

Preface—The Many Fates of Legal Positivism

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Probably the most interesting debate in legal theory of the 20th century, the debate about legal positivism, is appearing to fade away. The contributions to this special issue aim to analyze the question as to why this is happening. We asked the authors to consider the following hypotheses, which are partly contradicting:

(1) Positivism is (or was) only an answer to the historical challenges of industrial societies and the nation state. In the 21st century, its plausibility has seriously diminished.

(2) The theoretical landscape has become so diversified (there are so many different strands of positivism) that the mere denotation of a legal theorist as positivist does not say much about him or her. A positivist and a natural lawyer can be nearer to each other in most of the jurisprudential questions, than two legal positivists of different strands of legal positivism.

(3) Every argument has already been stated in the debate, so we keep repeating ourselves (and our respective theoretical ancestors). So, it is not irrelevant, but simply boring.

(4) Positivism has proved to be a plausible explanation on the structure of law, but it cannot explain satisfactorily the phenomenon of adjudication. So, though not false, it is just irrelevant to most of the questions that “really” matter for jurisprudence. Its explanatory force is too limited.

(5) Legal positivism is based on epistemological assumptions that are outdated today (cf. esp. Putnam). Objective truth about the law is not possible, as our knowledge is necessarily based on improvable epistemological presumptions (Quine).

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(6) Legal positivism has lost much of its attractiveness because the illusion of its political/moral neutrality has been destroyed. The separation of law and morality is a moral choice itself.

The above list was never meant to be a questionnaire, and the authors indeed took a rather liberal approach in answering our original questions and they did so—we believe—to the advantage of the final result. Partly because of this, and partly because it is usual with topics of legal theory anyway, we did not reach any final conclusions as to whether the above statements are just false commonplaces (and positivists conceptualizations have thus a good explanatory force on general legal questions), or whether the above statements are actually real and unsolvable problems, so legal positivism belongs only to the history of legal theory. But we definitely think that the reader will be able to form a more founded opinion after having read the contributions.

The contributions to this special issue are mostly based on papers presented at a special workshop of the 2009 IVR World Congress in Beijing organized by the present editors. Four colleagues were so kind to offer their participation *ex post facto* (Nigel Simmonds, Mátyás Bódig, Thomas Bustamante, Alexander Somek), and thus made our electronic conference volume more comprehensive even though we know that the topic we have chosen offers endless issues to discuss.

The contributions follow in pairs from which the second is always a comment on the first one. We are grateful to the editors of the *German Law Journal* for accepting our proposal. We thank Lisa Giles for her help in editing the contributions.