An Analysis on the Positive Perspective on International Law.

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Abstract.

This paper attempts to analyse the concept of International Law and examine its validity in general and positive jurisprudence. This paper will examine the various definitions and theories of what constitutes "law". The paper will analyse John Austin's theory of Positive Law, and the Hart-Fuller Debate on the role of morality on the making and conception of law in an attempt to relate it to International Law as it currently stands and establish its validity and enforceability on sovereign nation states.

The paper will conclude with a further recommendation as to how to improve the enforceability of International Law and further strengthen institutions that create, modify, and promote International Law.

Keywords; Positivist, International Law; Hart; Austin

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Introduction:

In any debate relating to contemporary jurisprudence, and its application in the real world, perhaps the most hotly debated, contested, and researched upon the topic is relating to the *validity, enforceability, and application* of what is termed as – International Law.

While there are few who would uphold the Hobbesian view of completely rejecting the existence of International Law, most International Law critics contend that such a presumed legal system is "weak law" or "improper law".[1] This view primarily finds its relevance in the Analytical Positivist theory of Jurisprudence; especially in Hart's Analytical Theory, Austin's Command Theory, and Kelsen's pure theory of law.

The fundamental argument of positivist philosophy is that – law and rule-making ought to be restricted to objective, and scientific knowledge that can be verified through scientific testing; in contravention to the principles of Natural Law which gives importance to metaphysical laws of the nature that are not scientifically determined. Positivist theorists contend that the basis of International Law can be found in Natural Law Jurisprudence, and hence is not – *proper law.*[2]

The Analytical Positivist criticism of International Law stems from the assumption that – subject-matter and validity of law is to be found exclusively in the written law of the nation-state, which has an enforcing mechanism.[3] Since International Law has no explicit enforcing mechanism, it cannot be considered to be a legitimate or proper form of law. This criterion for the validity of legal rules means, if transferred to the international field, that the only valid rules of international law are those which are revealed by the decisions of courts and international treaties duly ratified and not formally revoked.[4]

In the absolute contrast, is the Natural Law Jurisprudential approach to International Law.

Natural Law is quintessential in the historical role it played towards the recognition and emergence of the, now recognised, European States, especially rising during the Christendom period.[5]

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[1] H Lauterpacht, The Nature of International Law and General Jurisprudence (1932) Vol – 32 – Economica.
[2] Morgenthau Hans, Functionalism and International Law (194) Vol – 34 No. 2 – Cambridge University Press.
[3] Ibid.
[4] Anthony D'Amato, The Relation of Theories of Jurisprudence to International Politics and Law (1970) – Vol – 257 - Northwestern University School of Law Scholarly Commons
[5] H Bull, "Natural law and international relations" (1979) Vol – 5, British Journal of International Studies.

Natural law contends that there exist universal rules, laws, and directions which are applicable beyond the premises of society and culture.

Thomas Aquinas argued that the law of nations derived their influence from natural, and without adherence to these principles, men cannot live together. Aquinas opined – *"The law of nations is indeed, in some way, natural to man, in so far as he is a reasonable being, because it is derived from the natural law by way of a conclusion that is not very remote from its principles. Therefore, men easily agreed thereto*."[6]

This paper will attempt to analyse the development, and inception of International Law from Positivist Jurisprudential theories, especially in the context of Austin's Command Theory. Furthermore, the paper will provide counter-arguments to the positivist theories, from natural law theories, and even from within the Positivist theories such a Pollock. Furthermore, the paper, in its conclusion, will attempt to provide a middle-ground for emphasising on the validity of International Law.

STATEMENT OF THE PROBLEM

Profounder of the positive theory of law, such as John Austin define law as – "The Command of the Sovereign." Given that there is no sovereign authority responsible for the enforcement of International Law, Rules, or Conventions, - Can "International Law" be considered as a valid and enforceable branch of law?

[6] D'ENTRiVES, AN INTRODUCTION TO LEGAL PHILOSOPHY (1970) Vol. 32 - British Journal of International Studies.

Research Questions.

Is the positivist approach to International Law correct?

Hypothesis

International Law is a valid and enforceable branch of law.

REVIEW OF LITERATURE

- **FSC Norththrop – Contemporary Jurisprudence and International Law (1952) Vol–62 Edition – 5 – Yale Law Journal;**

This paper elucidates the relationship between the Positive Perspective of Law, and its impact on the inception and evolution of International Law.

- **A.H Campbell - Problems of Public and Private International Law, Transactions for the Year 1949 (1949) Vol. 35 - Transactions of the Grotius Society;**

This research paper analyses a lecture given by Prof AH Campbell on the evolution of International law through the jurisprudence of the Historical and Sociological perspective of law. Furthermore, it elucidates and differentiates the concept of enforcement when it relates to municipal and international law.

- **Robert Ago – Positive Law and International Law (1957) Vol. 51, No. 4 - The American Journal of International Law;**

The research journal emphasizes on the evolution of the Positive school of Law, and examines International Law through the same sphere; and makes an argument on why International Law might not be considered as "law" in the traditional sense of the word.

- **Mehrdad Payandeh - The Concept of International Law in the Jurisprudence of HLA Hart (2011) - Vol. 21 No. 4 – The European Journal of International Law;**

This journal tries to explain the validity of International law through varying questions relating to law; and applies the Hart-Fuller debate in context of International Law.

- **H. Lauterpacht - The Nature of International Law and General Jurisprudence (1932) – Vol. 52 - The London School of Economics and Political Science and the Suntory and Toyota International Centres for Economics and Related Disciplines;**

This paper was written in the background of the Second World War, and analyses factors such as wars, questions of sovereignty, and jurisdiction and influences Jurisprudence relating to International Law.

- **Anthony D'Amato - The Relation of Theories of Jurisprudence to International Politics and Law (1970) – Vol. – 257 - Northwestern University School of Law Scholarly Commons;**

The journal revolves around how International Politics, and the scenario of global politics effect International law and the Jurisprudence around it.

- **Josef L. Kunz – The Theory of International Law (1938) – Vol. 32 - Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)**

This paper elucidates the varying theory of International Law, and the varying repercussions of the same.

- **V.D Mahajan, Jurisprudence (5th Edition, OUP – 2011)**

This textbook is an authoritative textbook which elucidates and explains in details the subject of Jurisprudence for Law Students. It is helpful to this research paper to understand the voracity of claims made in the Positive School on the Perspective of law.

- **Malcom N Shaw, International Law (8th Edition, OUP – 2010)**

This textbook is an authoritative textbook elucidating the varying concepts of International Law. It is helpful to this research paper as it helps us understand the inception, and validity of International Law as a discipline.

Scope

The scope of this research paper is limited to analysing the Doctrines of Marshalling and Contribution, and the relevant Transfer of Property Act sections.

Objectives

- To analyse the validity of International Law from the perception of Positive Interpretation of Law;
- To analyse the validity of International Law from the perception of the Hart-Fuller Debate;
- To establish International law as a valid, and enforceable branch of law.

Methodology

The researcher in the present research has adopted doctrinal or no empirical method for collecting required data. This research will base its findings, inter alia, on analytical and critical studies.

Sources of Data –

1. Governmental Reports;
2. Legal Textbook;
3. Judicial Decisions;
4. Analysis of Judicial Precedents;
5. Online Journals;
6. Online Articles;
7. Other online resources.

Mode of Citation:

- The researchers have followed a uniform mode of citation throughout the course of this project. (OSCOLA citation format)

POSITIVIST APPORACHES TO LAW AND ITS IMPLICATION ON INTERNATIONAL LAW.

JOHN AUSTIN (COMMAND THEORY)

Through his many writing on legal jurisprudence and enforcement of laws, it can be concluded that John Austin believed that International Law is not law; he postulates this on the basis that International Law, unlike domestic or municipal law, is not given by a sovereign or enforced through the fear of sanctions.[7]

Austin defined real commands as the will of a *sovereign*, who is a person who receives arbitral obedience of the society, however, does not owe such kind of obedience to any other individual.[8] Based on this definition, Austin argues that if the law does not flow from the will of a determinate sovereign having arbitral control over their subjects, that it is not a real law. He relies on the principle of "No political sovereign, no law." Austin further contended that international law can become *positive or law properly so called* only under a global empire who can impose sanctions and command obedience over all subordinate states.[9]

Rules of International Law, according to Austin, did not qualify as the rules of positive law and not being commands of any sort, and hence were placed in a category of laws *"improperly so called."*[10]

Some Austenian philosophers believe that the *"Sovereign"* aspect of Austin's command theory adapted to a new form in the new-age democratic world. They believe that the word "sovereign" has evolved to be viewed as the reflection of the totality of the will of the people, who chose their representatives to represent them in law-making institutions. They further argue that since members of the International-Rule making are not elected/selected by the will of the people, such rules made by these institutions cannot be given the status of law.[11]

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[7] Koh H Harold, "Why do Nations Obey International Law?" (2016) Vol-3 Yale Law Review
[8] Austin John, "The Province of Jurisprudence Determined" (1832) Cambridge University Press, Cambridge.
[9] Van Kuijck C, "What is Law of Nations According to John Austin" (1943) Standard Encyclopaedia of Philosophy.
[10] Ago Robert – Positive Law and International Law (1957) Vol. 51, No. 4 - The American Journal of International Law
[11] Mukuk – The Normative Irrelecance of Austin's Command Theory in International Law (2016) Vol 28, No. 3 – MIMBAR HUKUM

While Austin and Austenian philosophers do not deny the existence of an International body of rules, they contend that "International Law" was no more than *International Morality*, similar to the by-laws binding a member's club.[12] Such an example can be seen in the Article 26 of the Vienna Convention on the Laws of Treaties find its resonance in Article 2(2) of the United Nations Charter which provides that – *"All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in* ***good faith*** *the obligations assumed by them in accordance with the present Charter."*[13]

Austenian positivists contend that if International Law was "*proper law"* or *"real law",* the good faith clause would not have necessary at all, as they believe that non-compliance of any command by the sovereign would invite *sanctions,* which would automatically ensure compliance by the subjected individuals or any such body in question.

The lack of a hierarchical sovereign, the non-compliance of commands, and the need for an institution based on good-faith is the reason why Austenian positivists believe that International Law is *law improper*.

HANS KELSEN. (ANALYTICAL THEORY)

Hans Kelsen conceives law as a hierarchical system. He believes that the constitution stands above a statute, the statute above the ordinance, and any norm-setting organ is a higher organ than one which does not set norms but merely applies them. According to Kelsen, it is not the legal order of states that occupies the highest stage in the hierarchy of law; it is international law that tops the pyramid.[14] Interstate relations are, according to him, governed by law just as are intrastate relations; however being a positivist jurist he rejects theories of international law which entails terms such as – *"rights of mankind"* or *"justice."*[15]

According to Kelsen, International Law, is customary law based upon a *system of norms.* Thus, Kelsen believes that International Law is customary law. According to Kelsen, other law-for instance, like state law; it obligates and authorizes individuals. The norms of international law have the same characteristics as those of state law. Therefore, the norms of international law can be analysed by the same method which is used for the analysis of norms generally; and this

[12] Bhatia Gautam, "The Command Theory of Law: A Brief Summary, and Hart's Objections" (2008)
[13] Article 2(2) of the UN Charter
[14] Verdross Alfred, "Concepts of State, Sovereignty, and International Law (1928) Vol -2, Concept of the Unity of the Legal Order on the Basis of the International Constitution.
[15] Stern W.B, "Kelsen's Theory of International Law" (1936) Vol-30 No. 4, American Political Science Association.

analysis leads Kelsen to the positing of an act of compulsion as the consequence of certain factual conditions which are considered illegal actions. In international law, reprisals and war are those acts of compulsion which are consequences of illegal actions.[16]

Kelsen however believes that International order still forms a primitive legal order, comparable to that of pre-state community. It is the members of the International order themselves, not a legislative body, which determines the norms. In most cases, the question of whether a norm has been violated is decided by the party which charges the violation, not by a judicial organ. It is the party to the dispute determining the guilt of its adversary, not an executive organ, which applies the measure of compulsion (reprisal, war) as a consequence of the legal wrong. Hence, Kelsen argues that International Law, as of yet, does not completely manifest into what Austin deems as – *"law properly so called."*[17]

However, Kelsen argues that the so called" decentralised*"* status of International Law will be gradually overcome as it will, in time institute its own organs which can enforce the commands directed by them. When this happens, the varying Nations States will not be required to play their current roles as intermediaries and the entire international legal system will inevitably become more *centralised.*[18]

HERBERT LIONEL ADOLPHUS HART. (PURE THEORY)

Hart's theory relating to the concept of International Law can be explained in 3 distinct sub-topics, -

1. Criticism of Austin's Command Theory.

   Hart's conception of International Law begins at the criticism of Austin's Command Theory, Hart found Austin's theory lacking because it failed to encompass many rules, even within national systems, that are indisputably law. Looking at national systems, Hart noted that not all laws are designed to order people to do things; not all laws are enacted by a sovereign, but instead arise in other ways; and legislators do not just bind others by laws, they bind themselves too. Those observations about national law were powerful points against Austinian critics of international law, and they remain so today.[19]

[16] Stern W.B, "Kelsen's Theory of International Law" (1936) Vol-30 No. 4, American Political Science Association.
[17] Ibid.
[18] Verdross Alfred, "Concepts of State, Sovereignty, and International Law (1928) Vol -2, Concept of the Unity of the Legal Order on the Basis of the International Constitution.
[19] Murphy Sean, "The Concept of International Law" (2009) Vol 3, American Society of International Law.

To support his assertion, Hart gives the example of a contract. Contracts are not meant to get the binding parties to do something against their will, rather they are instruments through which the parties fulfil their desires, through the concept of *quid quo pro.* Hart equates the same logic to treaties, wherein he contends that these treaties do not arise out of a sovereign will or command, but rather to bind nation states and their representatives into acting in a certain way so that the Nation States can fulfil their desires, which are a reflection of the people's will.[20]

2. Characteristics of Law as a non-optional or obligatory rule.

For HLA Hart, the law is present whenever certain conduct is made *non-optional and obligatory*; and it is due to which Hart believed that International Law is not the law in the strictest sense.

Hart believed the law was present when the obligation arises from social rules when the general demand for conformity is insistent and deviations result in intense social pressure that generates feelings of remorse, or guilt. Hence, for Hart, the law can arise from rules that are completely customary in nature, where there is no centrally organized system of punishments, and where the social pressures fall short of physical sanctions, so long as the social pressures are of a magnitude that compliance is habitual. [21]

Proponents of validity of International Law feel that such habitual compliance or obedience is evident in the treaties, and international law in the contemporary global scenario. Possible militaristic sanctions enforced through the United Nations Security Council, WTO-authorised trade retaliation, or censures in the nature of social sanctions through the United Nations General Assembly; hence they contend that according to the obligatory form of law, as was contended by HLA Hart, International Law is a valid, perhaps weak, form of law.[22]

3. Primary and Secondary Rules.

[20] Ibid
[21] Bhatia Gautam, "The Command Theory of Law: A Brief Summary, and Hart's Objections" (2008)
[22] Murphy Sean, "The Concept of International Law" (2009) Vol 3, American Society of International Law.

Hart famously divided laws into two distinct types, - Primarily legal rules; and Secondary legal rules. Primary rules directly govern the conduct of individuals, while secondary rules allow for the creation, and innovation, alteration, or execution of primary rules.

Hart argues that for a society to *exist* primary legal rules are quintessential; however, for a society to *keep existing.* Lacking a definitive legislature, a binding judiciary, and a non-penal executive mechanism, Hart saw International Law as *primitive law,* consisting only of primary rules, hence not properly fitting the definition of law in the contemporary sense.[23]

DEFENDING THE VALIDTIY AND ENFORCEABLITY OF INTERNATIONAL LAW IN GENERAL JURISPRUDENCE.

Sir Fredrick Pollock's defence on the validity of International Law.

Fredrick Pollock said law or a legal system to be valid if it fulfils the following factors,

- A legal system requires the existence of a political class;
- The recognition of members;
- Settled rules binding upon them.[24]

Judging by Pollock's definition of law, International law does fulfil the conditions to be recognised as a valid legal system, -

Firstly, there is a political community of 193 member states that are considered equal in the International Law forum, despite political, economic, and cultural divisions.

Secondly, there is a system of rule and principles that comprise the international legal order. The United Nations Charter, and other various treaties are apt examples of this.

[23] Ibid.
[24] Brierly, The Law of Nations (1963) Vol 1 – Oxford University Press.

Thirdly, the members of the International community recognise these rules and principles as binding upon them. The legally binding force of international law is seen through Articles such as Article 38 of the Statute of the International Court of Justice.[25]

Such a definition of the legal system validates International Law.

Furthermore, International law is much more refined than domestic legal systems. It emphasises internal, rather than external, motivation. Since international law relies for its operation on reciprocity rather than coercion, the reasoning processes whereby one formulates the substantive rules cannot disregard the social and political realities to the same extent as in the more primitive domestic systems. One's conclusions must constantly be checked against reality for it is only there, in the practice of states, that one can ascertain the rules that are the object of the internal, reciprocal processes. The "enforcement" structure of international law is substantially different from that of domestic systems in that, instead of there being a vertical normative order based on coercion and its variants, a horizontal order has evolved. Stability and compliance are achieved by mutual accommodation, cooperation and reciprocity, the impetus coming, as in the Golden Rule, from a desire to be treated in a like manner should one find oneself in the same situation at some future time. The "sanction" for noncompliance is not administered by some superior third party but by other interested, and potentially interested, states. The response to a perceived violation of an international norm will be a denial of reciprocal privileges, related or unrelated to the original wrong or, as a last resort, the use of some degree of force. The important thing to notice for the purposes of validating International Law is that the sanction is reciprocal, being determined and implemented by a directly interested party, almost invariably one which has been or will be affected by the violation. This constitutes a very real limitation on the scope of the international legal system's jurisdiction. For, if the subject matter of a norm does not affect another state to a sufficient extent to make it willing, or likely, to respond to the violation, then there is no compulsion for compliance apart from the purely self-administration on the part of an offender or potential offender. This kind of self-administration needs no system of law.[26]

[25] Statute of the International Court of Justice, Art. 38
[26] FSC Norththrop – Contemporary Jurisprudence and International Law (1952) Vol – 62 Edition – 5 – Yale Law Journal

Conclusion.

No matter how much one may vilify state sovereignty, the argument that a supranational legal authority is viable, or latent, is a very difficult one to make. One must first establish, in the context of United Nations law for example, that Article 2 (7) of the Charter' is invalid and no longer applies to human rights.

Since natural law is the only legal system with any clear claim to authority over the state it is not at all surprising that those concerned with human rights should find themselves attracted to the natural law philosophy. Only there can they find a system that acts as a censor of states' legal orders, an obvious prerequisite for the systematic protection of human rights on a worldwide scale. However, reliance on natural law in the late twentieth century is not a particularly persuasive position to argue from, due to the general disrepute into which natural law has fallen. Since natural law no longer has widespread credibility, the human rights proponents have had to find an alternative system for reviewing the substance of the positive law of nation-states. The vehicle they have chosen is international law which, after the transformation into "new" international law, is being put into service as a substitute for natural law as the means of reviewing the validity of domestic legal systems. International law has attained this new status through two processes. First, it is consciously confused with natural law, as though the two are synonymous and no distinction really needs to be maintained between them. This ensures that international law will receive the benefit of any remaining credibility possessed by natural law. Second, it is assumed that international law is manifestly superior to the nation-state rather than being a product of that institution. This ensures that any conclusion that might be reached in international law will invalidate inconsistent domestic laws and render any inconsistent state practice "criminal" regardless of whether any actual results flow from such a designation.

BIBLIOGRAPHY

Research Journals and Articles –

- Ago Robert – Positive Law and International Law (1957) Vol. 51, No. 4 - The American Journal of International Law
- Austin John, "The Province of Jurisprudence Determined" (1832) Cambridge University Press, Cambridge.
- Bhatia Gautam, "The Command Theory of Law: A Brief Summary, and Hart's Objections" (2008)
- Brierly, The Law of Nations (1963) Vol 1 – Oxford University Press.
- D'ENTRiVES, AN INTRODUCTION TO LEGAL PHILOSOPHY (1970) Vol 32 - British Journal of International Studies.
- FSC Norththrop – Contemporary Jurisprudence and International Law (1952) Vol – 62 Edition – 5 – Yale Law Journal
- H Bull, "Natural law and international relations" (1979) Vol – 5, British Journal of International Studies.
- H Lauterpacht, The Nature of International Law and General Jurisprudence (1932) Vol – 32 – Economica.
- Koh H Harold, "Why do Nations Obey International Law?" (2016) Vol-3 Yale Law Review
- Mukuk – The Normative Irrelecance of Austin's Command Theory in International Law (2016) Vol 28, No. 3 – MIMBAR HUKUM
- Murphy Sean, "The Concept of International Law" (2009) Vol 3, American Society of International Law.

- Stern W.B, "Kelsen's Theory of International Law" (1936) Vol-30 No. 4, American Political Science Association.

- Van Kuijck C, "What is Law of Nations According to John Austin" (1943) Standard Encyclopaedia

- Verdross Alfred, "Concepts of State, Sovereignty, and International Law (1928) Vol - 2, Concept of the Unity of the Legal Order on the Basis of the International Constitution.

- Morgenthau Hans, Functionalism and International Law (194) Vol – 34 No. 2 – Cambridge University Press.

- Anthony D'Amato, The Relation of Theories of Jurisprudence to International Politics and Law (1970) – Vol – 257 - Northwestern University School of Law Scholarly Commons

Statutes –

- The Rome Statute of 1998.
- The United Nations Charter of 1945.