

Three arguments against legal positivism and a possible reply

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The literature on “legal positivism” is never-ending. Here I adopt a very narrow definition of legal positivism, following Michael Hartney: “Legal positivism is simply a theory about what counts as law and nothing else: only rules with social sources count as legal rules”. What the different versions of legal positivism have in common is the thesis that in the last analysis the existence of law depends on social facts and not on moral facts. As a consequence, there is not a necessary connection between law and morality (social thesis plus separation or separability thesis). I present three objections to legal positivism and try to outline a possible defence. The three objections deal with: a) Alexy’s claim to correctness; b) the impossibility of distinguishing the observer from the participant; c) the interpretative turn of legal knowledge.