Re-evaluating legal positivism or positivism and fundamental rights: a comedy of errors*

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Introduction
With a bill of rights becoming a future possibility in South Africa, a game, always a favourite with lawyers and legal academics, has once again come into vogue. Called ‘positivism-bashing’, it works something like this. One identifies some aspect of the legal system that one dislikes, blames it on positivism and then suggests a solution that is ostensibly far removed from this school of thought. It is a very respectable game – Gustav Radbruch started it, the Law Commission plays it; and so do legal academics. One can almost say, ‘even educated fleas do it ...’.

It is not my intention to reopen the old positivism/natural law debate. To my mind the distinction is artificial, unnecessary and unproductive.1 Nor do I wish to provide a justification (or apology) for positivism. What I should like to do, is to try to determine whether positivism is, in fact, what writers assume it to be. Of course, everything depends on one’s definition of legal positivism. As Hart and other writers have shown,2 a variety of meanings can be attributed to the term.

On the whole, South African critics ignore the diversity of positivism, which leads to a considerable amount of confusion and the ‘slinging of abuse to non-existent villains’.3 To try to make some sense of the confusion, I shall, first of all, attempt a tentative definition of positivism, look at South African writers’ definitions of the term and then examine two aspects of these definitions. Lastly, these versions will be compared with what the positivists themselves have said. The aim is to determine whether we are not blaming the wrong school of thought for problems in the legal system.

The definition of positivism
It seems clear that the term ‘positivism’ has meant a number of different things to a number of people. Hart thought that five meanings could be attached to the word,4 Bobbio reduced these to three,5 while Raz, too, acknowledged three

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1 Weinberger ‘Beyond positivism and natural law’, in MacCormick and Weinberger An institutional theory of law (1986) 111, suggests that the modern trend in jurisprudence is for theories of natural law and positivism to converge.


3 Jori (n 2) xi.

4 Hart (n 2) 601 n 25.

5 As quoted by Jori (n 2) xii.
basic theories. To my mind it is these three theses that form the core of what
may be understood as positivism. They are as follows:

1. The epistomological thesis, which claims that knowledge of facts and
values is acquired in different ways and therefore the value free description of law
is not only possible, but necessary. This is the basis for the distinction be-
tween law and morality.

2. The social thesis which holds that what law is and is not is dependent on
social factors (be they language, utility or public morality). This is the basis
for the denial of 'absolute' or 'natural' rights that are universal and un-
changing.

3. The command thesis with its premise that law is essentially a command by
the sovereign to the people. This is linked with the social thesis, so that the
power to command is limited to that which is socially desirable.

It should be clear from my discussion that in many cases the term 'positivism'
is not the appropriate one. Positivism should be distinguished from realism,
from authoritarianism and from the 'ordinary language' philosophy. Even within
the positivist school, there are major and fundamental differences that should
be taken into account. Most South African writers ignore these distinctions
and/or schools and deal with 'positivism' as if the term has only one, settled
meaning. Unless some effort is made to understand that there is a difference
between Bentham and Austin, Hart and Kelsen, Raz and Williams, 'positivism-
bashing' becomes little more than tilting at windmills.

South African writers

The Law Commission, relying (with one exception) on secondary sources, ap-
parently blames positivism for the lack of protection of human rights in South
Africa. Positivism is defined as the rejection of the moral basis of law; the idea
that 'law' is concerned only with positive law and with the acceptance
of utility as the basis of law. It should immediately be apparent that this is
an illogical conclusion - the result of a common misunderstanding regarding
positivism. HLA Hart has shown conclusively that the utilitarians have never
denied that legal rules are influenced, at least in part, by moral considerations.
Nor have they denied that moral rules might become legal rules, or that judges
might be bound to decide cases in accordance with what they thought just or
best.

6 The authority of law essays on law and morality (1979) 37-38.
7 This is an idea taken from empiricism and Hume in particular: Lloyd Introduction to jurispru-
dence (1985) 247.
8 The most recent development is the analysis of law using the tools of ordinary language
philosophy - a trend started by Hart: see The concept of law (1961) 55-56, 86-87.
16.
10 This is a particularly pervasive idea regarding positivism. It is generally accepted, too, that
'positive law' includes legislation only. It is clear from positivists' writings that they regarded
positive law as including (for instance) common law and 'judge-made' law: see n 39.
11 SA Law Commission (n 9) 14.
12 Hart (n 2) 598-599: 'First, they (the Utilitarians) never denied that .... the development of
legal systems had been powerfully influenced by moral opinion .... Secondly, neither
The essence of the positivist argument is that 'in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law'.

From this it should be clear that the positivists have not denied that morality influences law and should, in fact, do so. What they deny is the use of morality to determine whether a rule is a valid rule of law or not. The validity of a particular rule is one question, the morality of that rule another – morality does not determine validity.

A second extraordinary conclusion that the Law Commission comes to is that it is only the 'extreme' form of positivism that does not support the idea of human (or fundamental) rights. What is so peculiar about this statement is that it fails to distinguish between the different schools of positivism, nor does it explain what is meant by an 'extreme' form.

Dugard has been one of the staunchest critics of positivism, blaming the 'bad decisions' of the South African courts on the acceptance of positivism as a jurisprudential guide. His contention is that positivism is concerned mainly with the command theory ('the austere doctrine of the imperative nature of law') and the separation of law and morals. In his opinion, this doctrine has resulted in the bad track record of the South African judiciary where the protection of civil liberty is concerned. Dugard suggests a new creed based on legal realism and natural law.

This criticism is echoed by writers like Kruger, who identifies positivism with Bentham nor his followers denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best'.

13 ibid 599.
14 De Wolfe Howe 'The positivism of Mr Justice Holmes' 1951 Harvard Law Review 529 at 541: '... understanding of the law would be more perceptive than it had been if one saw morality as its source rather than its content'.
15 Differently put, the enterprise of saying what law is or is not should be kept separate from deciding whether the law is good or bad, just or unjust. See Weinreb 'Law as order' 1978 Harvard Law Review 909 at 909.
16 (Note 2) 41.
17 Of course it is correct to say that there are different schools of positivism: see n 3. What is unacceptable is that the Law Commission does not indicate what schools exist, where they differ and why one should be considered as an 'extreme' form of positivism. Even if one can make an assumption, this is not a very scientific way to go about things.
18 'The judicial process, positivism and civil liberty' 1971 SALJ 181 at 183. Once again it must be stressed that positivism embraces many theories and a scientific analysis should take cognisance of them all.
19 ibid 199.
20 ibid 200. It is difficult to reconcile these two – realism is a derivative of positivism (the very school Dugard criticises) and is severely criticised by natural law thinkers: see Jori (n 2) xv.
21 'Regpospositisme en die “ongeskrewe” teks van die (nuwe) grondwet' 1991 SAPR/PL 229 at 229.
the intention-theory of interpretation, and Devenish, who blames positivism for the 'mechanical and wooden' interpretation of statutes by the courts. Dyzenhaus' criticism of positivism is more fundamental and attacks the theory of knowledge underlying positivism, namely the idea of value-neutral description. Dyzenhaus argues that value-neutral description is impossible.

There are two arguments regarding positivism that I should like to discuss in more detail. The first concerns the criticism of the command theory and the second deals with the idea that positivism and the protection of fundamental rights are somehow incompatible. Let me elaborate. The command theory is understood by South African writers as a necessary precondition for the idea of parliamentary sovereignty. It is assumed that the command theory implies that the sovereign (in casu parliament) has unlimited powers to legislate and that the courts must merely implement these commands without reference to their moral content (or lack thereof). Critics of positivism claim that, because of this, positivism did not create an empirical science, but made a moral choice for conformism. Closely aligned with this is the idea that the positivists' insistence on the separation of law and morals was the main reason that fundamental rights were not protected in South Africa. The argument is that, if the courts had had the capacity to test legislation on broader grounds than 'manner and form' only, much of the discriminatory legislation would have been declared invalid.

In the following section I shall look at the question of positivism and conformism and then examine the problems regarding the command theory and fundamental rights in the light of the positivists' views on the matter. For this purpose we shall refer primarily to the writings of Austin, Bentham and Mill.

Positivism and conformism
"At all events, the positivistic attitude, so its critics would argue, produces not empirical science, but the moral choice of conformism – a moral (or immoral?)...

22 'Teleological evaluation: a theory and modus operandi of statutory interpretation in South Africa' 1991 SAPR/PL 62 at 67: 'Positivism as a jurisprudential theory has contributed to a judicial rejection of legal values and a rigid separation of law and morality ...'.

23 Ibid 67. He comes to the erroneous conclusion that, since the positivists stressed the distinction between law and morality, this meant moral considerations were ignored in the process of interpretation. Interestingly, Bentham criticises the literalist theory of interpretation which, he says, derives from Blackstone: see Bentham A comment on the commentaries and a fragment on government (eds Burns and Hart, 1977) 98.

24 'Positivism and validity' 1983 SALJ 454 at 454. This is what Hart calls 'non-cognitivism' within positivism. It implies that some positivists accept that values cannot be known in the same way that facts are – a theory by no means unanimously accepted: Bentham did not support this idea: see Jori (n 2) xv.

25 Dugard (n 18) 187.

26 Jori (n 2) xiv. This is sometimes called 'authoritarianism' or 'executive-mindedness' in South African debates.

27 Devenish (n 22) 75-76 claims that it was the tradition of Roman-Dutch law to test legislation against the principle of equity. Consequently, our legislation should have been tested against common law. Even if this historical exposition is correct, common law is regarded by positivists as part of the law and the argument is therefore useless.

28 It is beyond the scope of this paper to discuss the writings of contemporary positivists. Here we are concerned primarily with the foundations of positivism.
attitude to which lawyers are all too easily prone'. To a certain extent, conformism is a necessary part of the rule of law in that power is conferred, controlled and exercised through general rules. The main criticism against positivism is, however, that this conformism has lead to dictatorship and oppression.

The idea, that the positivist insistence on the separation of law and morals in determining the validity of legal rules lead to dictatorship, now seems ‘fanciful, in the extreme’. In the case of Nazi Germany, this accusation fails to take into account the influence of German idealism and neo-Hegelianism. In the case of South Africa, much the same can be said. Certainly the idea of an unlimited and illimitable sovereign power that cannot be challenged by the courts is foreign to positivist thinking. Why positivism should lead to oppression in South Africa, but not in England, the home of positivism and empiricism, is not easily explained. Maybe the British judiciary better understood the nature of positivism.

Interestingly, the Dutch approach is much the same as the one followed in South Africa, namely of seeing the protection of rights as a ‘political’ activity in which the courts should not interfere. Consequently, laws cannot be tested against ‘higher norms’ or ‘values’ contained in the constitution. The call for a return to ‘continental values’ needs therefore to be qualified at least.

The command theory

It is important to note, first of all, that there is no logical reason why a positivist insistence on the separation of law and morality need necessarily coincide with the imperative theory of law. However, it is a theory expounded by both Bentham and Austin and, as such, must be studied.

Jeremy Bentham’s (1748–1832) definition of law reads as follows:

A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should

29 Jori (n 2) xiv;
30 ibid.
31 Lloyd (n 7) 271.
32 Fuller ‘Positivism and fidelity to law — a reply to professor Hart’ 1958 Harvard Law Review 630 at 648. Jori calls this the reductio ad Hitlerum argument: see Jori (n 2) xiii.
33 Lloyd (n 7) 867.
34 Much in this line has been said by Forsyth and Schiller ‘The judicial process, positivism and civil liberty II’ 1981 SALJ 218. The basis for the positivist argument is that a scientific description of law remains necessary before it can be judged — this is Bentham’s distinction between censorial and expository jurisprudence: see Bentham (n 23) 397-404.
35 Regeringsnota Advies van de Raad van State aan de koningin (Staatsuitgeverij juni 1974) no 612.
37 Hart (n 2) 593.
38 Bentham The limits of jurisprudence defined (1945) 88. It is important to note that this does not mean that only legislation is seen as law. For Bentham (n 23) 429-430, the common law is a tacit command and as such still law.
This is not the complete picture. Bentham stresses that the legislature cannot do anything that is unlawful. However, it can do something which would make it inexpedient for the citizens to obey. He then states: 'We have a Constitution. We have our liberties, our rights. Our kings have boundaries to their authority'.

It seems clear that Bentham never accepted, as did Austin, the idea of an undivided and unlimited sovereign. In fact he recognised a distinct class of laws which placed restrictions on the legislative power of the sovereign. This 'transcendental' class of laws was not regarded as morality but as an integral part of the structure of law. Furthermore, it is thought that Bentham created the idea of judicial review, although he thought this was probably done by extra-legal enforcement.

John Austin (1790–1859) was probably the most rigid of the utilitarians in his insistence on the unlimited and undivided sovereign who commands those in the habit of obeying. Austin defines law as 'a command which obliges a person or persons, and obliges generally to acts or forbearances of a class'.

Even he, however, insisted that law cannot itself be based on law but must be 'based on something outside the law. He sought to base it on fact, namely the habitual obedience of the people. This typically Austinian analytical approach might tend to seem rather cold and forbidding. However, he took a very progressivew view on judicial legislation which seems to suggest that, at the least, law could also be created by the judiciary — a law which would bind the sovereign. It would seem that the South African judiciary's reluctance regarding 'judge made-law' is, at the least, not positivist in conception.

John Stuart Mill (1806–1873), perhaps the easiest of the positivists to read, might yet be the most difficult to understand. He apparently agrees with Austin's definition of law as essentially a command. He accepts, however, that the power of the sovereign must be limited, not only by the democratic process but also by limiting legislative powers. The legislative power is limited to those aspects over which the law can legitimately exercise control. Mill says quite

39 Bentham (n 23) 56.
40 Bentham (n 38) 150: 'It appears then that there are two distinct sorts of laws ... the one addressed to the sovereign, imposing an obligation on the sovereign: the other addressed to the people, imposing an obligation on the people'.
41 Bentham (n 23) 488. Admittedly, Bentham had considerable trouble with this, fearing a battle of words under the guise of the law.
42 Lectures on jurisprudence vol I (1873) 'The province of jurisprudence defined' lecture VI 98.
43 Ibid 226. It should, however, be noted that the habit of obedience is seen by Austin as a distinguishing mark of an independent political society and not as an integral characteristic of law as such.
44 Austin (n 42) vol II (1873) 'Law in relation to its sources', lecture XXVIII 526 et seq; Lecture XXIX 549: 'Provided it be made in the direct or in the legislative manner, law, established immediately by subject judges, is just as good as law emanating immediately from the sovereign'.
45 As expressed in the maxim iudicis est ius dicere non dare.
46 Essays on equality, law and education (ed Robson, 1984) 165 et seq.
47 Utilitarianism, liberty and representative government (1910) 68.
explicitly that the only reason for which power can be exercised over a member of society would be to prevent harm to others.\textsuperscript{48} Mill's most important contribution, however, is the insight that law is a social institution that must be understood in terms of society's needs and values.\textsuperscript{49} It seems clear that none of the positivists discussed ever envisaged that law could be an unlimited and illimitable command. While Bentham and Mill explicitly provided for limitations to legislation, Austin at least acknowledged that legislation could be repealed and/or amended by judicial power. Quite apart from that, these positivists recognised that common law could and did exist alongside legislation, all being species of law.\textsuperscript{50}

\textbf{Fundamental rights}

It has long been assumed that the positivists were, if not antagonistic to the idea of fundamental rights, at least not in favour of it. The truth is, however, that Bentham, Austin and Mill were life-long law-reformers. They did not believe that substantive law could be reformed without the reformation of its form and structure. Consequently, they thought that a conceptual framework was a necessary prerequisite for law reform.\textsuperscript{51} It has already been pointed out that Bentham was concerned with the upholding of rights\textsuperscript{52}, but rejected emphatically the idea of 'natural rights'. He wrote: 'All this talk about nature, natural rights, natural justice and injustice proves two things and two things only, the heat of the passions and the darkness of the understanding'.\textsuperscript{53} He regarded any law as necessarily encroaching on liberty. However, he believed, if it stopped there, it was 'pure evil': the law must do this evil so that good may come from it.\textsuperscript{54} There are no 'natural' rights to liberty, equality or property, but these rights are recognised because their recognition leads to general happiness.\textsuperscript{55} Austin held that the sovereign was incapable of legal limitation. Political liberty is the liberty from legal obligation which is granted or taken away by the sovereign. Consequently, the sovereign is legally free to abridge or enlarge political liberty, but is constrained by positive morality from doing certain things.\textsuperscript{56} Liberty is also not a value in itself, but only valuable in so far as it is conducive to the general good.\textsuperscript{57} Typically of a lawyer, Austin defines 'right' in the following way: 'Duty is the basis of Right. That is to say, parties who have rights, or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon other parties'.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{48} Ibid 73.
\item \textsuperscript{49} Ibid 49.
\item \textsuperscript{50} See n 38.
\item \textsuperscript{51} Bentham (n 23) 404, 410.
\item \textsuperscript{52} See n 39.
\item \textsuperscript{53} Bentham (n 38) 84.
\item \textsuperscript{54} Ibid 139.
\item \textsuperscript{55} Lloyd (n 7) 254.
\item \textsuperscript{56} Austin (n 42) 281.
\item \textsuperscript{57} Ibid: 'Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers'.
\item \textsuperscript{58} Ibid 407.
\end{itemize}
Of all the positivists, Mill was most explicitly concerned with the protection of rights and liberties. This is already clear from the subjects of his lectures 'On liberty', 'The Negro question' and 'The subjection of women'. His criticism of natural law thinkers is that they 'occupied themselves rather in inquiring what things society ought to like or dislike, than in questioning whether its likings and dislikings should be a law to individuals'.\(^9\) For Mill, liberty is the highest right of any individual, not because it is a 'natural' right, but because that would be to the greatest benefit of the greatest number of people.\(^0\) The same argument pertains to equality.\(^1\)

Conclusion

There are many aspects of the positivist doctrine, especially the ideal of utility and the rather crude psychology it rests on, that seem naive and unsophisticated to lawyers of the twentieth century. What cannot be denied is that the positivists were the first to insist upon an analytic approach to the law that also took cognisance of social facts.\(^2\) They never lost sight of the society in which the law operated and the values of that particular society, as the natural law thinkers tended to do.\(^3\)

The time is right to acknowledge that all laws contain implicit moral values. This does not validate or invalidate these laws it is simply a matter of historical fact. To put it another way, morality determines the source and not the validity of law. It might be, that the mistake we made was not in trying to separate law and morality, but in uncritically accepting (explicitly or implicitly) the morality contained in apartheid-legislation.

A consistently positivist attitude on the part of the judiciary would have been to have accepted that limitations to legislative powers do exist, and to have forced the legislator to keep to these limits. Instead, the legislative powers of parliament were regarded as resting on an absolute (or God-given?) right to govern—a right that was, by virtue of its being 'natural', removed from criticism and scientific analysis. This is what Lloyd means when he concludes: 'It may be ventured that experience shows that muddled metaphysical speculation rather than clear thinking and refusal to allow reason to be overborne by emotional considerations, is far more likely to result in totalitarianism'.\(^4\)

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\(^1\) Mill (n 47) 70-71.
\(^2\) Ibid 2-3.
\(^3\) Mill (n 47) 59 and 29: 'Society between equals can only exist on the understanding that the interests of all are to be regarded equally'.
\(^4\) This is what Raz (n 6) 37 calls the social thesis of positivism, namely the idea that what law is and is not is a matter of social fact. Dyzenhaus (n 24) 467 also subscribes to this view.
\(^5\) Jori (n 2) xvi.
\(^6\) Lloyd (n 7) 271.