

Legal Positivism and Property Rights: A Critique of Hayek, Leoni and Peczenik*

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Abstract: Scholars such as F. A. Hayek, Bruno Leoni and Aleksander Peczenik have made claims to the effect that legal positivism has contributed to the erosion of constitutionalism and the rule of law, which in turn has entailed an expansion of government and reduced economic freedom, the core of which is private property rights. This conclusion is far from evident. Firstly, I contend that legal positivism is *compatible* with a strong support for private property rights. Second, *the causal relationship* between legal positivism and the degree to which private property rights are applied and protected is analyzed. A negative relationship may exist due to misunderstandings of what legal positivism is about or because legal positivism might undermine ideas that in turn constitute a firm foundation for private property rights. However, the main arguments about a negative relationship – that legal positivism centralizes and politicizes legislation and that it makes the legal culture servile in relation to the political sphere – are considered more dubious. An important conclusion is that possible effects of legal positivism on the degree to which private property rights are applied and protected can be affected through information about what legal positivism says and about the consequences of private property rights. This avenue is considered more promising for friends of private property rights than attacks on legal positivism as such.

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1. Introduction

F. A. Hayek was a virulent critic and opponent of legal positivism, the legal doctrine that regards “law and morality as strictly separable” (Kramer 1999:1). He went so far as to imply that legal positivism entails a radical restructuring of society along constructivist guidelines (Hayek 1960, 1976) and that it, in effect, is a form of socialism. Other scholars, such as Bruno Leoni and Aleksander Peczenik, largely concur. By influencing politicians directly, by changing the perception of law to that of centralized, malleable legislation, by making the legal profession servile towards the politicians, and by undermining certain traditional ideas, legal positivism, it is argued, has contributed to the demise of the rule of law and constitutionalism. This, in turn, has weakened the market economy and its core institution, private property rights, by opening up the sphere of legislation to social engineers. If one believes in such a causal relationship and advocates private property rights, it is indeed straightforward to find legal positivism highly problematic.¹

But is such a position motivated? Should one reject legal positivism if one strives to secure private property rights? There are reasons to doubt this. I will argue, firstly, that legal positivism is *compatible* with a strong support for private property rights. Hence, there is no logical conflict involved. The notion that there is such a conflict stems from misunderstandings of what legal positivism actually entails, and in an attempt to clarify what it actually entails I will connect to a vibrant, contemporary discourse, not least inspired by H. L. A. Hart and his followers.

I will, secondly, analyze *the causal relationship* that can be expected between legal positivism and the degree to which private property rights are applied and protected. A negative relationship may exist due to misunderstandings of what legal positivism is about or because legal positivism might undermine ideas that in turn constitute a firm foundation for private property rights. However, the main arguments about a negative relationship – that legal positivism centralizes and politicizes legislation and that it makes the legal culture servile in relation to the political sphere – are considered more dubious. An important conclusion is that possible effects of legal positivism on the degree to which private property rights are applied and protected can be affected through information about what legal positivism says and about the consequences of private property rights. This avenue is

¹ Henceforth, the effects of legal positivism on property rights are the focus of the analysis, in accordance with Mises (1949: 678) who states that “[p]rivate ownership ... is the fundamental institution of the market economy,” although it can readily be applied to effects on government power or the market economy more broadly.

considered more promising for friends of private property rights than attacks on legal positivism as such.

It can be instructive to point out what this paper is *not* about. It is not primarily a study in the history of ideas or of some particular scholar; and it is not a philosophical defense or critique legal positivism – rather, the analysis is strictly positive.² Focus is put on *the effects of legal positivism*, rightly understood, on certain political, legal, and economic institutions and ideas, most notably the degree to which private property rights are applied and protected.³

2. Definitions of Terms

Before going into the compatibility and relationship between legal positivism and private property rights, these terms need to be defined.

By *legal positivism* is meant the following, according to Himma (2002: 125):

The conceptual foundation of legal positivism consists in three commitments: the Social Fact Thesis, the Conventionality Thesis and the Separability Thesis. The Social Fact Thesis asserts that the existence of law is made possible by certain kinds of social fact. The Conventionality Thesis claims that the criteria of validity are conventional in character. The Separability Thesis, at the most general level, denies that there is a necessary overlap between law and morality.⁴

By *property rights* is meant a bundle of rights which, according to Cooter and Ulen (1988: 91), “describe what a person may or may not do with the resources he owns: the extent to which he may possess, use, transform, bequeath, transfer or exclude others from his property.” In the present text, only private property rights are discussed; and when the terms *strong* and *weak* property rights are used, they refer to the degree to which private property is legally applied and protected.

² For critiques of legal positivism, see Fuller (1964), Dworkin (1977, 1986) and Finnis (1980).

³ A similar type of analysis of such effects of another idea, viz., ethical subjectivism, is carried out in Berggren (2004).

⁴ Cf. Soper (1995: 425) and Kramer (1999: 2). The version of legal positivism that is discussed here is the inclusive one – see Waluchow (1994) and Kramer (1999). The exclusive version, primarily represented by Raz (1979, 1986), claims that it is not, like the inclusivists think, sufficient to say that there is no necessary connection between laws and morality but denies that there *can* be any such connection. The exclusivists regard these phenomena as separate, not only, like the inclusivists, as separable. See Marmor (2002).

3. Are Legal Positivism and Private Property Rights Compatible?

Legal positivism as an idea is compatible with the view that strong private property rights are desirable. That is, a person can claim that legal positivism is a correct way of understanding law and legal systems *and* that strong private property rights are desirable without engaging in a logical contradiction. A society where all are and always have been legal positivists may very well have strong private property rights. This follows from the fact the legal positivism is a theory of the character of law and legal systems and which, as such, concerns *form* and not *content*. Posner (2003: 18) describes Kelsen's view in the following way: "Law has no prescribed content; it is simply what people authorized to do law do until their authority is withdrawn from them by death, retirement, or forced removal from office by impeachment or other means."⁵ That is, as a theory legal positivism says nothing about how the laws should be designed but only something about what laws are. A law can have any content and still be a law – there is no necessary connection between law and moral quality.⁶ What determines if a regulation is a law or not depends on whether it has come into being in accordance with an ultimate norm or rule, such as Kelsen's *Grundnorm* or Hart's Rule of Recognition.⁷ It is evident that strong property rights can be expressed in law (most legal positivists would even claim that such rights are rights only if they are defined by law), and consequently there is no logical conflict between embracing legal positivism and defending strong private property rights.⁸

However, legal positivists deny that property rights, or any right, can exist outside of a legal order defined as such by social facts in accordance with an ultimate normative rule.⁹ A legal positivist cannot, therefore, accept the claim in the U.S. Declaration of Independence, that people have "certain inalienable Rights" and that these are prior to the establishment of government. As Bentham (1931: 113) starkly puts it: "[P]roperty and law are born together and die together. Before the laws there was no property; take away the laws, all property

⁵ See. Kelsen (1967: 13). Cf. Hayek (1960: 237-239).

⁶ See Hart (1958). On Kelsen's view, see Stewart (1990).

⁷ See Green (2003).

⁸ Weak private property rights, as well as collective property rights, are of course also compatible with legal positivism.

⁹ Hence, natural law is not accepted as law. Recall Bentham's (1987: 53) rejection of natural rights as "nonsense upon stilts." See Bix (2002) for more on modern natural law theory.

ceases".¹⁰ Posner (2003: 255) describes Kelsen's point of view in the following way: "[T]he holder of a right is simply someone authorized to invoke the sanctioning power of the state." And Undén (1927: 53) clarified the legal-positivist position: "A new law can never constitute a 'violation' of property rights as such. Such a way of expression entails a contradiction." (Own translation from Swedish.) But note, again, that this way of viewing things does not say anything about how strong or weak property rights should be, only that they are to be understood as the result of lawmaking in accordance with some ultimate convention defining what constitutes lawmaking. It bears noting that legal positivism does not exclusively recognize legislation as law. It may also regard common law as law, but this depends on the specification of the ultimate convention that clarifies what is law in a particular context.

4. Does Legal Positivism Lead to Weak Property Rights?

4.1. *The Thesis of a Negative Relationship*

It is undoubtedly the case, then, that a defense of legal positivism is logically compatible with support for strong property rights. A more interesting, but also more subtle, question concerns the causal relationship between these two variables. Does, as claimed by some, widespread embracement of legal positivism entail weak property rights and, more generally, an expansion of government and a smaller role for markets?¹¹

Hayek (1976: 44, 53) expresses his view in the following way:

¹⁰ Interestingly, Hayek's teacher Mises (1949: 725) also maintains that the state is the source of property rights, or at least of their protection: "Beyond the sphere of private property and the market lies the sphere of compulsion and coercion; here are the dams which organized society has built for the protection of private property and the market against violence, malice, and fraud. ... [H]ere are rules discriminating between what is legal and what is illegal, what is permitted and what is prohibited." However, some legal positivists find at least the Bentham claim too stark. While agreeing that property *rights* cannot exist except as law, they readily agree that *property* can exist on the basis of pre-government arrangements, e.g., conventions.

¹¹ Note that for someone who dislikes this development the argument here is of another kind than purely philosophical ones. This argument is rather consequentialist in character: legal positivism is thought to result in certain outcomes which in turn are disliked, and *therefore* legal positivism is disliked.

Legal positivism has become one of the main forces which have destroyed classical liberalism because the latter presupposes a conception of justice which is independent of the expediency for achieving particular results. Legal positivism, like other forms of constructivism [sic] pragmatism of a William James or John Dewey or Vilfredo Pareto, are therefore profoundly antiliberal in the original meaning of the word, though their views have become the foundations of the pseudo-liberalism which in the course of the last generation has arrogated the name. ... Legal positivism is in this respect simply the ideology of socialism – if we may use the name of the most influential and respectable form of constructivism to stand for all its various forms – and of the omnipotence of legislative power. It is an ideology born out of the desire to achieve complete control over the social order, and the belief that it is in our power to determine deliberately in any manner we like, every aspect of the social order. ... Legal positivism has thereby also become the chief ideological support of the unlimited powers of democracy.

Hayek (1960: 234-235) develops this further:

The ascendancy of these political views was greatly assisted by the increasing influence of various political conceptions which had arisen earlier in the century and which, though in many respects strongly opposed to one another, had in common the dislike of any limitation of authority by rules of law and shared the desire to give the organized forces of government greater power to shape social relations deliberately according to some ideal of social justice.¹²

Leoni (1991: 22, 90, 99) presents a similar view:

It is also paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation. ... Even those economists who have most brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really compatible with a law-making process centralized by the authorities. ... Individual freedom in all countries of the West has been gradually reduced in the last hundred years not only, or not chiefly, because of encroachments and usurpations of the part of officials acting against the law, but also because of the fact that the law, namely, the statutory law, entitled officials to behave in ways that, according to the previous law, would have been judged as usurpations of power and encroachments upon the individual freedom of the citizens.

Peczenik (2001: 122-124) comments on Swedish jurists and is more careful in claiming an influence of legal positivism. But he especially stresses that they are characterized by a far-reaching loyalty towards the legislators:

Even if it is hard to stringently prove any historical causal relationship it is still possible to assert that the most important unwritten principles behind Swedish legal practice is value relativism and the far-reaching loyalty of courts to the legislator. The former constitutes the explicit core of Hägerströmianism, while the latter is well in agreement with Hägerström's way of thinking." (Own translation.)

Do the harsh critics of legal positivism have a point? Does this idea undermine traditionally evolved legal ideas, causing property rights to weaken and the market economy to become more curtailed? Even if legislators *can* decide to introduce strong property rights,

¹² See further Hayek (1960: ch. 16).

on the basis of legal positivism, *will* they do it? Or will they be more inclined to go in the opposite direction?

That politics is strongly influenced by ideas, of which legal positivism is an example, was stressed by Keynes (1953: 383-384):

[T]he ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. ... But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.

Here, it is accepted that ideas *could* have such an effect, although of course the effect of each specific idea must be analyzed separately. To analyze the alleged negative connection between legal positivism and the strength of property rights, the mechanisms need to be specified. In Figure 1, such an attempt is presented.

Figure 1. How legal positivism is thought to influence legislation about property rights

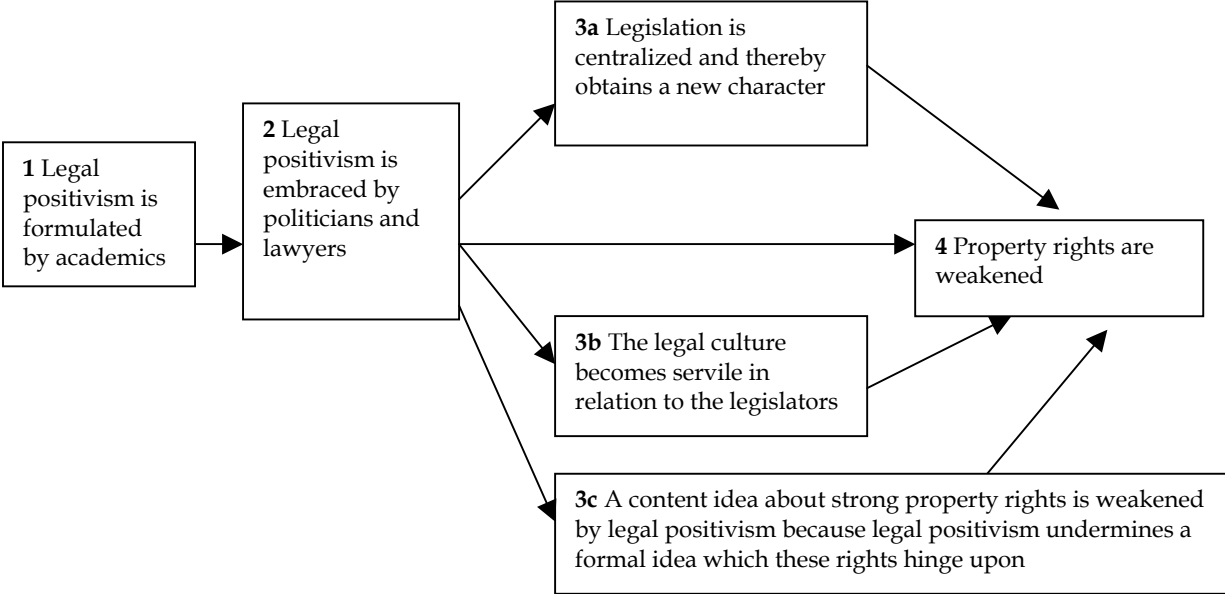


Table 1 presents *my interpretation* of how the scholars quoted above fit into Figure 1.

Table 1. Mechanisms that explain how legal positivism may influence legislation about property rights

Scholar	Character of the relationship	Central mechanism
Hayek	Strong, certain, direct	The arrow between box 2 and box 4 in Figure 1: Legal positivism is a kind of socialism which directly and in itself influences its proponents to weaken property rights.
Hayek-Leoni	Strong, certain, indirect	3a in Figure 1: Politicians, who have the power to legislate, transforms the legal order from one characterized by decentralization, common (judge-made) law and spontaneous order to a centralized, legislation-based order → legislation focuses on specific questions to be solved rather than on the general-principle approach of common law and is also influenced by interest groups and shortsightedness → legislation becomes characterized by social engineering, utility thinking, and redistribution rather than by strong property rights.
Peczenik	Semistrong, probable, indirect	3b in Figure 1: Legal positivism to some extent contributes to the legal culture becoming servile in relation to the legislators as laws are only seen as the result of political decisions and as the interpretation of jurists are primarily based on the considerations of the legislators → the independence of jurists and the rational power of legal argumentation is weakened → property rights are weakened.
(Not explicitly stated)	Strong, probable, indirect	3c in Figure 1: Legal positivism may undermine a formal idea which is intimately connected to a content idea about strong property rights and is therefore negatively related to the strength of property rights.

Note: By a *strong* (*semistrong*) relationship is meant that *given that legal positivism gains influence* it affects things in a profound (non-negligible) way. By a *certain* (*probable*) relationship is meant that given that legal positivism is formulated and embraced it certainly (probably) gains influence. By a *direct* relationship is meant that legal positivism in itself influences legislation about property rights; and by an *indirect* relationship is mean that legal positivism influences legislation by affecting how the constitutional system (both the legislative and the judicial branches) is designed and function.

4.2. Questioning of the Thesis of a Negative Relationship

In this section, the four versions (one direct and three indirect) of the thesis that legal positivism undermines strong property rights are looked into.

4.2.1. The Thesis that Legal Positivism Directly Undermines Property Rights

As has been pointed out above, one has to distinguish between two types of ideas: content ideas and formal ideas. The former are normative and specify a certain goal; the latter are

non-normative and represent a certain type of understanding, classification or interpretation of reality. Legal positivism is a formal idea that does not specify any goal for the content of either law or politics. It only entails a view of what a law and a legal order are, about how to define these concepts. If ideas matter in the sense of Keynes – that is, if they have causal influence on human action (in this case legislation) – then they must deal with the obtainment of human goals in one of two ways. They must either be content ideas, i.e., specify a goal of some kind, or ideas that clarify how a goal of some kind can be better achieved. This latter type of ideas contains empirical knowledge about consequences. New such knowledge that clarify that a certain goal can be achieved better by using new means may, e.g., cause political reforms to be undertaken. A formal idea, on the other hand, neither contains a specified goal nor empirical knowledge about a certain goal can be obtained. It merely suggests definitions and categorizations – how to understand concepts.

To take the example of property rights: if one is heavily influenced by the content idea socialism one wishes to weaken private property rights and transfer, presumably by force or a threat thereof, ownership of resources to the government or some other collective. One can be a legal positivist and hold this political view, but legal positivism cannot cause it. Hayek's (1976: 53) claim that "[l]egal positivism is in this respect simply the ideology of socialism..." is consequently obviously incorrect in that it confuses content ideas and formal ideas. If there is a relationship between legal positivism and weakened private property rights, then it is probably a correlation rather than a causal relationship.

At least this holds if legal positivism is understood correctly. It is possible that some, like Hayek, misunderstand legal positivism such as to interpret it as a content idea, in which case it (erroneously) is thought to influence action. But if so it is not this idea *per se* that has a causal effect; and if one dislikes the content idea that is conflated with legal positivism one should criticize that idea instead.

The Thesis that Lawmaking Is Centralized and Politicized and Obtains a New Character

Hayek and Leoni adduce an indirect mechanism through which the embracement of legal positivism leads to a deterioration of market institutions, e.g. in the form of weakened private property rights. This is illustrated in Figure 1 by means of box 3a. They claim that legal positivism entails centralized, politicised legislation which replaces a more decentralized, common-law based type of legal order. They furthermore think that the former type of order is distinctly inferior to the latter, given their classical liberal values. This

follows from interpreting the common law as a form of spontaneous order that is gradually refined by means of developed arguments, that is open to local knowledge and a rich body of legal precedent, and that is prone to apply abstract principles.¹³ Centralized, politicized legislation, on the other hand, is thought to be characterized by non-generality (i.e. laws that are enacted so as to aim at particular outcomes that often benefit some at the expense of others), quickness and shortsightedness, and an inferior knowledge of the relevant facts.¹⁴ Legislation, on this view, is based on what Hayek (1973: 29-34) calls *constructivist rationalism* and on a belief in social engineering – the idea that society can be governed in accordance with the intentions of political decision-makers, not least, to quote Hayek (1973: 142), “to secure particular results for particular groups.”

There is a main problem with this argument, namely that *legal positivism is not incompatible with a common-law system*. Hayek is quite wrong in suggesting otherwise. Legal positivism does not say that only legislation decided upon in a political decision-making body is law – but that social facts determine what is law. Both Kelsen and Hart were of the opinion that the common law can be law, on the condition that the ultimate norm, the *Grundnorm* or the Rule of Recognition, acknowledges such a system as part of the legal order. As Simpson (1973: 83) puts it: “As applied to the common law such weak versions of positivism could in principle no doubt cater for the possibility that it consists of rules which are not necessarily of legislative origin, nobody having ever laid them down.” Peczenik (1996: 122) concurs: “According to Hart law consists of social rules, either written down *or in the form of common law*.” (Own translation and italics.) In Hart’s case the authority of law is a social phenomenon, a behavioral regularity, or a convention, and his rule of recognition is a social rule that exists because it is used in practice.¹⁵ Law hence rests on customs regarding who has the authority to settle disputes, what the legal sources are, and how the legal rules can be changed. These customs can encompass the common law. Also within the framework of a more centralized legal order, Hart (1958) clarifies that a rule of recognition can give judges discretionary power to make decisions when the law is unclear or incomplete; Hart

¹³ Cf. Peczenik (2002) for a critique of relatively unconstrained majority rule and in favor of a strong influence for courts and legal scholars on grounds of rationality and coherence.

¹⁴ For a detailed argument, see Hayek (1973: chs. 4-6).

¹⁵ See Marmor (1998).

thinks that judges then make new law.¹⁶ Also decisions grounded in moral deliberation are possible.¹⁷

According to Kelsen, the legal validity of a norm is ascertained by whether or not it has come into being in accordance with another, higher norm, all the way up to the *Grundnorm* (which is conceptually presumed rather than empirical).¹⁸ The legal order is hence a series of delegations, e.g. from the *Grundnorm* to the Constitution, from the Constitution to the legislature and the courts, etc. The independent role of the courts is substantial in Kelsen's system. He admits that sometimes the only law that a court can use to settle a case is that which gives the court the power to settle cases.¹⁹ The delegation of power to courts can thus be of a quite discretionary kind, and judges have a possibility to develop the application of law without necessarily being restricted in a detailed way by a higher norm with regard to content.²⁰ A common law system, where the judges have been delegated power to make decisions and where they make them on the basis of a rich set of precedents, is certainly imaginable within the framework of this model.

A second problem with the Hayek-Leone argument is that it is far from evident that a common law system entails the type of outcomes that are predicted by its proponents. Even if legal positivism was incompatible with common law, which it is not, it is not certain that this would be to the detriment of legal positivism. Already Menger (1963: 233), in spite of being a pioneer of evolutionary theory, presented a critique: "[C]ommon law has proved

¹⁶ For a critique of this way of interpreting the actions of judges, see Posner (2003: 80-81, 268-269).

¹⁷ See Kramer (1999: 114-115, 152, 197-199).

¹⁸ Buchanan and Tullock's (1962: 77-80) research in constitutional economics bears resemblance to this approach. Cf. Buchanan (1974: 335-336) and Brennan and Buchanan (1985).

¹⁹ Kelsen (1967: 152).

²⁰ Stewart (1990: 285) develops this line of reasoning: "Expressed more precisely: each higher norm recognises the act of will of the lower organ - or recognises custom - as a 'law-creating fact'. Since there is a reference to acts, at no stage is law-creation a matter simply of logical deduction. The new norm is not a product of logic, nor even a product of knowledge - since knowledge of the earlier law, however ambiguous, does not produce a new norm. The organ's act of will draws on both the authorising norm and other sources, including norms drawn from morality and politics; however, the moral and political norms do not thereby become part of the legal order. The higher and lower legal norms stand in a relation of 'validity' in the sense that the higher norm authorised the creation of the lower norm. In dynamic order a norm 'is not valid because it has a certain content' but 'because it is created in a certain way'; in principle, it may have any content at all, although sometimes a higher norm prescribes that lower norms must or must not have certain contents."

harmful to the common good often enough ... and legislation has just as often changed common law in a way benefiting the common good".²¹

The debate about the consequences of different legal system with regard to what type of decisions they give rise to, with ensuing legal, economic, and political consequences, is still active.²² It does in any case seem clear that Hayek's and Leoni's confident, almost deterministic, predictions to the effect that centralized, politicized legislation will lead to weaker property rights and socialistic policies are not correct. For example, many of the liberalizing reforms in the West from the 1980s and later, in terms of deregulation, privatization, and tax reforms, were undertaken by legislatures.²³

A third problem with the Hayek-Leoni argument is that it seems to operate on the premise that decisions that emanate from legislatures are always and only made by means of

²¹ For a discussion, see Barry (1982: 31-33). Hayek (1973: 88-89) himself acknowledges that the common law may stand in need of correction by legislation from time to time but offers no systematic account of when this is to be carried out.

²² More critics: Buchanan (1977), Okruch (2000, 2001), Posner (2003: 287-289, 2005) and Schubert (2004). Posner's critique is interesting, as he is often seen as a defender of the common law on the grounds that it is more economically efficient than legislation (see Hadfield 1992). However, Posner and Hayek differ in the sense that the former wants to allow judges to adjudicate on the basis of consequentialist analysis of the law-and-economics type, whereas the latter only thinks that "true law" emerges (or is found) on the basis of adjudication rooted in customs and traditions. Posner (2005: 162) says: "But often it makes no sense to base law on custom because a custom may reflect conditions that have changed - lacking central direction, custom tends to lag behind social and economic change - or may be the product of incentives that diverge from the socially desirable, as in the examples given earlier of a custom of not compensating victims of an industry's noncost-justified pollution or careless injuries, or of refraining from price competition. Customs may in short be vestigial and dysfunctional. And again, on the crucial question of *when* law should reject custom, Hayek casts no light." Benson (1990) furthermore argues that common law was not entirely evolutionary - in addition to customary law it contained authoritarian royal law. Among Hayek's defenders one e.g. finds Rubin (2004). New cross-country research on the effects of legal origins - common law or civil law - also gives the common law proponents some support: among other things, private property rights are stronger in common law countries. See Glaeser and Shleifer (2002). The question is, however, if these results are particularly useful in practice. A conservative argument would be that it is not feasible in many cases to substitute one type of legal system for another due to certain hard-to-change traditions, and even if it were possible, the new system would probably not function in the same manner as in countries where it evolved organically.

²³ Gwartney and Lawson (2004) measure the degree of economic freedom in 123 countries from 1970 and onwards by means of an index which among other things measures the quality of the legal system and how secure property rights are. It e.g. makes clear that property rights are relatively strong in Sweden, a country characterized by legal positivism, and that they have become stronger in recent decades, in spite of reliance on centralized, politicized legislation.

the simple-majority rule. But constitutions regularly contain different institutional combinations, some of which are better at guiding decision-making in a market-enhancing direction (if that is what one desires) than others.²⁴ E.g. judicial review, specification of rights (not least property rights), federalism, a principle of generality²⁵ and a division of power can all be part of a constitution, which can be expected to affect which legislative decisions are made.²⁶ *All these institutions are compatible with legal positivism.* As pointed out by Hart (1958), Bentham, the pioneer legal positivist, held that the highest legislature in a country could be legally bound by a constitution. A rule of recognition (like the U.S. Constitution) can e.g. entail a set of institutions that constrain or counterbalance single-majority rule in various ways. There is no reason to believe that legal positivists on average are less inclined than others to advocate constrained majority rule. Kelsen e.g. designed the Austrian Constitution after the World War I, of which a Constitutional Court was part!²⁷ This critique against legal positivism falls as well.²⁸

But as pointed out earlier, it may be the case that legal positivism has been misunderstood by many, such that constitutionalism and a division of power have been seen as inconsistent with it. In that case people's incorrect understanding of legal positivism may have contributed to a weakening of property rights, but then it is the misunderstandings rather than legal positivism as such that are the root cause.

The Thesis that the Legal Culture Becomes Servile in Relation to the Legislators

Now we come to the thesis that the practitioners of the legal system become servile in relation to the legislators in a legal system dominated by legal positivism (box 3b in Figure 1)

²⁴ Hayek (1960, 1979: Ch. 17) himself presented a constitutional proposal which implies that he thought it possible to reduce the problems with centralized, politicized legislation, if it is in place. This insight is, however, rarely present in his critique of legal positivism (or democracy). Rapaczynski (2004) claims that if constitutional rules have an effect in upholding strong property rights, this occurs through procedural rather than through substantive rules.

²⁵ See Buchanan and Congleton (1997). The generality that Hayek regarded as characteristic of the common law can also be introduced as a constitutional rule in a centralized legal order.

²⁶ Okruch (2000) claims that in the civil law tradition there is also a strong element of following precedents in adjudication, and so he thinks Hayek's distinction between the systems too strong.

²⁷ He also held that a constitution could contain substantive norms such as freedom of expression and religion – see Kelsen (1986).

²⁸ One can also add that institutional competition can limit political decision-making, both within a country and between countries. This mechanism is fully compatible with legal positivism.

and that this effect of legal positivism indirectly weakens property rights (which presumably would otherwise be protected in some manner by the jurists). The phenomenon of servility is closely related to that of obedience, and one of the most common misunderstandings of legal positivism asserts that its proponents see political power as expressed in legislation as morally right per definition and that one therefore should always obey all laws. This is completely incorrect. As Green (2003) clarifies:

No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, i.e. that it should be obeyed by subjects or applied by judges. Even Hobbes, to whom this view is sometimes ascribed, required that law actually be able to keep the peace, failing which we owe it nothing. Bentham and Austin, as utilitarians, hold that such questions always turn on the consequences and both acknowledge that disobedience is therefore sometimes fully justified. Kelsen insists that ‘The science of law does not prescribe that one ought to obey the commands of the creator of the constitution’ (1967, p. 204). Hart thinks that there is only a *prima facie* duty to obey, grounded in and thus limited by fairness -- so there is no obligation to unfair or pointless laws (Hart 1955). Raz goes further still, arguing that there isn't even a *prima facie* duty to obey the law, not even in a just state (Raz 1979, pp. 233-49). The peculiar accusation that positivists believe the law is always to be obeyed is without foundation. Hart's own view is that an overweening deference to law consorts more easily with theories that imbue it with moral ideals, permitting ‘an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: ‘Ought this law to be obeyed?’ (Hart 1958, p. 75)”.²⁹ (Italics in original.)

To the extent that one finds jurists of a certain legal culture servile in relation to legislators it is, against this background, important to identify the correct causes. Legal positivism cannot, rightly understood, constitute such a cause. That conclusion is particularly important in discussions of regimes who have committed atrocious deeds, e.g. the Nazis in Germany. Dyzenhaus (1997) has criticized Kelsen on the grounds that his theory of law facilitated for the Nazis in various ways, not least in that jurists and other public officials with power obeyed the laws that were introduced.³⁰ Even if legal positivism entailed always obeying the law, which it does not, the Dyzenahus critique would hardly be

²⁹ Cf. Kramer (1999: Chs. 2, 9), who develops arguments about why obedience to all laws just because they are laws is not something that legal positivism condones, not even for judges, Waluchow (1998) and Schofield (2003), who writes more about the views in this regard of Bentham and Austin, and Posner (2003: 261), who clarifies Kelsen’s position. As Kramer (1999: 266) points out it is *because* the legal positivist makes a distinction between laws and morals that he can find a legally valid rule immoral and not worthy of obedience.

³⁰ There was a debate on this topic between Radbruch and Hart: see Hart (1983: 72–78).

convincing. As Posner (2003: 290) puts it: "It is fanciful to suppose that a theory of law propounded by a Jewish professor would have done anything to stop Hitler."

It is furthermore compatible with legal positivism to design institutions that give jurists an important, independent, and distinct role – e.g. in the form of transparent and merit-based systems for appointing high judges,³¹ discretion in adjudication,³² and legal review – which means that if such institutions do not exist, it is not because of legal positivism. However, due to a misunderstanding it may be that many who are favorable towards legal positivism have honestly believed that it implies obedience to all laws, with servility as an effect of this misunderstanding. Perhaps the words of the critics have become self-fulfilling prophecies.

It is, of course, compatible with legal positivism also to afford jurists a limited role, perhaps stipulating that they follow the government's instructions about how laws are to be interpreted.³³ It depends on the Rule of Recognition in place in a certain legal system. Legal positivism does not stipulate how that rule is to be formulated.

If servility of jurists can be ascertained, in spite of not being a result of legal positivism rightly understood, the question is how servility brings about a weakening of property rights. What leads to such a weakening in general is first and foremost dependent on the preferences of the legislators and what shapes these. If jurists are servile they arguably do not constitute an influence per definition. Perhaps the idea is that non-servile jurists who were able to influence politicians were in place initially, and now servility reduces this way of influencing politicians who wish to weaken property rights. This may be correct, but how does one know what the preferences of the non-servile jurists are in the area of property rights? If they are less supportive of strong property rights than politicians, on average, then non-servility is no guarantee for strong property rights, quite the opposite. And even if they are more supportive of property rights than politicians, on average, the question arises how big an influence jurists have and should have on the content of legislation.

The claim that legal positivism induces servility and that this servility weakens property rights does not, on the whole, seem very convincing.

³¹ Carlsson (2001: 72-73) questions whether the fact that many high judges in Sweden have a background as ministry officials has all that much to do with leading Swedish legal positivist Axel Hägerström, as is often claimed. Rather, the tradition goes back much longer.

³² Hart (1961: Ch. 7) e.g. stresses the open texture of the legal language which gives judges room to actually create laws in concrete cases. This room can, if the rule of recognition admits it, legitimately be characterized by ethical considerations and, of course, the rationality of legal argumentation (see Peczenik 1989).

³³ This appears to be the case in, e.g., Sweden: see Maccormick and Summers (1991).

The Thesis that a Content Idea of Strong Property Rights Is Weakened as a Result of the Undermining by Legal Positivism of a Formal Idea with which It Is Thought to Be Associated

But suppose that a formal idea and a content idea are intimately connected: by most people, they are thought to constitute a package. Suppose further that the formal idea is abandoned – might not a consequence be that the content idea is abandoned as well (box 3c in Figure 1)? This is a possibility. None of the scholars cited above have, to my knowledge, expressed this thesis directly, but it is not unreasonable to consider it implicit in their thinking. In this case, a formal idea has consequences, not on account of its own doing but through its perceived connection to a content idea. If, for example, strong property rights are in place and if they are thought to hinge on a natural-law defense which is undermined by an acceptance of legal positivism, then property rights could be weakened.³⁴ This effect is especially clear if legal positivism is thought to be associated with ideologies that are critical of private property, such as socialism.

But the question is if such an effect is probable after all. One factor of importance is the existence of a dominant content idea which is perceived as crucial for strong property rights. In many cases there probably is no such idea in place. Rather, property rights may be upheld on other grounds, such as a desire to achieve the consequences of such rights, either on the basis of egoism in those who own property or because such rights are thought to yield general benefits. In either of these cases, a weakening of property rights cannot really be traced to the demise of some content idea.

More generally, one can also ask why people's preferences would change simply because they become supportive of legal positivism. If they, prior to this, found strong property rights desirable, why would they change their mind because of, e.g., not taking natural law seriously anymore? After all, the consequences of strong property rights are still the same.³⁵ *If* preferences would change, the question is if this is a negative thing.³⁶ The previous preferences have perhaps then been revealed as non-genuine, as something that people have expressed because they have felt inclined to do so on the basis of a dominant

³⁴ Natural law can be seen as both a formal idea and a set of content ideas.

³⁵ In addition, legal positivism is compatible with moral realism, and people can find the proposition "the law should contain strong property rights" objectively true, regardless of whether they accept natural law.

³⁶ It is a negative thing if the change occurs as a result of a *misunderstanding* of legal positivism – for instance, that it implies socialism solely because some legal positivists have been socialists.

climate of ideas.³⁷ If the change results in weaker property rights, the challenge for the friends of strong property rights is not to criticize legal positivism, which in this case has only revealed people's true preferences, but to explain why there are good consequentialist reasons for strong property rights.

Even if legal positivism has indirectly weakened property rights in this manner at one point, it is probably difficult at a later stage to return to the original combination of a formal idea and a content idea. If people want to strengthen property rights, the views on this among others will hardly change as a result of abandoning legal positivism in favor of natural law. Again: why would people's preferences change as a result of a change in formal ideas? And if they change as a result of the formal idea in natural law bringing with it some new content idea it cannot without qualification be presumed that people's interpretation of the content ideas of natural law is the same today as it was before the acceptance of legal positivism. Today, perhaps a Christian Socialist version of natural law is more appealing to many, which could indeed bring about a weakening of property rights compared to a situation where legal positivism is prevalent.

4.3. Conclusions

In this section, four versions (one direct and three indirect) of the thesis that legal positivism will lead to weakened property rights have been examined. None of the versions were found to be particularly convincing. Nonetheless, it is possible that legal positivism has contributed to weakened property rights to some extent, in one of two ways.

First, there are many misconceptions of legal positivism. To the extent that jurists, politicians and others perceive it to be a content idea of a socialist kind which implies centralized and politicized legislation, which is incompatible with a division of power and constitutionalism, which requires servile jurists etc. – then it is perfectly imaginable that “legal positivism” has had an affect on the strength of property rights.

Second, it is also imaginable that legal positivism has undermined some other formal idea (natural law) which in turn constituted the foundation of a content idea of strong property rights. The plausibility of such a scenario can, however, be questioned. The question is to what extent natural law governed people's views of the strength of property rights prior to the advent of legal positivism. And it also seems odd to think that their

³⁷ Cf. Kuran (1995) and his theory of preference falsification.

preferences with regard to property rights changed solely for this reason, even if they did adhere to natural law.

Both of these possible causes should be welcomed by the friends of strong property rights, as they can be countered by factual information about what legal positivism really entails (among other things, it is fully compatible with strong property rights) and by consequentialist arguments about what effects strong property rights have on widely shared goals such as economic growth. It is suggested that these lines of argumentation are more promising for advocates of strong property rights than critiques of legal positivism as such.³⁸

5. Concluding remarks

Some claim that legal positivism is incompatible with a defense of rights such as property rights and, furthermore, a cause of a general development towards a weak protection of rights, a weakening of the market economy, high taxes and an expansion of government power. The most important conclusion in the present analysis is that the first claim is apparently wrong and that the second claim may contain an element of truth, but not more than that, and that it can be problematized.

The compatibility between legal positivism and a defense of strong property rights follows from the fact that legal positivism is a formal idea and not a content idea. Legal positivism clarifies what the concepts of law and legal order mean, not what the laws should say.

The issue of a causal relationship between legal positivism and weak property rights is more complex. The claims that have been made about such a relationship are not very convincing, for three reasons.

First, formal ideas cannot directly influence preferences and therefore not human behavior.

Second, it is unlikely that legal positivism leads to centralized, politicized legislation that erodes property rights, as legal positivism is compatible with the common law; as the common law in any case is not necessarily superior to a more centralized system; and as constitutional constraints on simple-majority rule are fully compatible with legal positivism.

³⁸ One should also keep in mind that even if legal positivism, or misunderstandings thereof, has weakened property rights, this effect need not have been particularly large or important. Other factors may still have played a much larger role. There is a tendency to identify legal positivism as a crucial factor, which I consider mistaken.

Third, it is not probable that legal positivism brings about a servile legal culture, as law and morals are thought separable and since no one, on legal positivism, is thought required to obey an immoral law; as institutional features that give jurists an important and independent role, such as a division of power, constitutionalism, judicial review, appointment procedures that do not allocate high judgeships on the basis of political merits and a discretionary role for judges, are all compatible with legal positivism; as servility may have other explanations, going further back in history than legal positivism; and as it is unclear how servile jurists can and if servile jurists want to influence the preferences of legislators, what the preferences of non-servile jurists look like and to what degree they can (and should) influence politicians.

But as has been pointed out, two other arguments for a causal relationship might be envisioned. First, legal positivism is often misunderstood. If people *believe* that legal positivism entails the views that power equals morality, that all laws should be obeyed blindly, that moral principles cannot constitute a basis for adjudication, that all rights are fiction, that law and morality are always separate, that socialism is good, that unconstrained simple-majority rule is the necessary institutional embodiment of democracy, etc., then if they are or become legal positivists, it is probable that they also develop a sceptical view of strong property rights. In this fashion, “legal positivism” could influence political decisions. Second, legal positivism might undermine a formal idea (such as natural law), which is seen as intimately connected to a content idea about the desirability of strong property rights, and in this manner, legal positivism could pave the way for weaker property rights. This is not evident, however. The status of natural law in most Western countries at the time when legal positivism entered the scene must be considered weak. And even if natural had had a strong position one might wonder why people’s preferences would change because of a change in formal ideas about what a law and a legal order is. And even if preferences did change, this may not be a bad thing, if they become more honest.

If legal positivism has weakened property rights because of one of these two (rather than the other analyzed) reasons, a friend of strong property rights may wonder how these rights could be strengthened. There are at least two avenues open. First, misconceptions about legal positivism can be rectified such that it is clarified that legal positivism is compatible with strong property rights. Second, one could proffer an argument based on the consequences of strong property rights as to why they are desirable, which could affect a legal positivist.

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