



## About John Austin Analytical School of Legal Jurisprudence “The Austinian Positive Theory of Law”

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### Abstract

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 Jeremy 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.

The legal positivist holds that only positive law is law; and by "positive law" he means legal norms by authority of the state. Nothing else is "law" to him, even though he may recognize other normative orders such as the religious or moral orders, or etiquette. Furthermore, everything thus created by state authority is law to the positivist, even though he may deplore the state of the law and seek to change it. The name "legal positivism," incidentally, appears to be preferable to "analytical jurisprudence" or "analytical positivism," which are often used, especially in connection with John Austin's work.

**Keywords:** Austin and, bentham’s positivist school main points of legal positive school

### Introduction

John Austin who pointed out that law cannot be defined by the inclusion of any ideal of justice and that law must be determined by reference to its source, i.e., the sovereign: "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a body of sovereign persons. And the sovereign is defined as a "determinate humane superior, not in a habit of obedience to a like superior," who receives "habitual obedience from the bulk of a given society. Thus the command of the sovereign, under threat of sanction, is law according to Austin <sup>[1]</sup>.

The version of legal positivism to be developed later in the altered form of analytical jurisprudence comprises the view that law is the command of a sovereign or, in simpler terms, a command theory of law. Bentham and Austin began with concepts they found in the political philosophy of Bodin and Hobbes who looked at sources of political authority and political obligations in terms of a sovereign giving commands <sup>[2]</sup>. A sovereign is not the one who gives commands according to divine or natural law and determines what we should do <sup>[3]</sup>.

A sovereign is identified by the fact that others show obedience to him, and his commands are the facts which we refer to as "law" <sup>[4]</sup>.

### Concept of austin’s positive and command theory

Austin, he proposed that whether law is "just" (and therefore, in the view of some, "natural") or "unjust" depends on criteria not capable of scientific cognition. Law is enacted for a certain purpose, which the lawmaker, in performing his political task no doubt regards as a good one, but no objective value judgment can be rendered in regard to this purpose, and hence in regard to the law as the social technique to accomplish this purpose. Rather, law like the norms of any normative order, is either valid or not, regardless of whether we like its contents <sup>[5]</sup>. Thus the validity of a legal norm depends, as Austin knew, on its source; it is not a "sovereign" to whom we must look,

however, but rather to the legal order itself. It is the legal order that determines the validity of a legal norm <sup>[6]</sup>.

Nature of law, "properly so called" in relation to law that is not, or the law, "improperly so called", (strict) positive law as a matter of general jurisprudence, the principle of utility, positive morality and it’s connection with God's and positive law, the concept of sovereignty, and the sources of law <sup>[7]</sup>.

According to Austin, "law, properly so called" comprises commands, whereas "law, improperly so called" does not. The first group of rules includes (1) God’s law; (2) positive law strictly so called and (3) individual rules of positive morality. The second group includes (1) other rules of positive morality based on sentiments or opinions and (2) metaphorical or figurative rules. Positive law is related in the way of resemblance, or by close or remote analogies, to other rules, as follows: in the way of resemblance, it is related to the law of God; in the way of resemblance, it is related to those rules of positive morality which are laws properly so called; by a close or strong analogy, it is related to those rules of positive morality which are laws set by opinion; and by a remote or slender analogy, it is related to metaphorical or figurative rules <sup>[8]</sup>.

The aim of his research was to determine the essence or nature which is common to rules properly so called; in other words, to determine the nature of a law imperative or proper, and to determine the respective character of the remaining four kinds of rules. In that regard, Austin determines the subject of jurisprudence research as research of positive law, determining the element of positivity and its relation to other objects or rules, and the rational elements in positive rules, which is the main or predominant element. Determining the nature of a law imperative or proper, he implicitly determines the nature of command and distinguishes: (1) commands as laws or rules and (2) commands as merely occasional or particular. Determining the nature of a command, he fixes the meanings of the terms which the term "command" implies, namely: (1) sanction;

(2) enforcement of obedience; (3) duty or obligation; and (4) superior and inferior<sup>[9]</sup>.

Also, God's law is divided into two kinds: (1) the revealed or expressed and (2) the unrevealed or tacit rules. Concerning the tacit law of God, Austin introduces three theories or three hypotheses on the nature of the signs or index: (1) the pure hypothesis or theory of general utility; (2) the pure hypothesis or theory of a moral sense, and (3) a hypothesis or theory mixed or compounded with the others. However, as Austin further notes, the divine law is the measure or test of positive law and morality in that sense that, law and morality, in so far as they are what they ought to be, conform, or are not repugnant, to the law of God. The divine law, positive law, and positive morality, are mutually related in various ways<sup>[10]</sup>.

### **Rationale Behind the Concept of the State: In View of Positive Law Thinkers**

Positive law thinkers, especially those belonging to the Analytical School, provide a clear and authoritative explanation for why the State is necessary. Their rationale is rooted in the belief that law exists only when it is created, commanded, and enforced by a sovereign authority. According to this view, the State is indispensable because without a sovereign, law would have no validity, certainty, or enforceability<sup>[11]</sup>.

The core justification offered by positive law thinkers is that the State is the ultimate source of legal authority. John Austin, the pioneer of the command theory, argued that law is a command issued by a sovereign and backed by sanctions. This means that law cannot exist in a vacuum; it requires a supreme political authority capable of issuing binding rules and ensuring obedience. Thus, the existence of the State becomes a logical necessity for the existence of law itself<sup>[12]</sup>.

Positive law thinkers also justify the State on the ground of social order and predictability. In the absence of a sovereign authority, society would fall into uncertainty and irregularity, as individuals would follow personal preferences rather than uniform rules. The State provides a structured framework of legal norms, allowing citizens to anticipate consequences, plan their actions, and lead a stable social life. Law, therefore, acts as an instrument of social control, and the State is the institution entrusted with this function<sup>[13]</sup>.

Another important rationale is the enforcement of rights and duties. Positive law thinkers maintain that rights do not exist merely because they are morally desirable; they exist because the State recognizes and protects them. Similarly, duties are meaningful only when the sovereign enforces them. This view positions the State as the central authority responsible for maintaining justice, resolving disputes, and preventing private retribution<sup>[14]</sup>.

Furthermore, the State is considered essential for maintaining the unity and supremacy of law. Without a sovereign power to declare what the law is, multiple interpretations and conflicting standards would emerge, leading to disorder. The State, through its sovereign authority, ensures uniformity, consistency, and hierarchy in the legal system. Thus, from the perspective of positive law thinkers, the rationale behind the concept of the State is grounded in authority, order, enforceability, and the need for a supreme source of law. The State is not just a political

institution; it is the very foundation upon which the entire legal system rests<sup>[15]</sup>.

### **Joseph Raz Criticise the role of coercion in positive theory of law**

Joseph Raz. On the one hand, as we all knew by the 1960s, law cannot be thought of as a "coercive order." That explanation is crude and childish: Coercion is almost the furthest thing from law. On the other hand, this insight nonetheless leaves the nagging question of why people very often in fact do seem to follow legal rules. If we think hard enough, we must eventually conclude the explanation is that law must be some other kind of "norm": that is, some other kind of "reason" on action<sup>[16]</sup>.

A significant part of both H.L.A. Hart's and writings had to do with the "normative" aspect of law; that property law is said to have – and that is not the prospect of coercion – which makes people feel they should obey it. Professor Raz, a legal philosopher at both Columbia University Law School and, like Hart and Dworkin, Oxford, has like those writers devoted quite a lot of time to thinking about what kind of norm, or reason for action, law could be, given that it does not involve the "threat of evil<sup>[17]</sup>."

One of the arguments had made against the necessity of coercion to law is that the "coercive model" does not explain the "internal perspective," by which people supposedly feel an obligation to comply with legal rules. Recall that in the views of both Jeremy Bentham and John Austin, "to be under an obligation" meant the same thing as "to face the possibility of punishment." He argued law must be viewed as more than just a predictive enterprise by which we say merely that "If a person does X, then Y will happen to him." That view reflects, he said, an "external perspective," which is insufficiently explanatory<sup>[18]</sup>.

### **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<sup>[19]</sup>, 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<sup>[20]</sup>, 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 <sup>[21]</sup> 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 <sup>[22]</sup>, 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* <sup>[23]</sup>, where 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.

### Conclusion

In conclusion, John Austin's Positive School of Jurisprudence provides a clear, precise, and systematic understanding of law by separating law from morality, religion, and custom. According to Austin, law is a command of the sovereign, backed by sanctions, and obedience to such commands is ensured through fear of punishment. This command theory brought certainty and analytical clarity to legal studies and helped establish jurisprudence as a scientific and logical discipline.

Austin's emphasis on sovereignty, authority, and sanctions strengthened the role of the state in law-making and highlighted the importance of legal certainty and predictability. Although his theory has been criticized for ignoring customs, judicial creativity, and modern democratic systems, it laid the foundation of analytical positivism and influenced later jurists like H.L.A. Hart.

Thus, despite its limitations, Austin's Positive School of Jurisprudence remains a cornerstone in the study of legal theory, as it provides a structured framework to understand the nature, source, and authority of law in a modern legal system.

### References

1. Joseph Raz. *The Authority of Law*. Andrew Stumpff Morison, Held on (Michigan), 2016. available at <<https://ssrn.com>>
2. Damir banovic. *The empirical –rationalist legal positivism* (Unpublished Ph.D. thesis, University of Sarajevo-Faculty of law), 2018.
3. Austin. "The province of jurisprudence determined" Cambridge university press, 1831.
4. Reginald Parker "Legal Positivism" *Notre Dame Law Review*, 1956.
5. Austin. *The Province Of Jurisprudence Determined* (Camp bell 5th ed., with notes of John Stuart Mill), 1885.
6. Austin. *The Province Of Jurisprudence Determined* 192 (Camp bell 5th ed., with notes of John Stuart Mill) 1885.
7. James William Harris ( *Law and legal science – An inquiry into the concepts legal rule and legal system*. Oxford: Clarendon Press28), 1979.
8. *Ibid*, P.30
9. *Ibid*.
10. Reginald Parker "Legal Positivism" *32 Notre Dame Law Review* 35, 1956.
11. *Ibid*.
12. Austin. "The province of jurisprudence determined" John, Cambridge university press, 1831, 322-373.
13. *Ibid*.
14. *Ibid*.
15. *Ibid*.
16. Damir banovic. *The empirical –rationalist legal positivism* (Unpublished Ph.D. thesis, University of Sarajevo-Faculty of law), 2018.
17. *Ibid*.
18. *Ibid*.
19. Damir banovic, *The empirical –rationalist legal positivism* (2018) (Unpublished Ph.D. thesis, University of Sarajevo-Faculty of law).
20. *Ibid*.
21. Joseph Raz. *The Authority of Law*. Andrew Stumpff Morison, Held on (Michigan), 2016. available at <<https://ssrn.com>> (4 Nov 2025)
22. *Ibid*.
23. Joseph Raz. *The Authority of Law*. Andrew Stumpff Morison, Held on (Michigan), 2016. available at <<https://ssrn.com>> (4 Nov 2025)
24. *AK Gopalan v. State of Madras*, AIR 1950 SC 27.
25. *RK Garg v. Union of India*, AIR 1976 SC 1559.
26. *EP Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.
27. *State of Bombay v. F.N, Balsara*, AIR 1951 SC 318.
28. *Verghese v. The Bank of Cochin*, AIR 1980 SC 470.