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# Legal Positivism: *An Analysis of Austin, Bentham & Hart's Concept of Law*

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***Abstract***

The Legal Positivism developed over the period of 18th and 19th century through the works of influential jurists such as John Austin and Jeremy Bentham.The works of these two great jurists was mainly responsible for the Legal Positivism School to acquire such importance in the field of legal jurisprudence.Their work was taken forward by H.L.A. Hart.

The basic concept behind legal positivist was that they considered law as it is and not what it ought to be. They separated moral principles from legal principles. They were of the view that law is the will of the superior which is backed by sanction.

Positivists do not deny that judges make law. As a matter of fact, a majority of them admit it. They also acknowledge the influence of ethical considerations of judges and legislators as a judge or legislator adopts a proposition when it is considered to be moral and just.

***Keywords***

Austin, Bentham, Hart.

***Introduction***

Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought[1]. The modern doctrine, however, owes little to these forbears. It's most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law.

It represented a reaction against the a priori methods of thinking which turned away from the realities of actual law in order to discover in nature or reason the principles of universal validity. Actual laws were explained according to those principles. The legal positivists believed that law had no relation to the moral principles. They said that the law does not have to be in consonance with the principles of morality and ethics and rather law is what is laid down by the superior authority.

Depending on the weightage given to the moral principles, legal positivists can be divided into positive positivists and negative positivists. Positive positivists such as H.L.A. Hart were of the opinion that the moral principles do exist in the universe but it is not required for the law to abide by them. H.L.A. Hart writes that "it is in no sense a necessary truth that law satisfy demands of morality, through in fact they have often done so."[2] Therefore, they do not negate the existence of the moral principles. However, Negative Positivists are those who completely negated the existence of the moral principles of ethics and morality. Therefore, they did not believe in the existence of moral principles. This includes jurists such as John Austin.

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[1]Finnis, John (1996), ***"Truth in Legal Positivism"***, in The Autonomy of Law, ed. Robert P. George, Oxford, Clarendon Press, pp.195-214

[2]Hart H.L.A.,***The Concept of Law,*** (1961, Second Edition), Clarendon Law Series, p.34

Therefore, we can clearly infer that the positivist school does not completely negate the existence of moral principles and to some extent also articulates that the law may be based on the principles of morality and ethics.[3] There view is that even the moral standards attain a legal status only through some form of official promulgation.[4]

The legal positivism seeks to demarcate between the law as it is actually laid down has to be kept separate from the law that ought to be. It does not analyse Censorial nature of law, it only analyse Expository nature of law that is, the law as it is given by a superior authority. A separation between the "is" and the "ought" is useful in providing a standard by which positive law can be evaluated and criticised. The philosophy of legal positivism, considered strictly, was to explain the real laws of the expositors, rather than the criticisms of the censors.

***John Austin (1790-1859)***

John Austin was a prominent British legal philosopher. Austin's theory of law is a form of analytic jurisprudence. He was an Army officer and later joined the Bar. He avoided metaphysical method which is a German characteristic and applied the method of English origin. The army life of strict discipline and command has its reflection in the Austinian concept of law. His lectures at the London University were published under the title '***The Province of Jurisprudence Determined'*** wherein he dealt with the nature of law and its proper bounds. Austin is best known for his work related to the development of the theory of legal positivism. Austin made attempts to clearly separate moral rules from what is known as the positive law. Austin is called the father of English jurisprudence and the founder of Analytical School. Austin's most important contribution to legal theory was his substitution of the command of the sovereign for any ideal of justice in the definition of law.

***Austin's Theory of Law***

He defined law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him".[5] Law is strictly divorced from justice. Instead of being based on ideas of good or bad, it is based on the power of superior. This links Austin with Hobbes and other theories of sovereignty. The first division of law is that into laws set by God to his human creature, and laws set by men to men.[6] In Austin's positivist system, the law of God seems to fulfil no other function than that of serving as a receptacle for Austin's utilitarian beliefs. The principle of utility is the law of God.[7]

There exist primarily two kinds of authority in Austin's legal universe the authority of the political superior and Christian scripture. Therefore, according to Austin, human laws are divisible into laws properly so called (positive law) and laws improperly so called.[8] The political superior is the direct source of human law.[9] As per Austin, positive law was the exclusive concern of jurisprudence whereas the law of God was primarily the subject of theology.

A further subdivision of positive law was introduced by Austin. Austin went on to distinguish laws set directly by the political superior or what was understood to be as sovereign from the laws which were set by private citizen in quest of their legal rights. The laws made by the ones authorised to do so or the subordinate political superiors like Minister Judges constitute as the laws set directly by the sovereign. The laws by superiors to inferiors where the superior is not political superior and the laws by analogy are clubbed under the head of Positive Morality. Austin distinguishes positive morality from positive law. For him positive morality is devoid of any legal sanction and distinction seeks to exclude considerations of good and bad from law. Thus, there is no place for ideal or justness in law and there is separation of laws and morals.

Thus, proper and improper laws can be classified into four groups:

1.The Divine Laws or laws of God.
2.Positive Laws: Laws set by superiors forming the appropriate matter of general and particular jurisprudence. These are the laws strictly and simply so called.
3. Positive Morality: The laws set by morals.
4. Laws metaphorical or figurative.

According to Austin, positive law and only positive law is the subject matter of jurisprudence. Austin says that "the matter of jurisprudence is positive law".[10] Jurisprudence is thus the general science of positive law. Law is a command of sovereign and command implies duty and sanction. Law properly so called are species of commands. Thus, Austin has propagated that law is command which imposes duty and failure to fulfil the duty attracts sanction. Thus, Austin defined positive law as comprising of command of a political sovereign backed by sanction on the ones who disobey the commands.

There are primarily four key constituents of this concept of law:

[3]Bhardwaj Pragalbh, ***Legal Positivism: An Analysis of Austin and Bentham***, International Journal of Law and Jurisprudence Studies, Vol.1, Issue 6, p.3
[4]HartH.L.A., ***Law, Liberty, and Morality,*** (1963), p.176
[5]Austin, 1832, Lecture First Published on ***Natural Law, Natural Rights and American Constitutionalism***, p.1
[6]*ibid*
[7]"*The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law, being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejection the appellation Law of Nature as ambiguous and misleading*". Austin, 1832, Lecture First.
[8]*"Closely analogous to human laws of this second class, are a set of objects frequently but improperly termed laws, being rules set and enforced by mere opinion, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term law are the expressions "The law of honor"; "The law set by fashion"; and rules of this species constitute much of what is usually termed International law*". Austin, ***The Province of Jurisprudence Determined***, (1832), p.215
[9]*Op.cit.* note 5 at 2, see also "*Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political society*", Austin, 1832, Lecture First.
[10] Murray, John,***The Philosophy of Positive Law***, (1869 , Third Edition), p.9

1. Command[11]
2. Duty[12]
3. Sanction[13]
4. Sovereign

Command and duty are correlative terms, the fear or sanction supplying the motive for obedience. Command, duty and sanction are inseparably connected terms, each embraces the same idea as the others though each denotes those ideas in a particular order or series. The power and purpose to inflict penalty for disobedience are the very essence of a command. The person liable to the evil or penalty is under the duty to obey it. The evil or penalty for disobedience is called sanction. A wish conceived by one and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded are signified directly and indirectly by each of the four expression. Each is the name of the complex notion.[14] So every law is a command, imposing a duty enforced by a sanction.

All commands are not law only general commands which obliges to a course of conduct is law. According to Austin there are two species of commands:

1. ***General Commands*:** where a command obliges generally to acts or forbearance of a class.

2. ***Particular Commands:*** where a command obliges to a particular act which it determines specifically or individually.

Austin defined "political sovereign" as any person, or body of persons, whom the bulk of a political society habitually obeys, and who does not himself habitually obey some other person or persons. As per this definition, under the Constitution of India, the highest office of the President of India is also bound by the rule of law as laid down in the Constitution.

The view of Austin, the sovereign must be illimitable, indivisible and continuous. As regards illimitability, Austin denied that his sovereign could be limited. Substantial areas of constitutional law did not consist of laws but of positive morality. The sovereign cannot be under a duty as he cannot command himself. To be under a duty implies that there is another sovereign who commands the duty and imposes a sanction.

As pointed out by Austin, the three kinds of commonly termed laws that are not imperative, meaning, they are not laws properly so called but still they can justifiably be included within the province of jurisprudence:

1. ***Declaratory or Explanatory Laws:*** Austin, in this point, conceded that imperative rules may be enacted in the guise of it being considered a declaration. These are passed only to explain the laws already in force and are therefore, not commands.

2. ***Laws brought in order to repeal laws***: These are also not commands but laws for revocation of command.

3. ***Laws of imperfect obligation***: Austin stated that of imperfect obligation are those laws which do not have any sanctions attached for their breach or punishment which would follow in case of a non compliance.

Austin and positive school viewed statements of obligation not as psychological statements, but as predictions of chances of incurring punishment and evil. He held legal rules to be threats backed by sanctions and statements of legal obligations as predictions that the threatened sanctions will be carried out. As per Austin's definition, the laws creating rights and liberties are laws properly so called as they are imperative in nature. They are considered as imperative as they happen to create duties that are correlative on the part of other people to oblige to. Austin also attempted to point out the differences between positive law and positive morality. As per Austin, moral rules that resemble positive law make up positive morality. There are various rules of positive morality that are co-extensive with rules of positive law.

As per Austin, whenever there is a conflict between positive law and positive morality, positive law would prevail.[15] Though Austin was a man who maintained that sovereign is bound to obey the divine law, he considered it to be a moral duty, and stated that even if the sovereign ever legislated against the divine law, it will still be law. Austin further adds that any other view in this regard would not only be wrong but it would be pernicious as it could lead to anarchy.[16]

Austin's method can only be applied in civilised society. Analysis is the chief method of jurisprudence. Austin' definition that command of the sovereign, suggests that only legal system of civilised societies can become the proper subject of jurisprudence because it is possible only in such societies that the sovereign can enforce his commands with an effective machinery of administration.[17]

The view of Prof. Dias is that Austin overlooked limitations through disabilities rather than duty. The exercise of sovereign powers may be limited by special procedures. Bentham has shown how sovereignty may be divided in such a way that each

[11]"*If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command*"., Austin, *supra* note 5 at 3
[12] *"Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it".* Austin, *supra at 3*
[13] "*The evil which will probably be incurred in case a command be disobeyed or in case a duty be broken is frequently called a sanction*". Austin, *supra* at 4
[14]Murray, *Supra* at 18
[15]John Austin, ***Lectures on Jurisprudence***,(2002), vol.1, Bloomsbury Academic, p.135
[16]Austin, *supra* note 5, p.163
[17]Tripathi, B.N. Mani, ***Jurisprudence (Legal Theory),*** (2010), 18th ed. Allahabad Law Agency, p.18

component has a limited power to prescribe for the other. The view of Austin was that a sovereign can have no claim as a claim has to be conferred by a sovereign on someone.[18]

***A Critical Review of John Austin's***

This critical review provides an analytic summary of John Austin's The Province of Jurisprudence Determined, focusing in particular on Lectures I and II, and concludes by developing two critiques of Austin's theory of law. Specifically, the conceptual pillars of Austin's command theory and the two types of law "properly so called, "namely the general commands that men impose upon other men to regulate their conduct, and the divine laws that are revealed either through scripture or by applying the principle of utility to the analysis of social practice. In my critical interjection, I raise two objections to Austin's theory First, that Austin fails to persuasively consider the prospect of a conflict between divine natural law and state sanctioned positive law, along with the consequences of the application of the principle of utility to adjudicate such a conflict; and second, that despite the claims to general applicability implied throughout Austin's framework, his conceptualization of the law remains a prisoner of both time and place, collapsing in the face of Montesquieuian systems of separation of powers or contemporary constitutional practices.

Austin's The Province of Jurisprudence Determined John Austin's stated purpose in The Province of Jurisprudence Determined is to "distinguish positive laws (the appropriate matter of jurisprudence) from objects by which they are connected by ties of resemblance and analogy," namely by determining "the essence or nature which is common to all laws that are laws properly so called"[19]. As such, Austin's is a conceptual enterprise to precise the definition of the law in contradistinction to cognate concepts, and to subsequently proclaim its study to be the province of legal analysis. To this end, Austin promotes a command theory of law: "A law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a class" or a "course of conduct." Austin notes a few exemptions from his command theory laws that do not constitute commands that are nonetheless an appropriate object for jurisprudential inquiry.[20]

A command, furthermore, always "express or implied of the wish being presented" by a superior to his inferiors it, in other words, demands a theory of sovereignty, or of legal personality[21]. By "superior," Austin does not understand some form of "precedence or excellence" but a more raw notion of domination: "superiority signifies might the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[22] This is a highly hierarchical conception of law, which suggests the impossibility of properly legal horizontal agreements amongst equals (say, between private parties of equal social status) absent a superior authority sanctioning the agreement and possessing the power to punish non-compliance. So who, or what entity, is endowed with the authority to legally bind subordinates to, in Austin's words, impose upon them an "obligation" to obey the command or face the threat of "sanction"? First, Austin reasons that "laws set by men to men" are embraced within his command definition of law[23]. In recognizing the sovereign authority of a "monarch, or sovereign number" to lay a general command "to a person or persons in a state of subjection to its author,[24]" Austin follows in the Hobbesian tradition of conceptualizing the state as possessing a corporate personality whose legal basis is not contingent a priori upon the consent of its subordinates or encompassed in complying with a social contract. As such, Austin traces the compel compliance.[25]

As a final point of clarification, note that Austin rejects the notion that some laws merely bestow rights without any corresponding duties or obligations, for by endowing an individual with the ability to seek out a remedy from public officials for the violation of their rights, the law imposes a duty upon the perpetrator of the violation to provide restitution or to face the state's sanction, depending on the transgression. Second, Austin reasons that "Laws set by God to his human creatures the law of nature," are also embraced within the command definition of law. These may either be "revealed" via "the word of God the medium of human language uttered by God directly, or by servants whom he sends to announce them," or they may be "unrevealed." Austin devotes most of his second lecture to proclaiming the principle of utility as the necessary conduit for unearthing unrevealed natural laws: "the benevolence of God," he writes, "with the principle of general utility, is our only index or guide to his unrevealed law." In this endeavour, Austin takes a rather empirical approach: the object of jurisprudence is to leverage our God given intellectual

[18]Mahajan V.D., ***Jurisprudence and Legal Theory***, (2013, Fifth Edition), Eastern Book Co.,Lucknow, pp.446-457

[19]Austin, John. 2000, (1832), ***The Province of Jurisprudence Determined***. Amherst, New York, p.24

[20]"Laws to repeal laws," which he terms "permissive laws," and "imperfect laws" –namely laws that are not coupled with a sanction (the threat of punishment) to subtype of the concept of 'command' only when the command "obliges generally" usually by possessing both effects (synchronic generality) and by obliging its audience to a particular conduct into the future (diachronic generality) rather than in an ad hoc fashion vis-a-vis a "specific act or forbearance," does it constitutea law, Austin, John. 2000, (1832), ***The Province of Jurisprudence Determined***. Amherst, New York, pp.19-23

[21] ibid

[22] ibid, p.24

[23]***The Province of Jurisprudence Determine***, Amherst, New York, p.10

[24] ibid, p.9

[25] Ibid, p.27, the inclusion of the latter appears a pragmatic concession, for Austin highlights that these are laws merely in the "sense wherein the term is used by the Roman jurists" –many of which may well have populated the halls of the University College, London at the time of his writings. Runciman, David. 1997, ***Pluralism and the Personality of the State,*** New York, NY: Cambridge University Press. Nota bene, however, that unlike Hobbes, who's ***Leviathan*** was, first and foremost, an appeal against civil war, Austin does suggest that the sovereign authority of the state is not always independent from the consent of its subjects. He does so when he transitions from the sentiment that "disobedience to an established government, let it be never so bad, is an evil: For the mischief's inflicted by a bad government are less than the mischief's of anarchy," a belief which Hobbes would have fully shared, to the conclusion that "so momentous, however, is the difference between a bad and a good government, that if it would lead to a good one, resistance to a bad one would be useful" (pg. 53). Such a case would, however, prove to be the exception, and the uncertainty regarding whether revolutionary energies could replace a bad government with a good one decrease the value of relying upon the principle of utility. In such an "eccentric and anomalous case," writes Austin, who is reticent to take a firm position, a "Milton or Hampdenmight animate their countrymen to resistance, but a Hobbes or a Falkland would counsel obedience and peace" (pg. 54). Authority of a command to its apex in the British case, to the sovereign Parliament. It is for this reason that Austin defends judicial commands as laws properly so called, for a "subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated" (pg. 31). "All judge-made law," in other words, "is the creation of the sovereign or state". And since judges arepublic officials endowed with delegated sovereign authority, when they draw from social practices customs and codify them "into legal rules the legal rules which emerge from the customs are tacit commands of the sovereign legislature" (pg. 32).

faculties for observing individual behaviour to subsequently answer the following question: "If acts of the class were generally done, or generally forborne or omitted, what would be the probable effect on the general happiness or good?" When the effects would be "pernicious, we must conclude that he enjoins or forbids them, and by a rule which probably is inflexible." As such, the calculus promoted by Austin is one that takes social behaviour, rather than individual action, as the requisite signal to reveal the natural law. The logic, as applied to a contemporary example, would unfold as follows: to evaluate, say, whether homosexuality is against the natural law, we should not apply the principle of utility to assess the proper treatment of a gay person in a single case; rather, we should ask whether the general welfare would be improved or depressed by endowing persons with equal treatment. If the latter is the case, then the prohibition of homosexuality is revealed to be part of God's law.

Two concluding points of clarification are in order. Firstly, the principle of utility is treated by Austin as more consistent revealers of God's law than "common sense," for "we are not gifted with that peculiar organ," and hence we must gather our duties, as we can, from the tendencies of human actions with the help of a glimmering light the principle of utility. Secondly, Austin makes clear that social norms concerning ethical principles what Austin terms "positive morality" to distinguish it from the "law of God" are only "improperly but by close analogy" related to law. This logic suggests that should the principle of utility reveal a particular public conduct as benefitting the public welfare, then that conduct, even if manifestly constituting a set of popular moral understandings, would latently reflect divine natural law, and would derive its proper legal status from the latter rather than the former.

## ***Bentham(1748-1832)***

The English jurist and philosopher Jeremy Bentham is the greatest historical figure in British legal positivism. Bentham, the founder of positivism, should be considered the "Father of analytical positivism", and not Austin as it is commonly believed. The debt that Austin owed to Bentham was enormous, patent and acknowledged. He was a champion of codified law.[26]

## ***Bentham's Theory of Law and Legal Philosophy***

Bentham's concept of law is imperative one as evident from his definition of law and his legal philosophy is also known as ***utilitarian individualism***[27]. According to Bentham "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are supposed to subject to his power."[28] He argued for codification of laws He believed that every law may be considered in the light of eight different aspects:[29]

1. Source of Law- Sovereign will.
2. Subjects who may be person or things; who may be active or passive.
3. Objects.
4. Extent.
5. Aspect- Command is only of the aspects of the will of the sovereign carrying with it the force of law.
6. Sanction which motivates evidence of law.
7. Remedial state appendages to stop or prevent evil.

[26]Paton, G.W.,***A Textbook of Jurisprudence***, 2007, (Fourth Indian Edition), Oxford University Press, p.5

[27]Closely related to these classical versions of legal positivism is the utilitarian moral theory. This theory is often associated with Bentham. However, he is not its originator. As F.C. Montague points out in his introduction to Bentham's *A Fragment on Government*, Bentham does not even argue for utilitarianism. He rather takes it for granted (Bentham 1931, p. 35), See e.g. Bentham (1970), p. 5 and Austin (1954), p. 253.By seeing the sovereign as a specific person or group of persons, the sovereign becomes more real. I do not claim to be original or profound in my comment on utilitarianism. For a more thorough criticism, see e.g. the contributions by Charles Taylor and Frederic Schick in (Sen and Williams 1982), ***Utilitarianism***, p.1112, Legal Positivism and Real Entities Bentham himself makes no claim to be the originator of the principle of maximizing happiness. He explains: It was from Beccaria's little treatise on crimes and punishments that I drew, as I well remember, the first hint of this principle, by which the precision and clearness and incontestableness of mathematical calculation are introduced for the first time into the field of morals a field to which in its own nature they are applicable with a propriety no less incontestable, and when once brought to view, manifest, than that of physics, including its most elevated quarter, the field of mathematics (Bentham 1962, pp. 286).The ideas of utilitarianism are decidedly older than Cesare Marchese di Beccaria.They can even be said to be part of (empathic) human nature. In the shape of theories prescribing maximization of pleasure they can be traced at least as far back as Plato's *Protagoras*.6 According to the classical version of utilitarianism, it is the resulting happiness that determines the moral value of an action. One obvious problem, of course, is the difficulties encountered when we attempt to measure relevant happiness. It is hard to determine all the consequences of actions, and it is impossible to measure the resulting happiness, especially, when it comes to other, maybe even future, persons. In response to the difficulties involved in determining the amount of relevant happiness, it might be suggested that likeliness should be taken into account. In the comparison of alternative actions it is then happiness, calculated in a probability equation that determines how actions are to be ranked. The amount of happiness attributed to a predictable outcome of an action is modified by the likelihood of that outcome. The modified amounts of "happiness" of the various predictable outcomes are then brought together in some manner to be compared to the modified "happiness" of the various outcomes of alternative actions. To calculate happiness in this way is not much easier than to measure it. In addition to this, it is difficult to determine to what extent the distribution of happiness affects the sum of happiness. It can be contended that the amount of happiness, unlike the number of marbles, changes depending on how it is distributed. But calculating the net happiness gained from different levels of satisfaction of some notion of justice or equality seems hopeless. Notions of justice might even be given a more prominent role in the equation. In agreement with John Rawl's "maxim in" rule (Rawls 1973, p. 152) it might be argued that the situation of those who are worst off takes overriding priority. From the point of view of a utilitarian calculation, this would mean that the resulting happiness for those who are better off could be omitted, as long as consideration for the happiness of those who are worst off (however that is determined)in the various alternatives yields singular results. It is, however, far from6 (Plato 2001 ***Protagoras***, p. 354) the use of the phrase 'the greatest happiness for the greatest number' can also be found in works preceding Bentham. E.g. Hutcheson (1971), p. 164. "The maxim in rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others."

[28] Bentham, ***Of Laws in General*** (H.L.A. Hart Ed.), Athlone Press (1970), p.1

[29]Dias, ***Jurisprudence***, 1985, Indian Reprint, 1994, p.340

8. Expression: Where the expression of law is complete in unequivocal terms, the Judge must adopt literal interpretation. It is only where the expression of law is incomplete that the Judge may resort to liberal interpretation. It is only where the expression of law is incomplete that the Judge may resort to liberal interpretation.

Bentham distinguished *expositorial* jurisprudence (i.e. what the law is) from *censorial* jurisprudence (i.e. what the law ought to be). Principles and laws together reveal Bentham's thinking about the law. Bentham did not think that law everywhere was regarded as the legislative will of the sovereign. Bentham regarded the term 'law' as a socially constructed fictitious entity. He knew that even in his own country the law was found mainly in the form of common law that was not the creation of a political sovereign. Bentham regarded this authorless, unpromulgated and uncodified body of rules that made up English law as being unworthy of the name 'law'. He dismissed similarly the idea of a higher natural law. He called such law 'an obscure phantom, which, in the imaginations of those who go in chase of it, points sometimes to manners, sometimes to laws; sometimes to what the law is, sometimes to what the law ought to be'.

Bentham reasoned that a system of law that derive its rule exclusively from the clearly expressed legislative will of a sovereign will produce clearer and more certain laws than the rules generated by the common law system. His preference for legislation was grounded in utilitarian moral philosophy, of which he was a principle instigator. Bentham proceeded from the axiom that nature has placed mankind under the governance of two sovereign masters, pleasure and pain. They alone point out to us what we ought to do, and what we should refrain from doing.[30] According to him, the good or evil of an action should be measured by the quantity of pain or pleasure resulting from it.[31]

Bentham's notion of pleasure included not only carnal pleasure but also the more sublime forms of satisfaction gained from intellectual and spiritual pursuits, noble deeds and self sacrifice. He drew from this his famous principle of utility, which states that an action ought to be approved or disapproved according to its tendency to increase or diminish the happiness of the party whose interest is in question.[32] Bentham was convinced that a system of law that derives its rules exclusively from the commands of a sovereign authority, when measured by the yardstick of public utility, is superior to the common law system. Whereas the former produces clear, authoritative and certain laws, the latter generates a cumbersome and illogical mass of precedent that serves the interest of the lawyers but not of the public. Bentham proposed the codification of all laws[33] and against judge- made law.[34]

According to Bentham, a law is an expression of the will of a sovereign within a state. Law in this sense requires a state that establishes sovereign authority. A society that lacks the superstructure of a state and has no sovereign hence has no law in the sense of Bentham's definition. By 'sovereign' he meant, 'any person or assemblage of persons to whose will a whole political community are supposed to be in a disposition to pay obedience and that in preference to any other person'. Thus, the sovereign may be an elected parliament, an oligarchy, or even an absolute ruler who is unrestrained by law and who secures the people's obedience by naked force.

Bentham suggested that the sovereign's power may be limited by constitutional rules that constrain the sovereign are merely rules of positive morality. Bentham struggled to explain the idea of legally limited sovereignty. He discussed the issue in relation to a sovereign who is an individual like sovereign prince, may set limits on his own power by a royal covenant (*pacta regalia*). A covenant that seeks to bind his successor will only be a 'recommendatory mandate' that becomes covenantal only when adopted by the successor. Bentham recognised the absurdity of a person giving themselves a binding order. The effectiveness of a sovereign's self command depends on the sovereign's will and good sense. It will be effective as law only if the sovereign is subject to an outside force, such as a superior court with power to invalidate laws- in this event the sovereign is not sovereign. Bentham says that a sovereign's self-imposed limitations are enforced only by force of religious or moral sanctions. These forces are no match for the political will of the sovereign.

The content of the law may be established by the sovereign by conception or by adoption. Conception is where the substance of the law is conceived by the sovereign itself as when the queen in Parliament enacts a statute that lays down a new rule of conduct. Adoption is where the sovereign confers validity on a rule made by another person. This may happen in one of the two ways. First, the sovereign may adopt laws already in existence and made by other persons. Bentham called this 'susception'.[35] Thus, sovereigns may adopt the laws created by their predecessors, thereby providing for the continuity of the legal system. Second, sovereigns may declare that they will adopt laws made in the future by another person. This is 'pre-adoption'. What we call

[30]Bentham, ***An Introduction to the Principles of Morals & Legislation,*** Oxford, p.2
[31]Bodenheimer, ***Jurisprudence: The Philosophy & Method of the Law,*** Universal Law Publishing, 2009, pp.84-85
[32] Bentham, supra at 2
[33] Suri,Ratnapala, ***Jurisprudence***, Cambridge University Press, 2009, p.31
[34]Dias, ***Jurisprudence,*** 1985, Indian Reprint, 1994, p.340
[35]http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/01._advanced__jurisprudence/07._law_as_an_outcome_of_statehood__positivism_classical_positivism__bentham,_austin_and_kelsen/et/8121_et_et.pdf

delegated legislation today falls in this category. This is the case where an Act of Parliament authorises an official to make laws and bestows validity upon them.

Not every expression of sovereign will generates law as it is commonly understood. Sovereign will becomes law only when it takes the legislative form. Thus according to Bentham, administrative orders, military commands and judicial decisions are not laws. According to Bentham, a law is about conduct what a person or class of persons may do, must do or must not do in given circumstances. Subjects of the law are the persons to whom the law is directed. A law may be directed at a single person commanding that person to do or not to do a specified act. A law has effect only on persons who are subject to the sovereign's power. The objects of a law are the acts or forbearances that the sovereign aims to secure by enacting the law.

***H.L.A. Hart (1907-1992)***

Herbert Lionel Adolphus Hart was a British philosopher who was professor of jurisprudence at the University of Oxford. His most important writings included Causation in the Law, The Concept of Law, Law, Liberty and Morality, Of Laws in General and Essays on Bentham. Hart criticizes the concept of law that is formulated by Austin in The Province of Jurisprudence Determined Austin claims that all laws are coercive orders that impose duties or obligations on individuals. Hart says, however, that laws may differ from the commands of a sovereign, because they may apply to those individuals who enact them and not merely to other individuals. The Concept of Law[36] is an analysis of the relation between law, coercion and morality Hart says that there is no logically necessary connection between law and coercion or between law and morality. He explains that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion and morality. Thus, he rejected Austin's theory of analytical positivism and expounded his legal theory based on the relationship between law and society.[37]

***Hart's Rule Theory (Primary &Secondary Rules of Obligation)***

Hart criticizes Austin's theory of laws as commands and argues for a new framework which describes law is a system of two types of rules. Hart, like Austin, is a positivist and wants to separate the descriptive question of what law is from the prescriptive question of what law should be. But, he does believe that there is a normative aspect to the law, which is reflected in the obligation we feel to follow it. In his analysis Hart makes a distinction between two types of rules (primary and secondary). The separation of rules into these two different categories allows him toEstablish a method to determine the validity of a law, which is what determines whether it creates an obligation among citizens in a society or not. For the most part, Hart is able to create a very neat and consistent model to describe the legal system, but one inconsistency that I saw, and which I will address, is with the way that Hart incorporates judicial decisions into his system of rules.

First of all, in Hart's analysis, laws are described as rules in order to be distinguished from Austin's theory of laws as commands. A brief observation of existing laws will present us a wide range of laws that do not neatly present themselves in command form. For example, power conferring laws, which describe or direct agreements between people such as contracts or marriages, appear to be granting people rights or describing the way public officials should react to certain circumstances rather than commanding people to behave in a certain way.

Furthermore, the command theory leaves out an explanation for how, in modern representative systems, the rule makers who issue the commands find themselves bound by them as well.[38] For these reasons, Hart believes that a more appropriate metaphor for thinking about laws is that of rules in a sporting competition. Rules can not only direct the players to perform or refrain from performing certain actions, but they also give directions to the umpire or score keeper. Furthermore, players feel themselves bound by the rules. The rules themselves provide a reason to act, not just the fear of punishment as in the command theory. Hart calls this point of view, where the existence of the rule provides an obligation for action, the internal perspective to the law.[39]Hart divides rules into two categories, primary rules and secondary rules. According to Hart's definitions, primary rules either forbid or require certain actions and can generate duties or obligations. For a citizen with an internal perspective to the law, the existence of a primary rule will create an obligation for him or her to behave a certain way.[40] When we think of something being against the law, or required by the law, we are generally in the realm of primary rules. A primary rule can be the law against the law requiring you to stop at a red light. In the "rules of the game" metaphor, an example of a primary rule would be that in football, it is illegal to restrain a player who is not in possession of the ball.

Secondary rules on the other hand, set up the procedures through which primary rules can be introduced, modified, or enforced. Secondary rules can be thought of as rules about the rules.[41] Continuing with our football metaphor, an example of a secondary rule would be that a coach is permitted to challenge a call by the referee, but must accept the final decision of the referee following the viewing of the instant replay. When analyzing the necessity for secondary rules, Hart imagines a simple society, with only primary rules, but concludes that such a society would face a number of challenges: because there would be no systematic method of rule creation, there would be uncertainty about what the rules actually are; the system would be very static,

[36]Hart H.L.A., ***The Concept of Law***, (1961, Second Edition), Clarendon Law Series, p.61
[37]Tiwari, Garima***Jurisprudence***-1, 2015, Lexis Nexis, p.85 and *see*, also Pathak, Vinay Kumar ***Hart's Concept of Law: Positivist Legal Theory & Sociology of Law***, Sodha Vani, An International Referred Research Journal, vol.6, 2017, pp.34-40
[38]Hart, H. L. A. ***The Law as a Union of Primary and Secondary Rules***. Oxford University Press, pp.68-69
[39]Hart, H. L. A. ***The Law as a Union of Primary and Secondary Rules***. Oxford University Press, p.73
[40] ibid at 74
[41]Hart, H. L. A. ***The Law as a Union of Primary and Secondary Rules***. Oxford University Press, p76

since any changes in the rules would have to occur organically; finally, without a defined adjudication method, inefficiencies would arise from disputes over whether a rule was actually broken.[42] These three problems can be remedied with the introduction of three types of secondary rules, in order: rules of recognition, rules of change, and rules of adjudication.[43] Of these three secondary rules, Hart believes that rule of recognition is the most important. The rule of recognition tells us how to identify a law. In modern systems with multiple sources of law such as a written constitution, legislative enactments, and judicial precedents, rules of recognition can be quite complex and require a hierarchy where some types rules overrule others.[44] But, by far the most important function of the rule of recognition is that it allows us to determine the validity of a rule.

Validity is what allows us to determine which rules should be considered laws, and therefore, which rules should create obligations for citizens with an internal perspective to the law. According to Hart, validity is not determined by whether a rule is obeyed, its morality, or its efficiency, but by whether it fits the criteria set forth by the rule of recognition.[45] In more complex legal systems we may have to trace the origin of a rule back a few steps to the "supreme rule" of that system.[46]

In the context of Hart's definition of validity (whether the law is derived from a source and in a manner approved by other rules) it simply does not make sense to ask about the validity of the rule of recognition in its supreme form. Once we have reached the rule of recognition, there is no higher level of rules to provide us with the criteria with which to judge its validity. Other writers have made the claim that the rule of recognition can simply be "assumed to be valid". Hart, however, believes that this description is inaccurate and prefers the explanation that the rule of recognition is "presumed to exist".

The word "validity" can only be used to answer questions about the status of a rule within a certain system of rules. Since the rule of recognition is the standard which we use in order to judge the validity
of other rules, it cannot itself have a validity test. Hart states that asking about the validity of the rule of recognition can be equated to asking whether the standard meter bar in Paris is in fact a meter.

In the same way that the Parisian standard bar identifies the accuracy of instruments used to measure a meter, the rule of recognition identifies the validity of a rule. You can use the Meter Bar to check the accuracy of other instruments, but the bar itself cannot be accurate or inaccurate because accuracy is only defined by how well an instrument approximates the standard.[47]

In this context, the rule of recognition cannot be described in terms of validity, but only in terms of existence. The rule or recognition is presumed to exist if it is actually accepted and employed in general practice. In this respect, the existence of the rule of recognition is an external statement of fact. While laws can be valid even if *defacto* no one abides by them, the rule of recognition can only exist if courts, legislators, officials, and citizens act in a consistent way that corresponds with the presumed existence and acceptance of such a rule.[48]

One area where I think that Hart's theory falls short is the way he incorporates laws that created on the basis of judicial decisions into his framework of rules. According to Hart, once a rule is established according to the rule of recognition, whether by the legislature or by judicial precedent, it becomes part of the legal pedigree and there is little further uncertainty about its meaning or validity. This analysis, and even the choice of the word "rules" implies that the laws are very explicit and do not contain much room for interpretation. However, in many real life examples we find that the laws are rather vague or flexible, or that they turn on abstract concepts, like in contract law, where judges often make decisions based on whether the parties acted in good faith. Let's take the discussion further with the contract law example. One of the parties has intentionally hidden some documents from its contract partner. A judge will consider this evidence of a lack of good faith and it may cost the first party the case, even if the law never explicitly listed" hiding documents" among the activities that are considered illegal. Hart would defend his theory by saying that in this case the judge went outside the boundaries of the existing law to create a new law, which never existed before that moment, and which states that it is illegal to hide documents from your contract partner. But this seems inconsistent with the way that judges view their own position in the legal system. No judge sees his or her role on the bench as a maker of new laws, but as an interpreter of the existing laws. In the metaphor that Hart gives of the rules of a game, the judge would be like a referee.

The referee can identify when a rule was broken, but it shouldn't be within her power to create new rules. A judge writing a decision in the contract example wouldn't say that there was no rule against concealing documents, but now that the question has come up, He thinks it would be good to have one. He would say that the rule against concealing documents was there all along; it wasn't explicitly written, but it was in the implied subtext of the general understanding about the rules of contract law, and that the first party should have known it was doing something wrong even if it wasn't printed in the text. If Hart would believe that any judicial decision in which there is uncertainty or a lack of specificity within the law in question constitutes the creation of new laws by a judge, then that amounts to an incredibly large quantity of retroactive laws, which is problematic to the consistency Hart wishes to maintain in his theory of rules. The reason that Hart gave for the necessity of a rule of recognition was to solve the problem of uncertainty about the rules by making it easy for people to clearly identify what the laws are. But if new laws can be created every time a judge makes a difficult decision, it makes identifying the rules just as difficult as if there were no rule of recognition at all.

[42] ibid at 75
[43] ibid at 76-77
[44] ibid
[45] ibid at 80
[46] ibid at 81-82
[47] ibid at 83
[48] ibid at pp.83-84

This means that judges are cannot be free and unconstrained to make new law in any way they wish every time a case comes up where existing laws were undefined or when the factors that influence a decisionare not explicitly part of a distinct set of secondary rules. Intuitively, a judge who decides that hiding documents from a contract partner is wrong, even if this is not explicitly stated in the law, has made a fair or just choice (it would almost seem unfair if the decision had gone the other way), but the types of considerations that would guide the judge in making this decision do not seem consistent with what would fall under the rule of recognition as described by Hart. Dworkin makes a similar objection when he discusses the way in which judges make an appeal to principles when deciding cases. Principles are not hard and fast rules since, standing alone; they do not constrain behaviour in the legal sense. They do however they provide guidelines for how the law is to be interpreted and applied.[49]

***Conclusion***

Hart asserts that Austin's theory of law fails to account for the functions of law which are outside the realm of criminality.[50] He acknowledges that there is a strong analogy between criminal law and general orders supported by threats, and that this analogy also extends to the law of torts. Whilst acknowledging the strength in Austin's account Hart replies with several key objections.[51] Firstly, Hart notes that the fear of consequence or punishment whilst a strong motivator towards conformity, does not account for laws which attract not sanction. Hart utilises laws surrounding wills and marriages to demonstrate this point. Secondly, Hart expands on this in his discussion of the "variety of laws" with alternative consequences to punishment invalidity, nullity, no force or effect.[52] This alternative consequence causes the legal power which Austin extolled and which was intended to be created to be in itself nonexistent. Thus, Hart assets the authority of the gunman does not exist outside of the social control of criminality, with a partial exception for tortuous social regulation.

Austin explains law as a command that you will keep on obeying however it is not true that a sovereign must or does seek current approval for historical laws. In this Austin has failed to appreciate the irreducible actuality of legal normatively a question which Hart seeks to answer but merely identifies as a question in doing so. Hart however, by his own account, states the law persists, obedience of those laws persists, and the laws do not require a renewal.

The question then morphs into what is truly good and from whence does such a thing spring forth? Is it law, morality, religion, perhaps a socially constructed amalgamation of norm, and non-norm moreover? Does such an absolute 'good' in fact exist within the myriad complexities of norm setting value constructing devices that are constituent with the wider socio-political apparatus?

The actuality of a common law system and its permanence is insufficiently addressed by the promulgation of judicial authority from the sovereign and its enduring continuity. Weakly this is in part due to the inevitability that evidentiary law commands will no doubt be adverse to prosecutorial assertions with in the arena of criminal law, thus entailing that law is also 'for the people' as well as 'for the control of the people'. It does this whilst also extending to the arena of Civil law and the instructive nature of law that both restrains and empower citizens whom seek action guidance with the authority that only can law offers.

True, the declaration of a civil order in action by a judge carries the weight of sanctions when not met, however whether it is met or not only becomes coercive at the point such action is taken, prior to that it is merely an order, a command, the moral obligation coercive in respect of sanctionable action, yet unrealised and thus unknown.

There is however some analogy between Austin's doctrine of law and the actuality of civil law. This analogy is demonstrable in that breach of civil law can and does carry the weight of sovereign supported sanction a coercive force.[53] However the habitual obedience of non criminal statues is not always a self interested, utility seeking endeavour. Hart notes there important classes of law where the analogy of coercive legal remedy falters in example the right to engage in marriage amongst other conferment's of legal right to act in manners ultra legal.[54]

Hart, attempts to address the morality question in Austin's doctrine with the example of a Puzzled Citizen, an actor seeking the action imbued with rightness irrespective of any coercive force counter shadowed against the self-interested motivations of the actor seeking legality through reflection against illegality. Neither sufficiently address the aspects of law which are social management, there is within this area of law a rich formation of jurisprudential thought beyond the scope of this essay that may offer competing perspectives to Austin's and Harts. Hart asserts Law is reasons yet fails to address rights and status (man, woman, other / citizen, non-citizen, illegal), law is more than reasons thus Harts statement is as insufficient Austin's a partial explanation is no explanation at all.

It is argued that both Hart and Austin overlook the ultimate gunman nature of both natural law and positivism. Both accounts of law power refer ultimately to threat, in natural law the threat of god's displease and positivism, the threat of the sovereign. Austin and Hart both concern themselves with an external view of legality, devoid of the internal conscience of the citizen.

[49] Dworkin, Ronald ***Taking Right Seriously***, Cambridge Harvard University Press, 1977,pp.74-75, see generally , Genaro R. Caarrio, ***Professor Dworkin's Views on Legal Positivism,*** Indiana Law Journal, Vol.55, Issue 2, (1979),pp.219-225
[50]Hart, ***The Concept of Law***, Oxford, Clarendon, p.27
[51]Hart, The Concept of Law, Oxford, Clarendon, p.27
[52] ibid at p.28
[53]Hart, The Concept of Law, Oxford, Clarendon, at p.27
[54] ibid

Mere external rules provide no action guidance when reflected against the deep nuances of everyday life, on reflection often neither does morality, perhaps one can offer a sense of intuitive 'right' steeping in objective understandings of a social set normative of 'right acts' buttressed against the absolute boundaries of legality. Austin set forth a blinkered account of formative legal authority which Hart counterbalanced against stipend morality masked in empiricism.

In contemporary society questions now exist such as genetic cloning, where legality is sparse at best and laden with questions of morality so heavy that legality itself cannot be resolved with any immediacy. It is then that we turn to laws seemingly inapplicable to provide action and moral guidance where none exists within direct legality. Thus it can be shown that law and morality exist in hybrid in contemporary society, and therefore must have done so historically.

Thus, it is argued that morality and law can be said to be intertwined, and the view of the legal positivist is not merely insufficient, it is opium pipe smoke of an early nineteenth century legal philosopher whose claim to immortality appears to be the widely recognised insufficiencies of his legal theory, and Hart offers no improvement. Hart's view of legal positivism is an ill-conceived attempt to smuggle morality into positivism while maintaining the veil of amorality.

Hart's view of legal positivism is an attempt to decouple "*ought*" as a normative a-moral principle. Thus "*ought*" becomes "I do for *legalities* sake" as opposed to "I do for *moralities* sake" whilst neither accurately portray 'right' citizenship in reflection of legal action guidance reflected against social morality, which unfortunately for Hart and Austin alike such a thing is actuality. To use Hart's own example, the law of wills is not obeyed because it is a legal *ought*, but because objective moral values call upon us to respect the wishes of the testator.

True cases abound of legal challenges to the wishes of testers yet these are legal tests to the 'should' overly not 'ought'. It is more than having an obligation or being obliged, as critics of Hart have noted that his admission of laws normatively is incompatible with his legal positivism. Thus, whilst seeking empiricalism Hart found himself extolling a blend of rationalism and naturalism peppered with the drab ends of linguistic positivistic empiricalism.

A Sovereign or such a defined which commands direct or otherwise is fundamentally incompatible with the English Legal system, thus Austin's initial premise is false conception and derails his account. The Civil law system and Civil Law in the English system is hard for Austin to explain and Hart does no better. Hart account at a core in truth to legal positivism is a claim to fear at its core is consequential. Consequently the core of legal positivism is obedience through consequence irrespective of morality both are simplified as deficient 'gunman legal theories.

In a modern legal system habitual obedience is in interest of the larger community. Sociologically described as informal social control, that which we do because this is what a good citizen does in comparison with the citizens surrounding and in un-moderated collective social agreement which is informed by collective understandings of legality, morality and common sense.

Thus,Hart's analysis of primary and secondary rules provides a very useful framework for understanding the sources of law and how we can distinguish valid laws from invalid ones without entering into subjective moral territory. Hart's system creates a way to reconcile some of the inconsistencies in Austin's theory, while also incorporating some of the more normative nuances of the law without making any moral claims. Hart observes that people feel an obligation to follow primary laws, even in cases where the likelihood of being caught and punished is slim to none. Since Austin defines laws as demands issued by a sovereign under threat of sanctions, this observation cannot be explained by Austin's theory. Hart argues that this obligation does not come from the moral content of the law, but from its validity, which is why we need secondary laws to determine the validity of the primary laws. Because people who take the internal perspective to the law presume the existence of the rule of recognition, they accept to be bound by laws that are valid according to the criteria set forth in the rule of recognition and in the secondary laws derived from this rule. I do feel, however, that Hart's theory on judicial decisions fails to address the reality of how judges see their role in the legal system, as interpreters or arbitrators of the law rather than creators of new laws.

The chief exponents of the legal positivist school are Austin, Bentham and Hart. Their main idea of law was similar but they differed in certain aspects. These jurists played a greatest role in developing legal positivism. This school received encouragement in United States from Gray and Hohfeld and on the continent of Europe from Kelsen, Korkunov and others.[55]

[55]Mahajan V.D., ***Jurisprudence and Legal Theory***, (2013, Fifth Edition), Eastern Book Co.,Lucknow, pp.440-441