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Lex Scripta: Assumptions And Foundation Of The Juspositivist Dialectic

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Abstract:
This article delves into the historical development and foundational underpinnings of Juspositivist thought. It explores the origins of the Juspositivist dialectic in response to Natural Law theories and examines its evolution through interactions with various intellectual movements such as the Historical School, the Enlightenment, and the Exegetical School.
Key legal theorists and their contributions to the Juspositivist tradition are also discussed, highlighting the transition from a focus on Natural Law to an empirical study of law, legal principles, and the role of legislation in shaping the law.
By conclusion, the importance of continuously reevaluating and refining our understanding of law in response to changing social, political, and cultural contexts, drawing on the rich history and insights of the Juspositivist dialectic is emphasized.
Key Word*: History of Law; Juspositivism; Natural Law; Legal Dialectic.*

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I. Introduction

It is imperative to note that, although the dichotomy 'natural law' versus 'positive law' has permeated the entire concatenation of the legal dialectic exposed in the previous items, the emergence of a new way of thinking about the subject has led to the classification of the debate presented up to that point under the broad banner of "Legal Naturalism" or, more commonly, "Jusnaturalism". In truth, the juspositivist rationale began to be woven from specific surveys throughout the Modern Age, gradually consolidating itself as a school of thought in contemporary times, making it clear that its principles diverged so drastically from the other interpretations that, in retrospect, it can be said that the legal debate was conducted, until then, among 'different jusnaturalisms'. In this topic, we will analyze some particularly relevant positions as precursors and consolidators of Contemporary Juspositivism.

II. The German Historical School

The so-called 'Historical School of Law' emerged in Germany at the end of the 18th century and the beginning of the 19th century. Strongly influenced by romanticism, the followers of this doctrine engaged in an intense anti-rationalist debate that, among other consequences, aggravated the desacralization of Natural Law. In broad disagreement with the majority opinion of the Enlightenment-influenced jusnaturalists, this school did not understand the legal phenomenon as stemming from an eternal, universal, and unchangeable origin, but rather as the historical product of the population and physical space for whom and where it operates, as the result of a mathematical operation in which the cultural, political, and economic situation enters as variables that change as relevant events unfold in each respective area, altering and adapting the Law over time.

Although the greatest exponent of this doctrine is, unequivocally, Friedrich Carl von Savigny, it is Gustav Hugo who is considered the founder of this line of thought, with the publication of his work "Treatise on Natural Law as Philosophy of Positive Law", in which the author effectively exposes Natural Law not as an autonomous normative system separate from positive law, but as a set of reflections and philosophical considerations on the latter. As a concept of Positive Law, he categorically asserts that it is the "law established by the State" - however, he does not necessarily restrict it to the figure of the legislator, also considering the figure of law established through customary law and jurisprudence. Thus, Hugo initiated the movement of the Historical School.

In summary, as Bobbio teaches, it can be inferred that the criticism of this doctrine against rationalist jusnaturalism falls on three main points: first, regarding the convenient uniformization of the human being, discarding the diverse characteristics that can be found between two or more people or, even, between two or more peoples; second, regarding the rationalization of history, through the design of processes and collective

decision-making in sometimes hypothetical, sometimes historical terms (for example, the establishment of the social contract) based on logical and rational arguments - for the historicists, the driving force of the human being and, therefore, of history, would be the emotional elements expressed in impulse, passion, sentiment, fear, etc; third, in the devaluation of the past and simultaneous optimism for the future - these thinkers adopted an anthropological pessimism, exalting past periods and valuing the traditions derived from them, while being skeptical about the benefits promised by major transformations, generally being considered conservative in the strict sense of the word.

Furthermore, one of the central tenets within the school was the belief in the Volksgeist, or the spirit of the people, according to which the legal system of a nation is a reflection of the values, customs, and traditions of its people, which in its turn evolve organically over time - as argued by the proponents, legal norms and institutions should be understood as products of historical development rather than as rational constructs imposed from above. This perspective led the school's thinkers to place a strong emphasis on the study of legal history and comparative law.

The German Historical School of Law played a crucial role in challenging the dominant legal theories of the time, particularly those rooted in rationalism and natural law. By emphasizing the importance of historical and cultural context in shaping legal systems, the school contributed to a more nuanced understanding of the development of law and legal institutions.

In conclusion, this school played an essential role in reshaping the study and understanding of law by highlighting the importance of historical and cultural contexts in the development of legal systems. Its focus on the interplay between law and society, as well as the concept of the Volksgeist, offered a unique and valuable perspective on the nature of law. Although the school's influence has waned in the face of more contemporary legal theories, its contributions to legal scholarship and its emphasis on the cultural and historical dimensions of law continue to resonate within the field and offer insights into the complex relationship between law and society.

III. The French Exegetical School

In time, Enlightenment thinking became very popular in France, deeply inspiring the bourgeoisie, and, in association with natural causes that led to poor harvests and political decisions that aggravated economic inequalities (such as the extensive support of Louis XVI to American revolutionaries), eventually triggered the Fall of the Bastille on July 14, 1789, ending the modern era and ushering in what historian Eric Hobsbawm calls the "Age of Revolutions".

Natural law ideals certainly played an important role in the event: by distancing the sanctity of natural law and asserting the right to life, liberty, and equality for all men through reason, it appealed to the miserable situation of the plebs, instigating nonconformity with that status quo - the bourgeois dissatisfaction with absolutist interventionist politics concerning economic issues and tax burdens, combined with popular dissatisfaction with severe socioeconomic inequality, culminated in the overthrow of the Ancien Régime in favor of a Constitutional Monarchy, whose Magna Carta was promulgated in 1791. Having achieved the bourgeoisie's objectives (materialized in the Girondins, moderate revolutionaries) and once the economic doctrine was reversed in favor of a liberal model proposed by Adam Smith, however, it became of great importance that these achievements were legally protected - not coincidentally, already in the 1791 Monarchical Constitution, it was expressly determined for the creation of a code of civil laws common to the entire nation.

Here it is important to pause to explain a little about the beginning of the process of codification of law, initiated at this time. Except for some historical attempts to gather normative bodies of a particular nation on the same subject, such as the infamous Corpus Iuris Civilis (it is important to explain that it is not a code properly speaking, elaborated and systematized in itself, but a collection of previous laws), the process of codification as a movement in legal thought took place due to the Enlightenment influence on the costly attempts to reinvent the post-revolutionary French state.

In fact, the political actors of the time proved to be heirs of the thinkers pointed out in the previous topic on Modern Jusnaturalism, adopting the idea that positive law should translate into the rationalization of natural law, so that it would finally be enforceable - at this point, largely diverging from the position of the German historical school discussed in the topic above, as defenders of customary law and, logically, averse to an idea as concise and static as that proposed by the codification process. On the subject:

The Enlightenment thinkers considered it possible and necessary to replace the accumulation of customary norms with a law constituted by a systematic set of legal norms deduced by reason and enforced through law. The movement for codification thus represents the extreme development of rationalism, which was at the base of jusnaturalist thinking, since the idea of a system of norms discovered by reason unites the demand to consecrate such a system in a code established by the state. (BOBBIO, Norberto. 1999, p. 55)

Thus, as the most important result of these factors, the Napoleonic Code came into force in 1804, an unequivocal historical milestone. Although it had, in its Article 4, established that it was the judge's duty to decide in each case and, in its Article 9, the criteria by which it should be done in the silence or uncertainty of the Law,

the majority interpretation that was made is that the legal norm should be deduced from the law at any cost - thus founding the Exegetical School of Law. Followers of this new current, staunch supporters of the doctrine of separation of powers popularized by Montesquieu in "The Spirit of the Laws," rejected any possibility that the magistrate could seek sources other than the code itself to discover the legal norm, accepting the legislative authority as such and believing that this was the best way to achieve the ideal condition of full legal certainty, which should be clearly, unequivocally, and previously established for the concrete controversy to be resolved.

Interpretation and application of the newly codified French law was the primary focus of the moment, which represented a departure from the complex and fragmented legal systems of the past. In this spirit, it sought to provide clarity and consistency in the application of the law by adhering to the principle that legal texts should be interpreted according to their plain meaning and the intent of the legislator.

The application of this understanding, therefore, brings about some changes in what was previously done: first, a paradoxical reversal in the relationship previously established between natural law and positive law, now arguing that the jurist has little interest in the former; second, an extremely distant conception of customary law, adopting the position that the only law would be that established by the state or recognized by it and, consequently, elevating the figure of the legislator; third, in the hermeneutic search for the legislator's intention when interpreting the code.

The school's methodology centered around a close reading and analysis of legal texts, with an emphasis on the literal interpretation of the law, as its proponents believed that the law should be applied according to the precise wording of the legal texts and the intent of the lawmaker, rather than through the use of judicial discretion or reference to external sources. This approach was rooted in the separation of powers doctrine, which sought to maintain a clear distinction between the roles of the legislature and the judiciary.

Prominent figures of the movement include Jean-Louis Thibaut, François Gény, and Raymond Théodore Troplong, who contributed to the development of the school's methodology and played a significant role in shaping the French legal system during the 19th century. Their works often focused on the importance of adhering to the letter of the law and avoiding judicial activism, which they believed could lead to inconsistency and unpredictability in the application of the law.

Although influential in its time, the school faced severe criticism for its rigid and formalistic approach to legal interpretation, given the argument that the school's emphasis on the letter of the law and the intent of the legislator can be limiting, preventing the law from adapting to new social, economic, and cultural realities. Despite these critiques, it played a crucial role in the development of modern French law and continues to have a lasting impact on the country's legal system and jurisprudence.

In summary, the emergence of the Exegetical School of Law, as well as the historical context of the French Revolution and the codification process, marked a significant shift in legal thought. This shift distanced itself from the previous emphasis on natural law and customary law, and instead focused on the importance of positive law established by the state, the role of the legislator, and the need for a clear and systematic legal framework. These developments laid the groundwork for modern legal systems and contributed to the evolution of contemporary jurisprudence.

IV. Juspositivism Itself

John Austin, an english professor, is considered the founder of Juspositivist thought itself, a title attributed to him due to his posthumous work "Lectures on Jurisprudence," in which, following the division made by Jeremy Bentham (the main proponent of utilitarian thought) between what he calls 'jurisprudence' (the Law as it effectively and empirically is and behaves) and the 'science of legislation' (the Law as it should be), and, unlike Bentham, he focuses on the former. As such, Austin dedicated his study to the principles, notions, and concepts common to all legal systems, explicitly stating in his work that he would not engage in evaluative analysis of the content of any legal norm.

In his doctrine, the author shares with the Historical School a complete rejection of natural law as law itself, as well as the understanding that the foundation of validity of existing law in societies derives from the effectiveness of the law. However, he effectively diverges from the Historical School in all other aspects - as such, he does not adopt the concept of Volksgeist as the primary form of positive law, converging with Hobbes and the Exegetical School regarding the typical form of law in the order emanating from legislation.

Austin's work, combined with the development of other legal schools and the historical context of the time, contributed to the further solidification of Juspositivist thought. His focus on the empirical study of law and the principles underlying legal systems helped to shift the focus away from evaluative and normative approaches to understanding law. This emphasis on positive law, and the recognition of its foundation in the effectiveness of legislation, would continue to shape legal thought and practice in the modern era.

The modern legal positivism that derived from Austin’s work can be described as an emergency response to what the proponents would say were the shortcomings of natural law theory and the historical and exegetical approaches to law, now very much focused on its sources and the role of the state in creating and enforcing legal

norms. This present approach distinguishes between law as it is (the positive law) and law as it ought to be (the ideal or moral law), maintaining that the validity of legal norms does not depend on their moral content or alignment with natural law principles.

The emphasis on the separation between law and morality is, in fact, one of the key features of modern legal positivism, as it is argued that the existence and validity of legal norms are determined by their sources, such as the legislature or the courts, rather than by their moral or ethical qualities. This distinction allows for a more objective and systematic analysis of legal systems, focusing on the mechanisms through which legal norms are created, interpreted, and enforced. By decoupling law and morality, it is widely believed that legal positivism provides a solid framework for understanding and evaluating legal systems on their own terms, without the interference of subjective moral judgments.

In this context, it is important to stress that by stating that legal norms derive their authority from the institutions and processes established by the state, such as legislatures, courts, and administrative agencies, the importance of understanding the political and institutional context in which legal systems operate, as well as the relationship between law and political power is greatly heightened, as the formal paths of shaping the law are highlighted.

The "state of the art" of legal positivism has evolved and branched into various sub-schools and theories, such as inclusive legal positivism, exclusive legal positivism, and the "New Haven" approach. Despite their differences, these modern legal positivist theories share a common commitment to the separation between law and morality, as well as an emphasis on the sources and institutions that create and enforce legal norms. By providing a clear and systematic framework for understanding the nature and workings of legal systems, modern legal positivism continues to be an influential and valuable approach in the study and practice of law.

V. Conclusion

In conclusion, the development and foundation of Juspositivist thought, as explored in this article, has been shaped by various historical events, intellectual movements, and prominent legal theorists. The Juspositivist dialectic emerged in response to the Natural Law theories and evolved through its encounters with the Historical School, the Enlightenment, and the Exegetical School. As the different branches of thought and notable theorists contributed to the conversation, the focus shifted towards the empirical study of law, the principles underlying legal systems, and the role of legislation in shaping the law.

Throughout its development, the Juspositivist movement has provided valuable insights into the nature of law and its relation to society. By emphasizing the importance of legislation and the legal system's responsiveness to historical and cultural contexts, Juspositivist thought has helped shape the way we understand and approach law in the modern era.

As we reflect on the assumptions and foundations of Juspositivist dialectic, it is essential to recognize the ongoing need for the evolution of legal thought in response to the ever-changing social, political, and cultural landscapes. The Juspositivist tradition provides a strong foundation for understanding the law as it is, while also highlighting the importance of continually reevaluating and refining our legal systems to better serve the needs of society. Ultimately, the journey through the assumptions and foundations of the Juspositivist dialectic reveals the complex interplay between law, society, and human thought, and the importance of engaging in an ongoing dialectical process to better comprehend and navigate the legal world.

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