Positive Law
A Brief Introduction

The theory of positive law is derived from the belief that law is simply what the political authority or lawmaker commands. Justice, then, means conformity to the law. Instead of law & justice being separate, as the naturalists proposed, supporters of positive law argue that they are identical. Therefore, the condition that human laws must conform to certain standards of morality and justice in order to be valid is abandoned. The only real morality is in human obedience to civil law.

The theory of positive law grew out of a reaction to the power and domination of the Roman Catholic Church during the Reformation. Under Henry VIII, the English parliament passed a number of statutes between 1529 and 1536 designed to strip the pope of his authority and spiritual jurisdiction within England. These laws included the confiscation of church properties and recognition of the crown as the head of both state and church in England. The belief in the supremacy of the crow and, later, Parliament and the separation of church and state gained acceptance. Secular authorities became empowered to enact laws governing spiritual matters and to impose constitutional restraint on lawmaking power. Previously, these restraints had relied on natural law. Unlike natural law, which was based on divine revelation and human reason, positively reflected the will of the crown and, later, Parliament.

As in natural law theory, philosophers played an important role in fully developing the theory of positive law. Prominent among them were Thomas Hobbes and John Austin.

THOMAS HOBBES

Among the earliest political philosophers supporting positive law was the Englishman Thomas Hobbes (1588 - 1679). For Hobbes, natural law was little more than a metaphorical justification for the claims of tyrants that their authority was based on eternal laws.

Natural laws - consisting of equity, justice, gratitude, and other such moral virtues - were not, according to Hobbes, laws at all but “qualities that dispose men to peace and obedience”. Not until such qualities were embedded in the commands of a sovereign authority would they become true laws. The weakness of natural law lay in its invitation to individuals to define its content according to the meaning it held for them. And, there was a need for a sovereign authority to ordain what was morally acceptable through binding civil laws, the violation of which resulted in punishment. Because Hobbes considered humans brutish and warlike he believed that leaving the control of human conduct to natural law opened the door to a violent and lawless society like the one he had lived in during the English Civil War 1642 to 1648.

Hobbes' theory of politics and law did not tolerate civil disobedience, except, perhaps, where the law sought to take away one's life. Obedience to human, or civil, law is part of the law of nature. Hobbes wrote:

... but every subject in a Commonwealth, hath covenanted to obey the civil law; either one with another, as when they assemble to make a common representative, or with the representative itself one by one, when subdued by the sword they promise obedience, and they may receive life; and therefore obedience to the civil law is part also of the law of nature.

Like all positivists, Hobbes proposed that the purpose of law, pure and simple, was the maintenance of order and strength in a commonwealth:

... law was brought into the world for nothing else, but to limit the natural liberty of particular men, in such manner, as they might not hurt, but assist one another, and joined together against a common enemy.

It is important to note that positivists believe that law could achieve its purpose without referring to morality. For most positivists, law (or Justice) and morality exist in splendid isolation.

1. Does positive law rely on natural law to give it meaning and force? To what degree?

2. Hobbes suggested that dictators could use natural law to justify their authority. How could it be argued that positive law could legitimize a dictatorship?

JOHN AUSTIN, JEREMY BENTHAM & UTILITARIANISM

John Austin (1790 - 1859), a prominent English jurist, was a main architect of modern positive law theory. In his lectures on jurisprudence, published in a book entitled *The Province of Jurisprudence Determined*, Austin claimed that the main purpose of government and law is the greatest possible advancement of human happiness. Austin's views were strongly influenced by *Utilitarianism*. Jeremy Bentham (1748 - 1832), founder of this theory, claimed that since humans are motivated by the desire to achieve pleasure and avoid pain, it made sense that laws should be directed toward producing "the greatest happiness of the greatest number" of people. In order to achieve this happiness, Austin argued, citizens must obey the laws made by governments and courts.
In Jeremy Bentham's view, law required:

- The existence of an authoritative body, such as Parliament or the courts, to which citizens are in a "habit of obedience";
- Legal pronouncements or commands, for example, statutes and common law, issued by the authoritative body to political inferiors;
- The imposition of a duty of obedience;
- Enforcement through the threat of penalties or legal sanctions

According to Austin, justice and morality are measured by obedience to the law. While recognizing that law may also be judged against the rules of morality or a divine standard,

Austin considered these subjective measures. Such measures would lead to anarchy because individuals would be free to select those laws best designed to meet their own purposes. Positive law, on the other hand, provides an objective standard for human conduct: a legal norm applying equally and impartially to all individuals. Ultimately, the function of the law is considered more important than its quality. For example, it may seem unjust to restrict a young person from drinking alcohol until they are nineteen, but if an important purpose is served such as preventing motor vehicle accidents involving teenage drivers, the law is justified. Hence, for positivists individual morality or a sense of justice plays little part in determining whether a law is good or bad. Austin, in particular, believed the context of the law should be judged according to its social utility. The purpose of law is not to seek justice, but to maintain social order and promote the social good.

Positive law bases itself upon the supremacy of the *rule of law,* (the belief that neither the individual nor the government is above the law). According to this principle, it is better to be governed by a system of laws than to be governed by a ruler or dictator, no matter how well-informed or benevolent.

Obedience to the law is demanded of all. While Austin would be the first to agree that the government must obey the governor, he recognized a reciprocal relationship between them. Hence, the governed, collectively, are superior to the governor, whose abuses are kept in check by fear of active resistance.

However, there is little room for civil disobedience within Austin's conception of law. As he put it, "the mischiefs inflicted by a bad government are less than the mischiefs of anarchy." Consistent with his utilitarian roots, however, Austin sanctions civil resistance of rebellion if it leads to the formation of a greater social utility:

… The members of a political society who resolve this momentous question (whether it is just to disobey the law) must, therefore, dismiss the rule (of natural law), and calculate specific consequences. They must measure the mischief wrought by the actual government; the chance of getting a better government, by resorting to resistance; the evil which must attend resistance, whether it prosper or fail; and the good which may follow, resistance, in case it be crowned with success. And, then, by comparing these, the elements of their moral calculation, they must solve the question before them to the best of their knowledge and ability.

Hence, the issue of civil disobedience is not resolved by recourse to absolute divine or natural law, but by weighing the consequences where the greatest good for the greatest number hangs in the balance.

1. Why did Austin say that positive law serves as an objective standard for human conduct?

2. Explain the theory of Utilitarianism. What is its connection to positive law?

3. Explain Austin's statement that "the mischiefs inflicted by a bad

government are less than the mischiefs of anarchy."

4. Explain Austin's conceptions of justice and morality. How do they differ from those of natural law theorists?

H. L. A. HART & LAW AS A SYSTEM OF COERCIVE ORDERS

H. L. A. Hart (1907 - 1992) is a well-known British jurist whose ideas, while in the best tradition of positive law, extend and refine Austin's theory of law. Hart's characterization of the general nature of law comes as close as is possible to the definition of positive law:

… there must, wherever there is a legal system, be some persons or body of persons issuing general orders backed by threats which are generally obeyed, and it must be generally believed that these threats are likely to be implemented in the event of disobedience. This person or body must be internally supreme and externally independent. If, following Austin, we call such a supreme and independent person or body of persons of the sovereign, the laws of any country will be the general orders backed by threats which are issued either by the sovereign or subordinates in obedience to the sovereign.

In sum, according to Hart, law comprises rules of general application, backed by threats given by persons who are generally obeyed. To this extent, Hart's rules differ little from Austin's. However, while Austin's theory could not cope with power struggles between order- givers - for example, the crown and Parliament - Hart proposes a second level of orders or laws to resolve disputes about constitutionality.

Hart breaks down the rules comprising his conception of law into two categories, *primary rules* and *secondary rules*. Primary rules deal with human conduct, defining what individuals must or must not do. Secondary rules set out how primary rules are to be recognized as valid, applied, eliminated, changed, and enforced. Secondary rules, in turn, are viewed by Hart as being composed of a subset of other rules: rules of recognition, rules of change, and rules of adjudication.

Rules of recognition set the criteria by which a primary rule may be recognized as valid and, in this sense, are viewed by Hart as the "ultimate" rules in the legal system. Constitutional laws establishing the required steps before legislation is said to be valid fall into this category. In Canada, such rules include the requirement that legislation receive three readings of the legislature, be passed by majority vote, and receive the assent of the crown in the person of the governor general, federally, or the Lieutenant Governor, provincially.

Rules of change determine how primary rules may be altered (by statutory amendments, judicial decisions, and individual agreements to opt out of the law where permitted.)

Finally, *rules of adjudication* deal with problems associated with enforcing primary rules; they identify the persons or bodies vested with authority to adjudicate (for example,

the courts, tribunals, and arbitrators) and specify their powers in the procedures they are to follow.

While Hart seems preoccupied with a precise set of rules to be applied to govern human conduct, he nevertheless recognizes how difficult it would be to make rules that would determine all manner of human interactions. Clearly, this sort of "mechanistic" jurisprudence is not viable in a world where legislators cannot possibly anticipate and, hence, plan for all future circumstances. Also, Hart insists, the limitations of human language prevent the law from always being clear and precise. Hart terms this quality of law - its indeterminacy - the "open texture of law". He explains:

the open texture of law means that there are, indeed areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.

While Hart acknowledges that in some cases adjudicators, such as judges, must weigh interests where no clear rules apply, his theory is lacking in any discussion of the moral or political values that would help their decisions, placing it squarely in the positivist tradition.

1. Explain Hart's conception of law as rules.

2. Do you support the positivist contention that there does not need to be any connection between the legal validity and the moral validity of a law?