LEGAL POSITIVISM: AN ANALYSIS OF AUSTIN AND BENTHAM

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Abstract

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

Although not free from shortcomings, the Legal Positivist School is regarded as the most influential school of thought in jurisprudence. Judges have based their decisions on this school of thought across various countries, including India. Indian Judges have been greatly influenced by the thinking of legal positivists and have applied their jurisprudence while giving landmark judgements such as A.K.Gopalan v. State of Madras to name one of them.

The basic idea behind legal positivists 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.

John Austin and Jeremy Bentham are the two most celebrated authors of this school of thought. Although the basic idea of the two is similar, there are certain glaring differences which have been discussed in detail.

Moreover, the Legal Positivist School has been looked at from the Indian Perspective and what role has it played in influencing the judiciary while giving their judgements in India.

Introduction: Legal Positivism

Legal positivism is regarded as one of the most influential schools of thought in legal jurisprudence around the world. This theory was developed to a great extent by jurists such as John Austin and Jeremy Bentham around the 18th and 19th century. Subsequently, this school of thought was taken forward by influential jurists such as Herbert Lionel Adolphus Hart and Joseph Raz.

The above jurists have significant differences in their views but the common idea that all of the above jurists have is that they analyse law as it is.[1]Therefore, they have the common objective of helping people understand the law of the land as it is and not as it ought to be. Therefore, the legal positivist school only aims to identify the law as it is laid down by a superior body and not how it should have been.

Moreover, the other common theme between all the jurists of the legal positivist school was that they kept law and moral principles on a completely separate footing. The legal positivists believed that law had no relation to the moral principles.[2]However, they were of the opinion that law often reflects the morality of the people that it controls. Therefore, 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 body.

Depending on the weightage given to the moral principles, legal positivists can be divided into positive positivists and negative positivists. Positive positivists such as 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. Hart writes that '*it is in no sense a necessary truth that law satisfy demands of morality, though in fact they have often done so'*.[3] Therefore, they do not negate the existence of moral principles. However, Negative Positivists are those who completely negated the existence of the principles of ethics and morality. Therefore, they did not believe in the existence of moral principles. This includes jurists such as John Austin.

Therefore, we can clearly infer that the legal 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. Their view is that even the moral standards attain a legal status only through some form of official promulgation.[4]

The school of legal positivism seeks to demarcate between law as it is and law as it ought to be. It does not analyse the Censorial nature of law, that is, law as it ought to be and concentrates on the law as it is given by a superior authority.

Two of the main jurists associated with the legal positivist school are John Austin and Jeremy Bentham. Their main idea of law was similar but they differed in certain aspects. These two

[1]H.L.A. Hart, The Concept of Law (1961, 2ndedn, Clarendon Law Series) 34.
[2]H.L.A. Hart, Essays in Jurisprudence and Philosophy (1983, 1STedn, Clarendon Press) 112.
[3]*Supra* at 1.
[4]H.L.A. Hart, Law, Liberty and Morality (1963) 176.

jurists played a huge role in developing this school and are considered to be the greatest writers in the field of legal positivism.

Methodology

Scope of Study

The scope of this paper is to study the basic concept of legal positivism in relation to the understanding of great jurists such as Austin and Bentham and how exactly did they perceive the law. Moreover, it is also to explore how the Positivist school has application in the Indian context.

Objectives

The main objective of this paper is to gain an in-depth knowledge about the Legal Positivist School and their understanding of the concept of law. Moreover, it is also to determine what was the opinion of John Austin and Jeremy Bentham regarding law and how did they differ in their opinions.

Research Questions

The following research questions have been broadly identified:

1. What is Legal Positivism?
2. What is law according to Austin and Bentham?
3. What are the differences between Austin and Bentham?
4. How is Legal Positivism relevant in the Indian context?

Method of Citation

OSCOLA method of citation has been followed in the paper.

John Austin's Analytical Jurisprudence and Legal Positivism

John Austin (1790-1859) was a prominent British legal philosopher who takes the credit for formulating the first systematic alternative to both 'natural law theories of law' and 'utilitarian approaches to law'. Austin's theory of law is a form of analytic jurisprudence. John 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 also embraced the idea of law being the sovereign command much like Hobbes and Bentham before him. Austin's jurisprudence was shaped on the lines of Jeremy Bentham's thoughts but Austin was in no manner whatsoever Bentham's intellectual clone. Austin and Bentham had their differences which we shall also be taken a note of in this paper.

Austin's Utilitarianism

John Austin's this particular reading of utilitarianism, has been the part of his work that received the most attention in his own day. The primary source of moral rules, as per Austin, was the law of God as revealed in the scriptures. Like Thomas Aquinas, Austin also opined that there is a part of the law of God that is unrevealed and must be discovered by resorting to reasoning. As it is understood clearly that God wills the greatest happiness of all his creatures, reason brings us to the principle of utility. Austin noted that we have to infer the laws of god which is not expressed or revealed in any manner from the probable effects of our actions on the greatest happiness of all, or even from the tendencies of actions of the humans which are to increase or diminish that aggregate. He believed that utility is the index for the discovery of divine pleasure.[5]

It has to be understood that Austin, much like Bentham, also reasoned that aggregate happiness is served by identifying the law with sovereign will. Austin however, included moral dictates of the scriptures in the category of 'law'. This lead him to the create a subset of 'laws properly so called' – which was named subsequently as 'positive law'. This was done primarily to signify laws made by the sovereign and its delegates.

Austin's Taxonomy

Austin attempted to classify all that he opined was the proper subject of jurisprudence. Adding to the laws of political sovereign, this was inclusive of divine law, moral law, customary laws, laws of private associations, laws of households, and also international law.

As per Austin, only some of these laws are what he called 'laws properly so called'. While the others are laws by analogy meaning laws only in the figurative sense, the criteria for a law to be 'properly so called' is that it derives from authority.

Austin believed that laws by analogy are not law per se but are positive morality. This is inclusive of rules which are of non-obligatory nature such as rules of social etiquette, moral rules etc. It

[5] (Austin 1873: Lecture IV, p. 160; see also Austin 1832: Lecture II, p. 41)

also covers customary law, international law and constitutional law which, as per the general opinion, are considered binding.

Laws Properly So Called and Positive Law

There exist primarily two kinds of authority in Austin's legal universe: the authority of the Christian scriptures and the authority of the political superior.

Divine law is understood to be that which is set by God himself for the creatures. The scriptures are known to be the source of divine law. The political superior is the direct source of human law properly so called which Austin termed as 'positive law'.[6] 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 citizens in quest of their legal rights. The laws made by the ones authorised to do so or the subordinate political superiors like ministers, judges etc constitute as the laws set directly by the sovereign.

Austin gave illustrations regarding what constituted to be the laws made by private citizens in pursuance of their legal rights. One such illustration of the laws made by private citizen was of rules made by the guardians for their wards and those rules imposed upon the slaves by the slave owners. So, as all the legal rights happen to be founded by laws of the sovereign, the ultimate source of these private powers remains the sovereign.[7]

As per Austin, only those norms which have been authoritatively established by God or by sovereign are proper laws. Laws improperly so called are generally based on opinion and not authority.

Austin's Positive Law

Austin defined positive law as comprising of commands of a political sovereign backed by sanctions on the ones who disobey the commands.

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

1. Political sovereign
2. Command
3. Sanction

Austin noted that a society which does not have a political sovereign does not have law in the strict sense of positive law. Political sovereign was regarded as a necessary feature of a political society which considers or claims itself to be independent. Austin was of the notion that where there is no sovereign, there is no independent political society where as the *vice versa* is also true.

As pointed out by Austin, positive law is the result of a sovereign's command. A command is an imperative that creates a duty by the presence of a sanction which would follow if there is an

[6]R. Campbell, The Philosophy of Positive Law (1879) 234.
[7]John Austin, The Province of Jurisprudence Determined (1832) 215.

incidence of non-compliance.[8] Command is something which is of such importance that it can never be distinguished from duty and sanction and they can all be considered to be varied aspects of a single event. Where ever there exists a duty, there will also be the presence of a command; while where there is a command, there also is a duty. The duty arises from the existence of punishment or sanction of sorts which follow in case of non-compliance or when there is a breach of duty.

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 jurisprudence are:

1. Declaratory laws – Austin, in this point, conceded that imperative rules may be enacted in the guise of it being considered a declaration. The declaratory laws are those which do not go on to form new duties but only clarify or provide the interpretation of existing legal relations.
2. Laws brought in order to repeal law- The process of repealing some laws may impose new duties or they can even go on to revive some of the former laws. As per Austin, the Laws to repeal law are not imperative commands.
3. Laws of imperfect obligation – Austin stated that laws 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. An illustration of laws falling under this category would be: the statutory duty of the city council to keep the streets clean and tidy.

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. For example: rules against killing someone, stealing, raping, assaulting.

As per Austin, whenever there is a conflict between positive law and positive morality, positive law would prevail.[9] 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 the 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.[10]

[8] John Austin, Lectures on Jurisprudence (2002, Vol. 1, Bloomsbury Academic) 135.
[9] *Id.*
[10] Austin, 1832: Lecture V, p. 163 (1995)

Jeremy Bentham and the Principle of Utility

Jeremy Bentham, the English jurist and philosopher, is regarded as the greatest figure in the history of British Legal positivism. In simple terms, Bentham's definition of law can be given as the will of the sovereign. He was of the opinion that rules which are derived exclusively from the commands of a sovereign authority form the law of the land. Therefore, he stated that rules which are derived from the will of the sovereign would produce more clear as well as more certain laws than the rules which are generated within a common law system.[11]

Therefore, according to Jeremy Bentham, '*law is 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 a class of persons, who in the case in question are subject to his power'.*

Therefore, Bentham clearly states that law, which is the will of the sovereign, regulates the conduct of the people to which it applies. Therefore, the law is what is laid down by the sovereign. The people who are subject to the law have to regulate their conduct in accordance with this will of the sovereign. Moreover, Bentham says that the law does not have to be in consonance with the principles of ethics. Therefore, law is whatever is laid down by the sovereign.

According to the Bentham, a sovereign is the highest superior body which does not owe any obedience to any other body. It is the sovereign which claims habitual obedience from the people living in a politically organized group.[12]Therefore, the sovereign does not owe any allegiance to any other body or group. It is the will of this sovereign body which is known as law.

Bentham, however, states that the power of the sovereign is not absolute as is the view of John Austin. Bentham is of the view that the power of the sovereign can be limited as well as divided. Therefore, he is of the opinion that a sovereign can, by his own will, limit his own powers by entering into agreements with certain external agencies which would put restriction on the power of the sovereign. Jeremy Bentham's concept of sovereignty is not absolute in nature and can be restricted to a certain extent.

Another important feature of law according to Bentham is that it should be backed by sanctions.[13] Therefore, the will of the sovereign must always be backed up by sanctions for it to become law. Bentham talked about the positive as well as negative side of sanctions, unlike Austin, who only talked about the negative side of it. Bentham was of the view that rewards should be given to the people who follow the law while punishments should be inflicted upon those who break the law. This was to encourage people to be law abiding and moreover, discourage them to break the law.

Therefore, according to Bentham, law is the will of the sovereign backed by sanctions.

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[11]Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (2008, Read Books) 79.
[12]*Supra* at 7.
[13]*Supra* at 11.

Principle of Utility

Jeremy Bentham also gave his famous theory of utility. According to Bentham, any person is governed by two masters, that is, pain and pleasure. Every man wants to increase the pleasure and diminish the pain. Therefore, any law should be made by keeping in mind this theory of utility. Every law should be promulgated by the sovereign in such a way that it diminishes the pain and maximises the pleasure of the people who would be governed by that particular law. Therefore, every law should be measured by the yardstick of public utility, that is, how much pain is it causing to the people and how much pleasure is the person getting from the law. Any law should aim at maximising pleasure and minimising the pain of the persons whom it governs.

Along with the Principle of Utility, Jeremy Bentham proposed the codification of all the laws and stated that the uncodified body of rules that was part of the English Law was not worthy of being called as law.

Therefore, Jeremy Bentham played a crucial role in the development of the theory of Legal Positivism.

Differences Between Austin and Bentham

Bentham was against the idea that scriptures were a source of law; he believed that the will of God is unknowable. Conversely, Austin regarded the law of God as revealed in the scriptures to be a primary source of moral rules.

The definition of the term sovereignty as provided by Austin talks about external aspects as well as internal aspects of sovereignty while the definition given by Bentham speaks only about internal aspect of sovereignty.

Austin only talks about the negative aspect of the sanctions; as per Austin, you ought to follow the law, but if you happen to break the law, you will be punished accordingly. Bentham believed that as every man wants to increase his pleasure and diminish pain and thus to encourage people to be more law abiding and discourage people from breaking the law there should be the inclusion of awards as well as punishment for people depending upon their behaviour.

As per Bentham, a sovereign by its own will, may put limits on its sovereignty by entering into agreements with external agencies, but Austin is opposed to this placing of limits on sovereign's powers and does not allow for it.

There was another sphere were Austin had a major disagreement with Bentham. As per Bentham's ideology, courts have no role to play in legal development. However, Austin had different ideas. Austin's utilitarianism leads him into the belief that judicial law making is not only inevitable but is also an unequivocal public good.

The common law, as defined by Austin, is a law made by the sovereigns through their delegates who are the judges. Austin reasoned that judges are mere agents of the sovereign, authorised to adjudicate disputes and to supply a rule where there exists a requirement of one. Austin has a complaint against the judiciary not because of their act of legislating but because of their act of legislating too cautiously. Austin, unlike Bentham, accepted the process of judicial law making and considered it as immensely beneficial and even absolutely necessary.[14]

[14] *Supra* at 10.

Criticism of Austin and Bentham

The view of John Austin and Jeremy Bentham that Law is the command of the sovereign backed by sanctions had certain shortcomings and therefore, was criticized to a certain extent.

According to John Austin, the Sovereign is supreme and owes allegiance to nobody else. However, the concept of International Law is a restriction on the external sovereignty of the determinate superior.The sovereign has limited powers due to the rules, regulations and treaties which for part of the International Law. Therefore, the idea that Sovereignty is supreme and absolute is challenged by the concept of International Law.Moreover, the fundamental rights given to the people restrict the powers of the sovereign and therefore, are a challenge to the internal sovereignty of the determinate superior. The sovereign has to exercise its powers according to the fundamental rights of the people and therefore, the sovereign cannot breach the rights of the people while exercising its powers. Therefore, fundamental rights also challenge the absolute character of sovereignty.

John Austin and Jeremy Bentham never talked about the concept of a legal system, which is prevalent almost all over the world in the modern era. They only talked about the concept of a sovereign and the sovereign being the source of the laws. The concept of a legal system was never discussed.

Moreover, the idea of the sovereign given by both the jurists gives rise to an autocratic regime since the sovereign is supreme and has absolute powers. Since the sovereign does not owe any allegiance to any other person or group of persons, it has the power to act as it wants and therefore, there are no restrictions on the powers of the sovereign. Therefore, the concept of sovereign gave rise to the idea of autocratic regime.

One of the primary shortcomings of the two jurists was the fact that they regarded sanctions as the only basis of law. They believed that the existence of law is not possible without it being backed by sanctions. Therefore, if the will of the sovereign is not backed by sanctions, it would not be called as law.

Legal Positivism: Indian Perspective

The theory of Legal Positivism has been used by the judiciary in India while deciding landmark cases. Therefore, there have been cases in India where the judiciary has been influenced by the legal positivist school while giving the judgement. Therefore, there are cases where the judges have interpreted the law as has been laid down by the legislature. Therefore, the legal positivist school has played a great role in the Indian perspective also.

In the landmark judgement of *A.K.Gopalan v. State of Madras*[15], the petitioner was detained under the Preventive Detention Act. The petitioner challenged the constitutionality of the said act on the ground that the act infringed Article 19 as well as Article 21 of the Constitution of India. The argument put forward by the petitioner was that law not only means '*lex'* but also *'jus'*. Therefore, the law is not only what is laid down by the legislature but should also be just and fair. The Supreme Court upheld the validity of the Preventive Detention Act and stated that law is '*lex'* and not '*jus'*. Therefore, what is laid down by the legislature is to be regarded as the law of the land even if it is not just. This judgement clearly reflected the thinking of the positivist school.

Moreover, in the case of *R.K.Garg v. Union of India*[16], famously known as the Bearer Bond case, the legislature, which is the supreme authority which is entrusted with the power of making laws, passed a law that if black money was invested in certain government bonds within a stipulated period of time, the government would not question with regard to the source of the black money. This law was challenged on the ground of arbitrariness under Article 14 of the Constitution of India[17] and it was argued that this particular piece of legislation was encouraging the evasion of taxes. The court upheld the validity of the law as it is and said that there is an intelligible differentia between those who invest in bonds and those who do not. Moreover, it applied the Doctrine of Pith and Substance[18], and stated that the purpose of the legislation was not to encourage the evasion of the taxes but to use the black money for productive purposes. Therefore, the law as it is was held to be valid by the Supreme Court.

Moreover, the theory of legal positivism was also applied by the apex court in the case of *Jolly George Verghese v. The Bank of Cochin*[19], were a law which stated that there would be imprisonment in case a person fails to repay a debt was held to be valid by the Supreme Court despite it being against the United Nation Convention. Therefore, the Supreme Court analysed the law as laid down by the legislature and gave the decision.

Therefore, in all the above cases, the court did not look into the matter whether the law is just or not; it only considered what the law is. Therefore, the thinking of the Legal Positivist School has been incorporated by the Indian Judges while giving judgements and therefore, legal positivism plays a crucial role in the Indian context as well.

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[15] *A.K.Gopalan v. State of Madras,* AIR 1950 SC 27.
[16] *R.K.Garg v. Union of India,* AIR 1976 SC 1559.
[17] *E.P.Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.
[18] *State of Bombay v. F.N.Balsara,* AIR 1951 SC 318.
[19] *Jolly George Verghese v.The Bank of Cochin,* AIR 1980 SC 470.

Conclusion

Legal Positivism, as we have already seen, is one of the most influential schools in the jurisprudence of law and relies on the law as a fact. The jurists of this school only analyse the law as it is and do not consider how it should have been. According to the views of great jurists such as John Austin and Jeremy Bentham, the moral principles do not determine the law of the land. However, there are certain positivists who do believe in the existence of the principles of ethics and morality and moreover, they are of the opinion that these moral principles are responsible, to some extent, in shaping the laws. Therefore, it can be clearly seen that although the overall idea of the jurists of this school is similar, but certain differences in their thinking does exist. The common notion of all the jurists belonging to the Legal Positivist School is that law is what is laid down by the superior and backed by sanctions. Moreover, they are of the common opinion that the moral principles are not to be taken into account while judging the validity of laws. All laws are valid which flow from the determinate superior and is backed by sanctions.

However, there are certain shortcomings of the Legal Positivist School such as it fails to elucidate upon any kind of legal system and sees sanctions as the only basis of law. Moreover, the concept of absolute sovereignty given by John Austin is challenged by International Law as well as fundamental rights that are available with the individuals.

Although there are certain limitations, Legal Positivism is regarded as the most influential school of thought in jurisprudence.

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