JURISPRUDENCE

TOPIC:
The Concept of Classical Positivism
in the area of
Analytical Jurisprudence

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ANALYTICAL POSITIVISM

The French mathematician and philosopher Auguste Comte (1798-1857), who may be regarded as the philosophical founder of modern positivism, distinguished three great stages in the evolution of human thinking. First stage, in his system, is the theological; stage, in which all phenomena are explained by reference to supernatural causes and the intervention of a divine being. The second is the metaphysical stage, in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things and as constituting the real moving forces in the evolution of mankind. The third and last stage is the positivistic stage, which rejects all hypothetical constructions in philosophy, history, and science and confines itself to the empirical observation and connection of facts under the guidance of methods used in the natural sciences1.

The celebrated law of the three stages, insofar as it characterizes positivism as the last and final stage in the development of human thought, is open to grave objections. It serves, however a useful purpose in describing the movement and general direction of Western philosophy from the early middle Ages to the beginning of the twentieth century. As far as the philosophy of law during the middle Ages was seen that the interpretation of law during the Middle Ages was strongly influenced by theological considerations: law was brought into close connection with divine revelation and the will of God. The period of from the Renaissance to about the middle of the nineteenth century, other hand, may be described as the metaphysical era in legal philosophy.

All the constructions were metaphysical in a broad sense inasmuch as they go beyond the physical appearance of things and proceed from the assumption of invisible forces and

1 Comte, the Positive Philosophy, transl. and condensed by H. Martineum (London, 1875)
ultimate causes that are to be sought behind the facts of immediate observation.

In the middle of the nineteenth century a strong countermovement against the metaphysical tendencies of the proceeding centuries set in. This movement may be described by the loose but comprehensive term positivism. Positivism is a scientific attitude rejects a prior speculations and seeks to confine itself to the data of experience. It turns away from the lofty heights of the spirit and restricts the task of scholarship to the analysis of the “given”. It refuses to go beyond the phenomena of perception and denies the possibility of a comprehension of nature in its essence. The basis for positivism had been prepared by the immense success achieved in the domain of the natural sciences during the first half of the nineteenth century. This success brought about a strong temptation to apply the methods used in the natural sciences to the realm of the social sciences. A careful observation of empirical Facts and sense data was one of the principle methods used in the natural sciences. It was expected that in the social sciences this same method would prove to be highly fruitful and valuable.

In the twentieth century, positivism assumed a new radical shape in the logical positivism of the so-called Vienna Circle. This circle was formed after World War I around Moitz Schlick and Rudolf Carnap and found a considerable number of adherents in England, the United States, and the Scandinavian countries. The epithet logical was annexed to the term positivism by the members of the Circle because they wished to use the discoveries of modern logic, especially symbolic logic, in their analytical work. Altogether neither all of the original members of the Circle nor the later converts adhered to an identical set of philosophical convictions, certain basic ideas and postulates are typical for logical
positivism as such. In the first place, it rejects all dogmatic and speculative assertions in philosophy. Statements about reality (or more precisely, about phenomena which appear to us as reality) are considered valid only on the basis of tested and verified sensory experience. Second, a deprecatory and almost contemptuous attitude is taken by the adherents of this creed towards the development of philosophy from Plato to the modern era. The majority of the great philosophers of Western civilization are regarded by them as metaphysicians and purveyors of nonsense. Third, while the logical positivism assign to science the task of description and the analysis of phenomena, they limit the task of philosophy to the logical classifications of ideas. In the words of Schlick, “it is the peculiar business of philosophy to ascertain and make clear the meaning of statements and questions.”

Only logical questions are regarded as philosophical questions, and the building of a logical syntax is described as one of the highest tasks of philosophy. Fourth, the logical positivism hold that ethical imperatives are merely “ejaculations” or “emotive” utterances which are cognitively worthless. Inasmuch as the objective validity of a value or ethical norm cannot be empirically verified, it cannot be meaningfully asserted. It is not, according to this view, the task of ethics to provide guidance to people as to how they ought to live. At best, its task can be to explain causatively why people hold, accept, or reject certain ethical views.

Beginning with the second half of the nineteenth century, positivism invaded all branches of the social sciences, including legal science. Legal positivism shared with positivistic theory in general the aversion to metaphysical speculation and to the search for ultimate principles. It rejected any attempt by jurisprudential scholars to discern and articulate an idea of law.

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2 Moritz Schlick, “Positivism and Realism”, p.86
transcending the empirical realities of existing legal systems. It sought to exclude value considerations from the science of jurisprudence and to confine the task of this science to an analysis and dissection of positive legal orders.

The legal positivist holds that only positive law is law; and by positive law he means those juridical norms which have been established by the authority of the state. In the words of the Hungarian jurist Julius Moor, Legal positivism is a view according to which law is produced by the ruling power in society in a historical process. In this view law is only that which the ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance. The legal positivist also insist on a strict separation of positive law from ethics and social policy.

Legal positivism has manifested itself most conspicuously in a jurisprudence of an analytical type, here designated as analytical positivism. Analytical positivism takes as its starting point a given legal order ad distills from it by a predominantly inductive method certain fundamental notions, concepts, and distinctions of other legal orders in order to ascertain some common elements. As Julius Stone has pointed out, analytical positivism is primarily interested in “an analysis of legal terms, and an inquiry into the logical interrelations of legal propositions.” In this fashion it provides the science of law with an anatomy of a legal system.

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4 The province and function of law (Cambridge, Mass 1961) p. 31.
Bentham, the father of Positivism, enunciated the theme that the laws are the work of human minds, and they can be whatever those which minds wish to make them⁵.

It was John Austin (1790-1859), an English jurist, who became the founder of the analytical of law. Austin set himself the task of making a beginning with the analysis of the principle concepts of English Law. Before doing so he felt it necessary to demarcate the province of law and to distinguish it from what is ought to be.

Like Bentham, Austin was an adherent of the utilitarian philosophy of life. The principle of utility appeared to him to be the intimate test of law.⁶ Like Bentham, Austin believed that “Law” is only an agreement of individual laws. In his view, all laws are rules the majority or which regulate behavior. These are either directives of those imposed by general opinion. A directive, whether general of particular, is the expression of intimation of your wish ‘that another shall do or forbear, issued in the form of a command. Accordingly, a law in its most comprehensive signification is a ‘rule laid down for the guidance of an intelligent being by an intelligent being having power of him’.

According to Austin the matter of Jurisprudence is positive law: law simply and strictly so called or law set by political superior to political inferiors.

But positive law (or law simply so called) is often confounded with objects to which it is related by resemblance and with objects to which it is related in the way of analogy: with objects which are also signified, properly and improperly by the large and vague expression law.

⁵ M. P. Tandon’s Jurisprudence- Legal Theory
In the largest meaning which it has, without extension by metaphor or analogy, the term law embraces the following objects: - law set by God to his human creatures and laws set by men to men.

Laws set by men to men are of two leading or principal classes. Some are established by superiors, sovereign and subject: by person exercising supreme and subordinate government in independent nations or independent political societies.

Austin distinguished between what he called ‘laws properly so called’ and ‘laws improperly so called’. The key to a law ‘property so called’ lies in obligation. An Obligation exists when another has the power and purpose of inflicting an evil on any actor, who fails to confirm to the desires conduct. This other may be God, or human being acting as political superiors i.e., a sovereign person or body of persons in an independent political society, or private persons acting pursuance of rights conferred upon them by political superiors.

Laws properly so called (positive law) – Laws set by political superiors to their subordinates in their legal rights.

Improper law - rules of the club, laws of fashion, law of natural science, rules of international law etc.

The latter he calls by name of ‘Positive morality’ the science of jurisprudence is concerned with positive laws, strictly so called, as concerned without goodness or badness.


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7 M. P. Tandon’s Jurisprudence- Legal Theory
8 P. S. Atchten Pillai, Jurisprudence and Legal Theory.
Every directive is a command, the threat of evil is a sanction and the party commanded and threatened is under an obligation or duty. Duty and sanction are correlative and fear of sanction is the motive for obedience.

A command may be ‘particular’ or ‘general’”. Particular command is addresses to one person or group of persons whereas general commands are addresses the community at large and enjoin classes of acts and forbearances. General command are continuing commands. Any commander who receives ‘habitual obedience’, is sovereign in that society.

Laws ‘properly called’ are subdivided by him into laws set by God, Divine Laws and Laws set by men to men acting as political superior. To every law set by men to men he applied the term ‘positive law’ or ‘law simply and strictly so called’ so as to distinguish them from the laws of God. ‘Positive laws’ are subject matter of jurisprudence. Separate from all these are laws set by men to men neither as political superiors, nor in pursuance of rights conferred upon them by such superiors, e.g., those set by a master to a servant or the rules of a club. They are still laws ‘property so called’ because they are commands, but he distinguished them from positive law by giving them the term ‘positive morality’.

Laws ‘improperly so called’ consist in the first place of ‘Laws by analogy’, i.e. law set and enforced by mere opinion, also somewhat confusingly termed as “positive morality”, - ‘positive’ so as distinguished them from the Laws of God, ‘morality’ so as to distinguish them from positive law or law strictly so called. Another subdivision included is ‘laws by metaphor’, which covered expression by the uniformities of Nature.

Major thrust in Austinian positive law was on separation of law from morals. As a corollary of it, he distinguished science of jurisprudence from ethics. Amos observed that a positive
law, as Austin has shown, must be legally binding through it may be unjust, “for him, command was the “key to the science of jurisprudence.

Salmond has criticized Austin’s theory of law which completely divests law from morality and held that law to be effective must have in it elements of ethics and justice.
Lon Fuller in United States said that the purpose of law is to subject human conduct to the governance of rules. The law, therefore, cannot be devoid of morality which includes values, ideals, natural law and notions of justice.

The German legal philosopher Gustav Radbruch has asserted that a purposive law can never be separated from justice and morality which are pre-conditions of a good law.
The school founded by Austin is variously called as ‘analytical’, ‘positivism’, ‘analytical positivism’ etc. Some of the jurists have objected to all the three terms. According to them, the word ‘positivism’ was started by Auguste Comte to indicate a particular method of study. Therefore, the word ‘positivism’ alone will not convey a complete idea of Austin’s School. The terms “Analysis” can not give separate identity to the school because it is applied to other schools also. Similarly, the terms, Analytical Positivism’ also creates confusion. Therefore, Professor Allen thinks it proper to call the Austin’s School as “Imperative School”.
Austin’s Conception of Law

Austin defined law as “a true laid down for the guidance of an intelligent being by an intelligent being having power over him.” He has divided law into two parts:

1. Laws set by God for men, and
2. Human Laws, i.e. laws made by men for men.

Human laws are further classified into Positive laws and other laws.

(a) Positive Laws. - these are laws set by political superiors as such, or by men not acting as political superiors but acting in pursuance of legal rights conferred by political superiors. Only these laws are the proper subject matter of jurisprudence.

(b) Other Laws. – Which are not set by political superiors or by men in pursuance of legal rights.

According to Austin, the study and analysis of positive law alone is the subject matter of jurisprudence and the chief characteristic of positive law are command, though not commands, may be included within the purview of jurisprudence by way of exception. The are as follows:

(1) Declaration laws – Law already in force.
These are nor commands because they are already in existence and are passed only to explain the law which is already in force.

(2) Laws of repeal - revocation
These are not commands but in fact they are the revocation of a command.

(3) Laws of imperfect obligation – No sanction
These are not treated as commands because there is no sanction behind them.
The function of jurisprudence, in the view of Austin, is the exposition of general notions and principles abstracted from positive systems of law. The more mature system of law, Austin pointed out, are allied by numerous uniformities and analogies in their conceptual structure; and it was the objective of general jurisprudence (as distinguished from national or particular jurisprudence) to elucidate these uniformities and analogies. “I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction. The task would involve an exposition of the leading terms of the law, such as Right, Obligation, Injury, Sanction, Punishment, and Redress. It would also entail, among other things, the categorization of rights, the classification of obligations, and the elaboration of various distinctions indigenous of legal systems.

The most essential characteristic of positive law, according to the Austinian doctrine, consists in its imperative character, Law is conceived as a command of the sovereign. “Every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. Not every type of command, however, was considered a law by Austin. Only general commands, obliging a person or persons to acts or forbearances of a class, merited the attribute of law in his opinion.

It was not necessary, in Austin’s view, that a command qualifying as a law must issue directly from a legislative body of the state, such as Parliament in England. It may proceed from an official organ to which lawmaking authority has been delegated by the sovereign.
Judge-made law, according to Austin, was positive law in the true sense of the term, since the rules which the judges make derive their legal force from authority given by the state. Such authority the state may be conferred expressly; ordinarily, however it imparts it by way of acquiescence. For, since the state may reverse the rules which he (the judge) makes, and yet permits him to enforce them by the power of the political community, its sovereign will that his rules shall obtain as law is clearly evinced by its conduct, though not by its express declaration. The norms enunciated by the judges comply with the perquisite most essential to positive law in the Austinian sense, namely that the law be set by a political superior for the guidance of political inferiors. This prerequisite is not fulfilled, on the other hand, in that branch of the law which is called international law. True to his own premises, Austin therefore denied the character of law to the rules and principles of international law. In his view, they should be looked upon merely as rules of “positive morality”, a branch of norms regarded by Austin as “rules set or imposed by opinion”.

A few words might be said about the Austinian conception of justice. He did not deny that a positive law could be “unjust” in a loose sense of the term if measured by a standard extraneous to it, as for instance the law of God. This did not mean, in his opinion, that a human law conflicting with the law of God was not obligatory or binding. The positive law, he argued, carried its standard in itself, and a deviated from, or disobedience to, positive law “is unjust with reference to that law, though it may be just with reference to another law of superior authority. The terms just and unjust imply a standard, and a conformity to that standard and a deviation from it; else they signify a mere dislike, which it would be far better to signify by a grunt or a groan than by a mischievous and detestable abuse of articulate language. According to this view, a law which actually exists is a law, disregard of
which can never be legally justified, though it might be excusable from a purely moral point of view.

Austin’s theory of law, although it remained almost unnoticed during his lifetime, later gained a great influence on the development of English jurisprudence. The well-known treaties on jurisprudence by Thomas Erskine Holland, William Markby, and Sheldon Amos were based on the analytical method which Austin advocated in legal science, George W. Paton in Australia and Sir John Salmond in New Zealand published texts which, although making concessions to non-analytical theories of jurisprudence, bear the earmarks of the Austinian approach.

In the United States, John Chipman Gray, Wesly N. Hohfeld, and Albert Kocourek made contributions to analytical jurisprudence. Gray, in an influential work, modified the Austinian theory by shifting the seat of sovereignty in lawmaking from the legislative assemblies to the members of the judiciary. The law of the State or of any organized body of men, he maintained, “is composed of the rules which the courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties.” It was his opinion that the body of rules the judges lay down was not the expression of preexisting law but the law itself, that the judges were the creators rather than the discoverers of the law, and that the fact must be faced that they are constantly making law ex post facto. Even the statutory law laid down by a legislature gains meaning and precision in his view, only after it has been interpreted by a court and applied in a concrete case. Although the judges, according to Gray, seek the rules laid down by them not in their own whims, but derive them from sources of a general character (such as statutes, judicial precedents, opinions of experts,
customs, public policies, and principles of morality), he law becomes concrete and positive only in the pronouncements of the courts. Judge-made law thus was to Gray the final and most authoritative form of law, and this conviction led him to the sweeping declaration that “it is true, in the Civil as well as in the Common Law, that the rules laid down by the courts of a country state the presents Law correctly.

**Criticism of Austin theory**

Austin’s theory has been criticized by many jurists. Some of the important criticisms against his theory are discussed below.

1. Custom ignored

Austin’s law as the command of the sovereign is not warranted by historical facts. In early times, instead of commands of any sovereign, customs used to regulate the conduct of people. Even after coming into existence of the State, customs continued to regulate the conduct of people, Austin has totally ignored the importance of customs.

2. Judge-made laws

In Austin’s theory judge-made laws find no place. In applying precedents and in interpreting the law, judges make laws which should also have been considered.

3. Law conferring privileges

The law which is purely of a permissive character and confers only privileges is not covered by Austin’s definition of law. An Example can be taken of the Wills Act which lays down the method of drawn a testamentary documents not been included in Austin’s definition.
4. Conventions
According to Austin’s definition, conventions which operate imperatively, through not
enforceable by Court, shall not be called law, although they are law and are a subject-matter
of study in jurisprudence.

5. International Law
Austin puts International Law under positive morality along with the law of honour and the
law of fashion. According to Austin’s definition, a very important branch of law has been
excluded from the study.

6. Rules set by private persons
According to Austin ‘positive law’ does not includes within itself rules set by private
persons in pursuance of legal rights which is undue extension because their nature is very
vague and indefinite.

7. Command theory untenable
Professor Olivercrona has denied the applicability of the ides of command of law. He says
that a command is not identical with a declaration of will. According to him, a command is
always an act through which on person seek to influence the will of another, therefore, the
ides of command for law in the present systems of Government is completely untenable.

8. Artificial
Austin’s view that the command of the sovereign is law treats law as an artificial things an
ignores its character of spontaneous growth.
9. Sanction

According to Austin, it is the sanction alone which induces the man to obey law. This not the correct view.

10. Relation of law and morals overlooked

According to Austin, “The science of jurisprudence is concerned with positive law, or with laws strictly so called, as considered without regard to their goodness or badness” which means that law is not concerned with morals. This is not true because law is not an arbitrary command but it is a growth of an organic nature.

The Pure Theory of Law.

Austin believed that the proper purpose or end of government was “the greatest possible advancement of human happiness”, and he insisted that the principles of utility, thus formulated, was to be the guiding rationale in the making of law by legislatures. By raising the principle of utility to the level of an authoritative test to control the “science of legislation,” Austian imparted an evaluative element to what he considered a scientific endeavor. In this sense, it might be said that a remnant of “natural-law”, thinking remained inherent in Austin’s theory of law.

It was the objective of Hans Kelsen (1881-1973) to purify the science of law from all evaluative criteria and ideological elements. Justice, for example, was viewed by Kelsen as an ideological concept. Justice, to him, was an “irrational ideal” representing the subjective predilections and value preferences of an individual or group. The usual assertion, he wrote, that there is indeed Such a thing is justice, but that it cannot clearly be defined, is in

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9 John Austin, The Province of jurisprudence Determined, p.59
itself a contradiction. However indispensable it may be for violation and action of men, it is not subject to cognition. Regard from the point of view of rational cognition, there are only interests, and hence conflicts of interest. The theory of law, Kelsen Maintained, cannot answer the question of what constitutes justice because this question cannot be answered scientifically at all. If justice is to be given any scientifically meaningful denotation, it must be identified with legality. According to Kelsen, it is “just” for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. “Justice’ means the maintenance of a positive order by conscientious application of it.

Kelsen’s methodological objectives did not stop with the elimination of political and ideological value judgments from the science of law. He wished to go a step further by keeping legal theory free from all extraneous, non legal factors. “Uncritically”, he said “the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. He sought to restore the purity of the law by isolating those components of the work of a lawyer or judge which may be identified as strictly “legal”.

According to Kelsen’s pure theory of law, the objects of the science of law are those norms “which have the character of legal norms and which make certain acts legal or illegal”. By the term norm, Kelsen means that “something ought to be or ought to happen, especially that a human being ought to behave in a certain way.” This definition of norms is, however, also applicable to moral and religious norms. It is characteristics of a legal norm, according to Kelsen, that is prescribes a certain human behavior by attaching to the contrary behavior as coercive act as a sanction. The pure theory of law considers the element of coercion as an

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11 Kelson, The Pure theory and analytical jurisprudence.
essential ingredient of the concept of law. “Law is a coercive order of human behavior. Kelsen holds that the coercion exercised by the legal order is not primarily a psychological one. The sanctions used by the law are outward sanctions consisting in the forcible deprivation of life, freedom, or property, or the imposition of some other measure regarded as an evil by the affected individual.

A legal norm is valid if it has been authorized by another legal norm is a higher rank. Only norms can validate a source of law, not social facts like popular acceptance or actual use. Thus, an administrative order is valid is authorized by a structure, a statute is valid if it is corresponds with the provisions of the constitution. The constitution, in turn, is valid if its making was authorized by an earlier constitution. But if a constitution is, for example, the first constitution of a new country, there is no positive source of law from which it can derive its validity. In that event, Kelsen resorts to the notion of a “basic norm”, which is norm presupposed by legal thinking and not an actual norm, and which runs as follows: Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution”. The basic norm is considered by Kelsen the ultimate for the validity of all norms that belong to the same legal system. From the validity of a legal norm Kelsen distinguished it effectiveness. Effectiveness means that a norm is actually obeyed and applied, while validity means that it ought to be obeyed and applied. In his earlier validity writings, Kelsen took the position that the validity of a legal norm was not conditioned by its factual effectiveness as long as the legal system as a whole was, for the most part, observed. In his later writings Kelsen assumed a closer relationship between validity and effectiveness by declaring that “a norm that is not obeyed by anybody anywhere, in other words, a norm that not effective at least to some degree is not regarded as
a valid norm required authorization by a higher norm, a minimum if effectiveness was a further condition of its validity.

According to Kelsen, the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. At the apex of the structure stands the basic norm postulating fidelity to the constitution. The constitution (which may be written and unwritten) sets the framework for the statutory and customary law. These two forms of law, in turn, prescribe rules for the exercise of judicial, administrative, and private activity. When the judiciary applies the statutory or customary law in a litigated case, it concretizes the general norms controlling the case and renders a decision which constitutes an "individual norm". Such a norm is directed at the single individual or group of determinate persons and provides a sanction (such as an award or damages) or other disposition designed to terminate the litigation. Individual norms are also set by administrative organs which apply general norms in a case resulting in an administrative decree or other concrete disposition. Such individual norms are considered by Kelsen “law” in the same sense as the general norms on which their creation is based.

In the view of Kelsen, “most legal norms both apply and create law”. A legislative body unquestionably fashions new law, but in doing so it must remain within the framework of, and thus apply, the provisions of the constitution. An adjudicating authority determining whether and in what way a general norm is to be applied in a particular case is engaged in a process which is partly declaratory and partly creative. The judge (or other law–administering official) must discover the existing law relevant to the indisposition of the case, but in establishing the presence of the conditions calling for the application of this
law and decreeing a sanction, the judicial decision has a constitutive character. In certain spheres of the law, Kelsen points out, a private transaction laying down norms for the mutual conduct of the contracting parties may stand between the general law of the state and the judicial decision. Here again, the norms set by private parties constitute partly an application of the general rules of contract law and partly the creation of new relations between the parties. The final stage in the descending process of applying, concretizing, and individualizing legal norms is the execution, the carrying out, of the compulsive act decreed by a court or administrative agency.

Law, according to Kelsen, is a specific technique of social organization. “The concept of law has no moral connotation whatsoever”, its decisive criteria is “the element of force”. The mechanical apparatus of the law is capable of protecting any political, economic, or social setup. “Any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm.”

Kelsen also asserts the identity of State and law. As a political organization, the State is a legal order, and every State is governed by law. The expression “government of laws” is therefore a pleonasm to Kelsen. The state is nothing but the sum total of norms ordering compulsion, and it is thud coextensive with the law.

Kelsen’s doctrine is perhaps the most consistent expression of positivism in the legal theory. For it is characteristic of legal positivism that it contemplates the form and structure of law rather than its moral and social content, that it views the institution of law without regard to the justness or unjustness of its norms, and that it endeavors to segregate jurisprudence as
completely as possible from other disciplines, such as psychology, sociology, and ethics. For purposes of analysis at least, Kelsen treats the law as though it were contained in a hermetically sealed container.

Neo-Analytic and Linguistic Jurisprudence

While the influence of the Pure Theory of Law has recently suffered a decline in most of the countries in which it was strongly in vogue at an earlier time, there has arisen, in the second half of the twentieth century, a neo-analytic movement which has exhibited particular strength in the Anglo-American orbit but has also extended its influence to other parts of the world. It is characteristic of many representatives of this movement that they have abandoned the monolithic exclusivity with which earlier analytical jurists sought to confine the province of jurisprudence to the exegesis of basic legal notions and concepts; they have admitted the legitimacy of other ways to deal with the phenomenon of law, such as the sociological interpretation of the natural-law philosophy. Furthermore, a substantial number of these jurists have made use of the modern sharpened number of these jurist have made use of the modern sharpened tools of logic, including symbolic logic and computer science, while others have strongly relied on the findings and attainments of twentieth-century linguistic science. Last but not least, the new analytic jurist have subjected the judicial process to a more searching and subtle investigation than was accomplished by their predecessors.

These tendencies become manifest in the work of the most influential exponent of the new movement, The British legal philosopher Herbert L. A. Hart (b. 1907). The pronounced analytic strain in harts thinking is apparent in his thesis that the key to the science of jurisprudence must be found in the combination of two categories of rules, which he calls
primary and secondary. Primary rules are standard modes of behavior which obligate the members of society to perform, or abstain from, certain types of action. These rules spring from the needs of the society and are designed to guarantee a satisfactory way of life. The roots of their binding force lie in their acceptance by the majority, and strong pressures for their observance are exerted by the majority upon noncooperative members of the society\textsuperscript{12}.

According to hart, a develop system of law must also have a set of “secondary” rules which establish and official machinery for the recognition and enforcement of the primary rules. First of all, they serve to identify the valid and subsisting rules of the system in some authoritative fashion. Second, they make provision for formal and regularized procedure designed to modify the primary rules. Third, they guarantee the implementation of the primary rules by setting up elaborate processes of adjudication and enforcement.

It is obvious that this view of the law avoids the one-sidedness of the Austinian command theory and seeks to construct a bridge between the imperative and sociological conceptions of law. Hart also attempts to mitigate the sharp confrontation that has often characterized the relation between legal positivist and believers in natural law. He concedes to natural-law theory that “there are certain rules of conduct which any social organization must contain if it is to be viable” and that such rules do in fact constitute a common in the law of all societies. He has, on the other hand, strongly defended the positivistic axiom that the duty of “fidelity to law” embraces all rules which are valid by the formal test of a legal system, although some of them may be decisively repugnant to the moral sense of the community.

Professor hart has also subjected the Austinian concept of sovereignty to a searching critique,

\begin{footnote}
\textsuperscript{12} H.L.A. Hart, The concept of Law, p.77
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written extensively on the philosophy of the criminal law, and engaged in a thorough
analysis of legal method and the judicial process. His writings have produced extensive
comments and reaction throughout the Anglo–American legal orbit.

Whether or not Ronald M. Dworkin (B. 1931) may be classified as a neo-analytical jurist is
some what doubtful, since he has been a critic of legal positivism and has also written about
problems generally deemed outside the scope of analytical jurisprudence. A justification for
such a classification may be found in the fact that Dwarkin has concerned himself
extensively with an analysis of basic legal notions, such as “right,” “obligation,” “rule,” and
“principle.” He has argued that the absence of a well-circumscribed rule directing the
decision in a litigated case does not confer upon the judge a discretion to make new law in
accordance with his personal views of good policy. He is bound in such a case to follow
general principles of justice and fairness recognized by the social order which, although they
have found no clearly articulated and formalized expression in the positive law, impose
substantial limits on judicial freedom. In taking this views, Dwarkin has acknowledged the
importance of non formal sources of the law.

It was stated earlier that neo-analytic jurisprudence has utilized the sharpened tools of
twentieth century logical science and has also placed strong reliance on semantic research.
Systems of legal logic characterized by an extensive use of mathematical symbols were
produced by Ulrich Klug. A German teacher of law, and Ilmar Tammelo, who holds a chair
of legal philosophy in Austria after having taught for many years in Australia. Neither of
these two authors, however, questions the legitimacy of other approaches to jurisprudence.
Tammelo, for example, has supplemented his logical studies by through reflections on
The role of language in the law was emphasized in England by Glanville Williams (b. 1911) and in the United States by Walter Probert (b. 1925). Williams, in his semantic studies of the law, has dwelled extensively on the ambiguity of words and the emotive character of many legal term. He has taken the position that a great deal of confusion has been engendered by the use of legal concepts carrying many different meanings, that it was inadmissible to speak the “proper” sense of word, and that value-impregnated terms like “justice”, “wrong”, or “the rule of law” serve emotional rather than rational functions. Probert has stresses the need for “word –consciousness” on the part of lawyers, since he considers language “the major instrument of social control”. Norms and rules are inherently ambiguous, he asserts, and the heart of the common-law process in the courts is not rules, (although they play a part in it) but rhetoric. His semantic view of the law leads him to define justice as “the search for some verbal guide to aid in selecting among competing premises.

Modern analytic and semantic jurisprudence received a great deal of stimulation from the work of Ludwig Wittgenstein (1889-1951), an Austrian –born philosopher who later taught at the University of Cambridge and was able to influence trends of philosophical thinking in the Anglo-American orbit decisively. In his Tractatus Logico-Philosophicus, Wittgenstein undertook an analysis of language, a human enterprise which he described as a picture of the facts constituting reality. He declared that all of philosophy was criticism of language, that its purpose was the logical clarification of thoughts, and that was particularly important to elucidate the meaning of complex sentences and propositions by dissolving them into their elementary constituents (which depict simple facts). Wittgenstein rejected the idea that it
was the task of philosophers to offer explanations of workings of the universe, or to advice individuals or societies how to conduct their affairs. He did not deny that human beings are confronted with questions of ethics and value, but he deemed such question to be in the realm of mysticism, in which meaningful propositions cannot be expressed.

In a later work, the Philosophical Investigations, Wittgenstein repudiated many of the theorems set forth in the Tractatus. His interest shifted from a logical analysis of propositions and their meanings to a consideration of the ways in which language actually works. He declared in his later work that “the meaning of a word is its use in the language, and that philosophy may in no way interfere with the actual use of language; it can in the end only describe it. He expressed the hope that philosophical problems and riddles would completely disappear if this method was properly used.

The reason for Wittgenstein’s turn towards a pure form of a linguistic empiricism must probably be sought in the fact that the Tractatus still preserved elements of an idealized theory of language. The philosopher was admonished to discover the hidden logical structure of language and to improve semantic understanding by breaking propositions down into their basic components, presumably for the purpose of discerning their “true” meaning. Wittgenstein may have reached the conclusion that this mode of analysis, in view of the diverse ways in which words and concepts are used, leaves too much room for subjective idiosyncratic interpretations to serve as a proper basis of scientific method.

Much of what has been done in the field of analytic jurisprudence corresponds to the notion of philosophical activity which Wittgenstein advocated in the Tractatus. The analytical jurists have aimed at the clarification of legal concepts by dissecting them and reducing them
to their basic ingredients. the question might be asked what kind of a direction Jurisprudence would have to take if the “ordinary language” philosophy of the late Wittgenstein were to be accepted as its foundation. It Must be taken into account here that legal language contains many terms of a specialized, technical nature, although there are also broad, non technical terms (like justice, reasonableness, and morality) which are part of the common, colloquial vernacular. It has been suggested that the notion of “ordinary language”, does not exclude words which are characteristically employed in special disciplines or in the professions, as along as reference is made to their prevailing denotations. If this position is taken, the task of analytical jurisprudence, conceived as a branch of ordinary-language philosophy, would be reduced to the description of standard uses of legal terms and concepts.
Bibliography:


