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On Alexander's "Legal Positivism and Originalist Interpretation"

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I'd like to begin my comment on Professor Alexander's paper with a quotation of Lewis Carroll's "Through the Looking-Glass and what Alice Found There":

"There's glory for you!" [exclaimed Humpty Dumpty].

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

The main tenet of Professor Alexander's paper is that there is a conceptual link between legal positivism and originalist interpretation. In my view, this thesis is mistaken.

Legal positivism is a methodological theory –or family of theories– about how to define the object of legal science, namely law. Originalism, in contrast, is a normative doctrine, or family of doctrines, about how a written constitution –and legal texts in general– should be interpreted and applied.

To my mind, it is not possible to deduce rules of behavior from conceptual considerations. The only rules that can be derived from a definition are those concerning the use of a concept; in the case of legal positivism, the concept of law.

If legal positivism implied originalism, as Professor Alexander posits, then it would have to hold that no social arrangement can possibly be a legal order unless its courts endorsed originalism. So, in order to decide whether a system of rules is or is not a legal regime, first we should find out if the courts are or are not originalist. For instance, a legal positivist could not consider that Canada has a legal regime, on pain of contradiction. If that were the case, the concept of law defined by legal positivism would be so narrow that it would lack any theoretical interest. But, fortunately, that is not the case.

Yet, since Professor Alexander accepts that the rules in force in Canada can be considered a legal regime, it follows that his thesis is not of a conceptual kind. It is rather a normative thesis. Apparently, he thinks that legal positivism implies that judges *should* attach to originalism. As far as I can see, his argument can be analyzed as follows:

- a) In legal systems, some people are empowered to create the texts the meaning of which is to be considered valid law. He calls these people “legal authorities”.
- b) The authorities’ intended meanings are the rules chosen by the authorities.
- c) To attribute any other meaning to the texts approved by the legal authorities is to take the symbols employed by the authors and reauthor them and give them a new meaning.
- d) To give a new meaning to the texts approved by the legal authorities is to create a different rule.
- e) Interpreters don’t have the requisite authority to create legal rules.
- f) Hence, courts should seek the authorially-intended meanings of the legal texts.

It is easy to see that statement f) is normative. So, it could not possibly be derived from the previous statements unless at least one of them was also normative. But statements a) to d) are clearly descriptive. Statement e), instead, i.e. that interpreters don’t have the requisite authority to create legal rules, is ambiguous; it can be interpreted in a descriptive or in a normative sense. In a descriptive sense, it means that the rules of competence do not empower interpreters to create the texts the meanings of which are to be considered laws. In a normative sense, it means that interpreters should abstain from creating legal rules.

Now, statement e) can be accepted by legal positivism in its descriptive sense, but statement f) can’t be derived from it. On the other hand, statement e), together with a) to d), gives support to f) when it is understood in a normative sense. But, in

that case, it can't be ascribed to legal positivism because legal positivism is not a normative theory.

It is true that, if interpreters gave to the legal texts a different meaning from that intended by their authors they would create new rules. However, that would only show that the real legal authorities and the formal legal authorities do not always coincide. But, as long as interpreters are human beings, law would still be a human artifact, and so, it can perfectly well be described within the legal positivist paradigm.

What's more, the main tenet of legal realism, in its different forms, is that the real legal authorities are judges, and legal realism is a family of theories that belong to the field of legal positivism. I don't see how Professor Alexander's claim can account for these theories.

As a final remark, I'd say that I think that Alexander's version of originalism is a plausible interpretation of the political ideal of division of powers. But legal positivism is not a theory about political ideals; it is a view about the concept of law.