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NOTES ON JURISPRUDENCE

Early Legal Positivism: Bentham & Austin

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Introduction

Legal Positivism developed in reaction to Natural Law theories and it distinguished itself as a movement after breaking away from the Natural law system of theorising. The difference between the two schools of jurisprudence lies in the fact that Legal Positivists, like any other type of Positivists (be they Sociological, Logical or Philosophical Positivists) tend to prefer to focus on the “real, observable world and its actual existence”¹ and to be able to produce a study of law that examines and describes the nature of systems of rules in contrast to the Natural Law theorists who tended to consider questions how laws can be made just or ethical.² In short, Positivism seeks to pursue the study of Jurisprudence solely from an analytical angle, thus concentrating on the question “what is law?” rather than take a normative approach as most Natural Lawyers are said to do. To this end, all Legal Positivists try to generalise common features of stable systems of rules to explain what law is in reality.

Although there are numerous Positivists and quite a few Positivist theories of Law, there are three dominant theories which embody this school of Jurisprudence. The first group includes the Early Positivists, Bentham and Austin, who propounded analytical positivism in the early Command Theories of Law. The second theory is the Positivist theory (or Concept of Law) of H.L.A. Hart which was described as the ruling theory of law by Ronald E. Dworkin and the third one is the Pure Theory of Law of Hans Kelsen.

All three theories share many features in common in that they react to natural law theories and they tend to encourage the study of law to focus on the study of human laws (which are a result of human endeavours) so as to avoid the lack of clarity they all feel natural law theories suffer from. All three sub-schools also hold that any link between laws and morals is arbitrary and at-

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¹ J. Penner, D. Schiff and R. Nobles, Introduction to Jurisprudence and Legal Theory: Commentary and Materials (2000) Lexis

Nexis UK, London, p. 92

² For a discussion on Natural Law Theories, see E. Nalbandian, “Notes on Jurisprudence: Natural Law Theories”, 1 Mizan Law Review, No. 1, June 2007, p. 167-178

tributable to linguistic expression. Thus, this theory intends that the two notions should be kept separate. Finally, they all assert that what human law is and what it ought to be are different questions (which for the positivists is the main reason why natural law is unclear).

Similarities aside though, each Positivist theory of law is distinct in its approach and emphasises different areas as being key to the true understanding of what law is. It is for this reason that the following notes will describe the Early Positivist theory of Law as introduced by Jeremy Bentham and developed by John Austin (Bentham's disciple) in the 19th Century and its possible criticisms which have since then been expressed by various critiques including later Positivists.

1. Background of Early Legal Positivism

In the 19th Century, perhaps one of the most influential figures in English law was Blackstone, who was conservative in his thinking. As such, his answer to the difficult question "what is law?" was steeped in praise for the common law system which in his view was based on reason and natural law. Bentham found Blackstone's theories unconvincing and in his many writings, pointed out the deficiencies in Blackstone's writings and lectures as well as those in the theories of Social Contractarians and other proponents of Natural Law theories. His main argument at this time was that Natural Law theories did not provide any objective guide to what was moral or immoral or good or bad in deciding what law was valid or invalid. Bentham argued that what constituted morality in these theories could in fact also be understood as being subjective, culturally determined standards of common likes and dislikes³. But his true opposition to Blackstone emanated from the fact that Blackstone explained that English law was based on natural law and praised it for the same reason. In Bentham's view, however, this was incorrect for a variety of reasons but mostly, Bentham (who was a reformist and thus was inclined to be more critical of the system) seemed opposed to all the praise of the English Law system. This, according to Bentham, is due to the confusion between what the law is and what it ought to be, which he blamed on the influence of Natural Law thinking.⁴

Bentham felt that this conservatism in legal thinking hindered reform and he held that law should be criticised, improved and reformed. Thus, he broke away from the general trend of the theories of his time and he introduced a

³ Supra note 1 and lectures by the authors of the book (Richard Nobles and David Schiff, London School of Economics and Political Science, 2004-2005)

⁴ J.W. Harris, *Legal Philosophies*, (1997) 2nd Ed. Lexis Nexis UK, London, p. 28

new approach in jurisprudential thinking by suggesting that law must be defined in terms of facts. For him the important facts included among others, the political facts of power,⁵ human commands/prescriptions and the system of coercion. To do so, he suggested that any definition of law needed to focus on at least eight very important issues in law, including;

1. The source – the person(s) whose will the law expresses or who created the law
2. Subjects – the person or things to which the law applies
3. Objects – the acts to which the law applies
4. Extent – the range of the law's application in terms of the persons whose conducts are regulated by the law.
5. Aspects – the various ways in which the will of the sovereign (expressed in the law) may apply to the objects (as in [3] above) of the law
6. Force – the sanctions which the law relies upon for compliance
7. Expression – the various ways in which the wishes of the sovereign are made known (the way law is published etc.)
8. Remedial appendages – any such other laws which are created and published in order to clarify the requirements of the principal law.

Once these elements were identified, Bentham then believed that the questions “what is good law?” could be answered based on ideas of utility whereby the good laws are those which maximise happiness/pleasure and the minimisation of pain/misery. But he pointed out that these could be done only after the question “what is law?” had been fully dealt with at the factual level.

Although Bentham is clearly the founder of the Command/Imperative theory of law (as named due to the idea that the factual ideas of the will of the sovereign as expressed in the law), his work about the nature of law was not widely known due to the fact that they were not published. Thus it fell to his disciple, John Austin, to develop/make known this legal theory in the 19th Century.

2. John Austin and the Command Theory of Law

John Austin was a disciple of Bentham's as he was both a positivist and a utilitarian. Hence, Austin's work was largely based on Bentham's work and Austin's classification of law and criticisms of his view of law are indeed necessary for a full understanding of the 19th Century Early Positivist Theory of Law.

⁵ E. Christodoulidis, L. Farmer and S. Veitch, *Jurisprudence: Themes and Concepts*, (2007) Routledge Cavendish UK, p. 12

Austin, like Bentham was a definitionist. He wanted to clarify what law was and what it was not and it was Austin who made the distinction between the terms (which he coined) ‘analytical jurisprudence’ – which involves looking at the basic facts of the law, its origins etc – and ‘normative jurisprudence’ – the question of the goodness of law. For Austin, like Bentham, the important part of the study was the analytical question. Another similarity between Austin and Bentham is that both jurists believed that the same factual issues (namely of power and sovereignty⁶ as well as sanctions⁷) were key to the understanding of the law, as it is.

Austin first sets out to clarify the idea that people with power set down rules for others who obey them to govern their actions. In other words, Austin suggests that law is ‘a rule laid down for the guidance of an intelligent being by an intelligent being having power over him’⁸ and this is done so in the form of a command. In short, laws can be understood in Austinian terms as commands from/by the sovereign. So everything that is law must be a command. But Austin points out that all commands are not law necessarily as some commands may lack the generality that will enable them to become a law. Hence, Austin’s theory holds that a command that is directed specifically is a command, but a command directed generally and over time is law.

Austin then goes on to discuss the fact that in the English language (as in some others) many concepts can be labelled as “law” - but these do not necessarily qualify as law as a lawyer, judge and other members of the legal profession would understand it. The word “law” is therefore according to Austin, vastly misused and not sufficiently considered. For example, Austin raised the idea of “laws of Science” or “laws of God” as well as “human laws” to indicate this. Austin, systematically approached this issue and classified laws into different types to focus his study on something quite specific. He firstly distinguishes the concept of the laws of God. These are God’s laws to regulate humans and so Austin called this ‘laws properly so called’ and indicated that this is not something to be considered in a theory which attempts to understand human laws.

In Austin’s theory, human laws are treated in distinct categories: firstly, laws strictly so called (positive law where rules are backed by sanctions and the laws are set by men for men) and laws not strictly so called (laws which have no sanctions by the State attached). This latter category was also labelled as “positive morality”. The laws strictly so called are then also divided into two: 1) laws set by men for men as political superiors to political inferiors

⁶ Ibid

⁷ Supra note 4

⁸ Supra note 1

and 2) laws set by men for men in pursuance of political rights (contracts, tort, property) which are not commands and are not as important or essential as the first type of law set by men for men and he tags these types of laws as being “Expository matter”. All other usages of the word “law” such as “laws of science” are said to be laws by analogy.

To summarise; Austin’s understanding of human laws can include three general types of law:

- Penal law: Command+Sanction
- Expository matter: lots of appendage type laws that develop over time but are not as essential as penal law: such as Family Law, Contract Law etc.
- Permissive Law or Positive Morality which includes International law etc. which are closer to being laws by analogy than they are actual laws

Ultimately, the focus of Austin’s theory is such that his conception of the law that needs to be studied can be and regularly is reduced into one very famous quote:

“Law is a Command of a Sovereign backed by a Sanction.”

This quote indicates the three elements that are key to the understanding of law in Austin’s terms: firstly the concept of the Sovereign, then the concept of the Command and finally, the role of Sanctions in law.

2.1 - The Sovereign

The sovereign is the source of law in a society and thus is the most important figure that needs to be understood. Without a sovereign there can be no law as human laws are a result of human endeavour and the endeavour of the human truly refers to the sovereign’s endeavours. As such, Austin describes the sovereign as a person or an institutions that is factually determinate (in other words can be clearly and easily identified) and is a common political superior. As the common political superior, this sovereign must also be someone or something that is habitually obeyed by the majority of the members of a society who must also not be in habitual obedience to anyone or anything else. Finally, Austin makes it a requirement that the sovereign should be legally illimitable and indivisible and the sole source of legal authority in any given society.

2.2 - Commands

A Sovereign as a source of law can only make the laws he/she/they/it wants in the form of a command. Hence, Austin states that the sovereign’s will is

expressed in the form of a command which is an imperative statement establishing the sovereign's wishes. The command is different from an order in that (as already mentioned above) Austin specifies that commands must be generally applicable and must not be specific. It is also a specific expression of will or type of order as anything that is a command in Austinian terms must have a sanction attached to it should the command not be obeyed.

2.3 - Sanctions

A sanction is in Austin's terms "even the smallest evil..." which can be any harm or pain which is part of the threat in the command of the sovereign. This is an important part of law as it provides the motivation for the subjects to obey the sovereign's commands and a disincentive for the majority of the society to disobey the law. As such, Austin describes the sanction as having to have possibility of application as this is a key part of the law in the event of a breach. The sanctions can include damages, remedies, compensation, maintenance costs or other types of punishments which are imposed on by actual bodies founded as institutions to enforce the law.

3. Discussion

According to Austin, laws only exist in independent communities that have identified political sovereign who is a person or a group whose commands are habitually obeyed in the community and who does not obey anybody else. For Austin, the sovereign who issues commands etc. is the Parliament which is the representative of the people. Furthermore for Austin, the legal sovereign is the political sovereign as this is the one body that has the power to promulgate its own laws and have them enforced except for the one exception where Austin includes judge-made-law as part of law in the sense that the sovereign delegates authority to judges to make law. It can and should be appreciated that Austin's theory is comprehensible and systematic.

Be that as it may, Austin's theory also suffers from various weaknesses (mainly the problem that the theory does not adequately explain the important features of modern legal system) that many critiques have explored. A most detailed study among the dominant criticisms of Austin's work (indirectly) can be found in H.L.A. Hart's "The Concept of Law" (1961). Hart's project was to create a 20th Century Positivist theory and his attempt was not to specifically criticise Austin's theory. Rather, Hart's attempt was to deal with the general problems all Imperative law theorists raised in describing the law in the most simple terms. The reason why a lot of it seems like a criticism of Austin is due to the fact that Hart regarded Austin's theory as the

“most thorough attempt to analyse the concept of law in terms of apparently simple elements”⁹.

The following criticisms will thus be structured along the lines of summaries of the second and third chapters of Hart’s “The Concept of Law” with additional points of criticisms where they exist from other sources furnishing the body of criticisms, where Hart has not done so.

3.1 - The Problem of the Continuity of the Legislative Authority

Austin has described a hierarchical system of law with a sovereign who is factually identifiable and whose commands are habitually obeyed. However, the problem with this idea is that it is not clear who the sovereign is (necessarily) in cases where the sovereign changes for example as Austin’s description of the sovereign does not actually make it clear how legislative authority continues from one person to the next or one institution to the next. For example, where a ruling sovereign passes away and a new one inherits the position or if there are elections and a new parliament is elected, there is no allowance for an instance where the bulk of the population will obey the new sovereign. This is as Austin only discusses “habitual” obedience, i.e. an obedience that has always been part of the behaviour of the bulk of the society. This makes it such that questions will arise as to whether the populations is going to have to continue being in habitual obedience to the older/preceding ruler (who, if dead, can no longer pronounce his commands) or will there have to be a new habit of obedience established for the new sovereign, who until he/it is habitually obeyed will not be a sovereign and thus will not have any legal legislative authority as he/she/it is not a sovereign. Hence, in Austin’s theory, allegiance to legislative authority seems to have gaps, which is a very serious weakness.

3.2 - The Problem of the Persistence of Law

As laws tend to be viewed by Austinians as commands of a determinate sovereign and thus all laws exist and are valid due to the authority and existence of this specific sovereign. Imagine that the sovereign that created this command/law has passed away or passed on, the questions arises as to whether the laws continue to exist considering the ones who commanded them no longer does. Austin suggests that the new sovereign affords the older laws his/her/its tacit consent and the laws will persist. However, in a systematically positivistic system, the new sovereign (which is not clear can exist due to the problem stated in 3.1 above) has to actually make a command as to the

⁹ H.L.A. Hart, *The Concept of Law*, 2nd Ed., Clarendon Law Series, Oxford University Press, 1994, p.18

existence of such a tacit consent. This, however, will be a problem because in most legal systems, the persistence of law is presumed by custom without requiring new sovereigns to go through a process of validating older laws as it is assumed that they are valid.

3.3 - The Problem of the Illimitability of the Sovereign

Hart points out that a sovereign as per Austin is not bound by any law or to any other sovereign. In short, a sovereign is illimitable in his/her/its power and Hart argues that in any Parliamentary system (and even in most monarchic systems) this theory of the scope of law cannot work as even the law-makers are bound by some laws. Although Hart did not develop the next argument that is going to be made in this paragraph, it is worth noting under this heading. Sovereigns tend to be bound at least by the rules which make up constitutions. Austin disregards constitutional law as law not properly so called but in so doing, makes a mistake as constitutional rules all clarify that legislators are subject to the law and this is in fact an important feature of legislative authority.

3.4 - The Problem of the Variety of Laws

According to Hart and Kelsen, Austin's failure to recognise various types of laws is a fatal blow to his theory. For example, Kelsen argues that contract law can be made to fit with an imperative law model and yet, Austin considers this type of law as expository matter. Hart on the other hand went further and said that there are many varied areas of laws and on a conceptual point of view each type has a different way of being defined and applied. He goes on to then point out that Austin's penal code as being imperative system is not complete or even desirable. Hart's view is that Austin is wrong to point that a law is not in effect until a sanction is in place and he further shows that there is a difference between following a habit and having legal obligations emanating from legal rules.

3.5 - The Treatment of International Law as Positive Morality as a Problem

This was not an issue Hart raised but quite similar to the issue of constitutional law as discussed above. Like constitutional law, for Austin, international law is a matter of positive morality and thus International Law is not law. Austin's reason for this statement was based on the idea that there is no determinate sovereign that can make the commands that make international law. He also does not recognise custom as a source of law which also makes it impossible in his conception of law to recognise international law as law.

However, in practice, laws can be said to exist and be valid in the international arena based on customs and treaties.

3.6 - The Problem of the Indivisibility of the Sovereign/ Legislative Authority

Another criticism Hart did not raise but is growing in importance, focuses on the issue that the sovereign has to be indivisible. This idea does not work in states with federalist governments such as the U.S.A etc. or in other parliamentary democracies that have devolved power in a bid to decentralise authority in law-making (see devolution in the United Kingdom). Quite often in such systems there are multiple law-making bodies and this type of system cannot be reflected in the view of the central and indivisible sovereign as described by Austin.

3.7 - The Problem of the Generality of Commands that are Law

Austin allows for judicial law making based on the idea of delegated authority however, Austin has not considered the fact that this idea contradicts the nature of judgements in judicial law making which tend to be more specific rather than general when ordering individuals by law to act or forbear from acting in a certain way. Despite the fact that this is a specific command, this is still a law in this case.

Concluding Note

In spite of Hart's (and other) criticisms levelled against Austin's theory, this theory has had quite wide-ranging influence on the works of numerous influential jurists, including the works of Hart. Austin's theory is indeed an important part of the study of legal theories and it is one of the most systematic and thorough analyses of law. Furthermore, this theory is not without its supporters. The fact that there are numerous criticisms to be made about this theory does not mean that it is all wrong. Needless to say, certain elements of the theory have influenced or are part of other theories including (arguably) Hart's theory of law. ■