellow citizens. But, even so, there would be much scope for further definition of their obligations and determination of how their dealings with each other were to be dealt with and commercial relations regulated.That is the essential role of the civil law. Furthermore, such necessary regulation would operate in the external forum rather than in the internal.

The issue with the relation between the civil law and the moral law, or positive law and the natural law, comes into play when the civil law has to prohibit and punish the external actions of those who deliberately flout the moral law and so affect not only their victims' rights but also the common good of the particular community in which they live. Are the human legislators entitled to do nothing about it or

even join in the violations of individuals' natural rights to life, property etc? According to legal positivism, in the former case the civil legislators are not failing in their legal duty, and in the second case cannot be said to be doing anything “unlawful”.

With regard to the first, civil legislators have a constitutional obligation to “posit” laws that are necessary for the common welfare of the community over which they have been placed. If they fail seriously in this regard the situation could be reached where the citizens would have the legal (constitutional) right to depose them. It is not a case, as is suggested by some, of having a moral right to protest but no right under the civil law.

The exercise of such a fundamental right is an unlikely scenario; but the second case alluded to is not. We are being increasingly subjected to legislation that purports to legitimate immoral actions and even to create legal “rights” to immoral conduct. One evil consequence of allowing that such legislation preserves the character of law, as the legal positivists want us to do, is that it becomes an offense to describe such immorality as evil. For the natural assumption of people is that whatever is legal cannot be thought to be bad.

The legal theory of positivism, therefore, is not as neutral as it purports to be but serves the interests of those in power who want to legitimate and license works of injustice and immorality for their own purposes, as happened suddenly and brazenly in Nazi Germany, but which is quite capable of happening gradually and surreptitiously in our own midst. Legal Positivism, indeed, and the ethical relativism to which it corresponds, is but the legal theory of political totalitarianism, which bases the rules of human behaviour upon will alone and hence political authority upon the will of those who gain power in the State.

LEGAL POSITIVISM II

If we are careful not to dissociate or separate human positive law (civil law) from its fundamental dependence upon the natural law (moral law) and from the presence within it of many precepts of the natural law, we can take on board much of what the legal positivists say about law.

For, after all, human civil law is essentially made up of positive law. This is the body of human legislation that has to render determinate what natural law leaves indeterminate. Accordingly, the law, so understood, depends upon human will not only in its origin (founded in a social consensus) but also in its content. Such content has no intrinsic moral significance. One's obligation to obey it presupposes a moral or natural authority conferred, but it relies upon its own (external) positive sanctions to enforce its precepts rather than the (internal) moral ones, though a complete lack of a respect for the latter would make any human society virtually ungovernable.

In the definition of law as it applies to positive law, the "ordinance of reason" comes down to a direction in accordance with reason which may mean no more than "not contrary to reason", which in this context means "not against the natural law". The promulgation too is in the form of a positive act of publication on the part of the legislator.

Moreover, being by way of "determination" it is not to be thought that the positive laws are arrived at by way of any necessary conclusion from moral laws (as principles of practical reason). This sort of

reasoning, as St. Thomas notes, applies within the order of natural law, where from primary principles of the natural law are derived secondary laws as conclusions (making up the content of the *Ius Gentium*).

Reasoning in practical affairs, however, is not as clear cut as in theoretical matters. Conclusions become more uncertain and more subject to exceptions the more removed they are from primary principles. The line between the secondary principles of the natural law and purely positive law, therefore, is not always easy to draw.

For example, a wage paid to someone must be just. Generally, however, it is set by agreement between the worker and his employer. Ordinarily, the positive law is only concerned with ensuring that the formalities of the contract are put in place so that the agreement between the parties can be enforced if necessary. They make their own justice by their agreement. But there is an underlying obligation on the parties to make such a bargain according to commonly understood principles of fairness, or “a fair day's pay for a fair day's work”. Such a sentiment transcends national boundaries and belongs in fact to what is called the *ius gentium*.

However, perhaps because it is not easy to set a rate in such matters that are so variable, the civil law does not always attempt to add its sanctions to the moral obligation here applicable. So it is that in Roman Law the courts did not interfere with the contract unless it was manifestly and grossly unfair (as a rule of thumb, less than half of what would be generally seen to be fair). English law was even less sympathetic to the party who made a bad bargain (any “consideration”, no matter how slight, was sufficient to uphold the unfair contract).

But, if the “agreement” or wage bargain was such that the worker was constrained to accept a wage that did not afford him enough for him (including his family) to live on, i.e. a “living wage”, more basic principles of justice come into play. Moreover, his extreme necessity has taken from him any freedom in regard to the wage bargain. Accordingly, the very first principles of the natural law have to be applied to ensure him his necessary sustenance and prevent him from

being exploited in regard to his work. In these extreme, but not so unfamilar circumstances in relatively recent times, civil authorities have felt constrained to intervene.

But, short of this extremity, as seen above, the moral notion of contractual justice or “fairness” will influence the application of the positive law in varying degrees so that the civil law in these matters is not so clearly dependent upon moral considerations.

However, the full implications of the civil law's dependence upon and incorporation of the moral law should not be overlooked. In regard to the first it is to be remembered that, though the positive laws obtain their force from human legislators (as acting in the name of the whole community concerned), their authority comes ultimately from God, as the supreme commander of all, whose will is known in our awareness of the natural law within us - our conscience being thus referred to as “the voice of God”).

The sanction that human legislators rely upon to enforce their laws is punishment of some sort (in pain of body, loss of liberty or goods). Nonetheless, the obligation to obey positive laws is backed up by a moral one, provided the positive laws fulfil all the conditions required. That is to say the authority of human legislators is naturally based, and one ought in conscience to obey them. The moral dimension, however, is mainly applicable to matters that seriously affect individuals' rights and the common good.

There is much social regulation that is merely designed to ensure the orderly conduct of human affairs, whose disobedience in any particular instance may not be of any great moral consequence. Thus, human legislators sometimes enact laws designed to regulate social behaviour sanctioned only by the imposition of a fine or other like penalty. These are called merely penal laws. In such cases it would seem that the legislators do not intend anything other than the legal sanction.

Thus, leaving aside for the moment those civil laws that re-enact

part of the natural law, e.g. with regard to murder, and thus add a legal sanction to the moral one, we may view such laws as not containing anything necessarily moral or immoral. For the role of positive law strictly taken in relation to natural law is that of adding some determinate direction to the law's subjects in areas that the natural laws have left indeterminate. Before this determination there was no law on the matter, and other determinations might very well have been made.

In the middle area of the *ius gentium* (rationally necessary conclusions) there will be the most difficulty in diagnosing the boundaries between natural and positive law, as can be seen from the example used. But that does not alter the basic fact that positive law may add to the determination of the natural law but it can never subtract from it.

This means that it has no authority (legal or otherwise) to legislate in support of anything immoral. Such a law would be "unconstitutional" even in the legal sense. For it is the natural law that "constitutes" the basis of the validity of the positive law, even if we are more used to regarding the term "constitution" as referring to an original consensus as the basis for all positive laws to be made in a particular human society.

Keeping these qualifications in mind, therefore, we may look at human law, as understood in purely positive terms, as a matter of convention or common agreement, based originally in a social consensus. A group of people coming together agree to regulate their common affairs by forming a social organisation, which we call a political body. Such a body has a natural right to govern itself and to determine the form of government. Originally by agreement, then, this political government will be one of three basic forms, described by Aristotle as of one, few or many relatively to the community concerned.

This common agreement, and the freedom it implies, will not necessarily be evident at the start. Indeed, the origin, and the early development of a particular political community, may exhibit rather

more “natural” features than “positive”. For most developed societies originate from family and tribal groups related naturally (by “blood”) and in which natural superiorities (such as parenthood and eldership) are determining factors.

However, we can say that the positive laws of such political bodies are made by the social body as a whole through its principal organ (head) which is formed according to the conventions of the particular society. Thus, the particular form of government is a positive institution. Similarly, that which is seen as the common purpose of the particular society (its common good) is something that has a character peculiar to it. Its vision of its temporal happiness is something generally agreed upon.

To some societies this may consist in possessions, or power, or freedom etc. Whatever it is, it has the character of being “posited”. This, however, does not necessarily, and, indeed, cannot subtract from the moral purpose (natural common good) which is presupposed. The “national interest”, which may be conceived, for instance, in basically economic terms, though in itself not immoral cannot be pursued so exclusively as to derogate from the natural common good of all communities, which is ultimately determined in moral and religious terms.

Such was the obvious fault in communist regimes. But it is also a serious temptation in capitalist economies, as most modern “developed” societies have become. Indeed, a secularist society can hardly avoid subordinating the natural common good to the positive.

Coming, therefore, to the heart of the civil law of particular political societies it is evident that it is essentially a system of legal rules arrived at by agreement, which laws come into effect by positive publication. However, though most evidently distinct from natural law and morality it is by no means independent of them.