

THE LINKAGE BETWEEN POSITIVISM AND DOCTRINE OF CONSTITUTIONAL SOVEREIGNTY IN INDIA; A JURISPRUDENTIAL APPROACH

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Abstract

Analytical Positivism in jurisprudence centers on understanding the core concepts of law independent of their moral, historical, or societal contexts. Rooted in a systematic and scientific approach, this school focuses on "law as it is," rather than "law as it ought to be," analyzing fundamental concepts like sovereignty, justice, and legislative theory. Prominent figures, including John Austin and H.L.A. Hart, argue that law, crafted by political authorities, should be viewed as a factual system rather than a moral construct. Various Indian judicial decisions, such as those based on legal positivism, illustrate this approach, with cases highlighting the distinction between legal rules and justice. Hart's theory, with its focus on primary and secondary rules, aligns with India's legal framework, where the Constitution serves as the ultimate standard of recognition. Jeremy Bentham's utilitarian influence and Hans Kelsen's "Grund Norm" concept further underscore the importance of the Constitution as a foundational norm in Indian law. In India, the Constitution's sovereignty echoes the various ideas of Analytical school's emphasis on legal authority, establishing the Constitution as the supreme legal standard. While some aspects of Analytical Positivism do not fully apply to India's diverse legal system, key principles continue to shape interpretations and applications of the Constitution. The enduring legacy of the Analytical School of Jurisprudence lies in its clear articulation of law's role and authority within an organized legal system, contributing significantly to the foundations of Indian constitutionalism.⁹⁵⁴ Thus, it becomes essential to answer some questions. What is the linkage between the theories of various scholars and the Indian constitution? Is it entirely a positivist idea? Does the Indian constitution act like a sovereign in India?

Keywords: Positivism, Grund norm, authority, Indian constitution, linkage, sovereign etc.

GRASP - EDUCATE - EVOLVE

⁹⁵⁴ Dr. Jai Mala, Seema Rani, Role of Legal Positivism in Democratic Governance in India, <https://www.internationaljournalssrg.org/IJHSS/2017/Volume4-Issue6/IJHSS-V4I6P104.pdf>, Last Accessed on 20th October 2024.

Introduction

School of Analytical Positivism

Analytical jurisprudence aims to analyze the fundamental ideas of law without taking into account their historical context, development, moral significance, or applicability. A book of analytical jurisprudence, according to Salmond, will cover a number of topics, including an analysis of the concept of law, an investigation of the theory of legislation, an analysis of the various constituent ideas that make up the complex idea of law, such as State, sovereignty, and the administration of justice, as well as an account of the legal sources from which law is derived.⁹⁵⁵

The main goal of the Analytical school is to provide legal ideas in a way that is both clear and systematic and applicable to a more extensive and advanced legal system. It starts with the actual legal facts as they stand right now. It attempts to provide definitions for those terms, elucidates their meanings, and shows how they relate to one another. Being well-versed in the fundamental ideas that underlie all legal reasoning is one of the objectives of the Analytical school. The importance of analytical jurisprudence lies in the way it clarified legal reasoning. It provided us with a precise, scientific, and unambiguous vocabulary. Austin's objective of "clearing the heads and untying the knots" was achieved. It deliberately omitted all outside factors that aren't protected by the law.⁹⁵⁶ Its features are:-

- **Emphasis on What the Law Is:** The Analytical School of Jurisprudence focuses on figuring out what the law is, not what it ought to be. It maintains that the authority and power of those who

enact and enforce laws form the foundation of law.

- **Lack of Moral Law:** Positivists contend that morality is not a fundamental component of the law.
- **Distinction Between Law and Justice:** According to this school, justice and law are two different ideas.
- **Reaction to Natural Law Theories:** The Analytical school is against natural law theories because they emphasize moral and ethical issues and rely on nature, God, and rationalization.

Constitution as a Sovereign in India

The Latin word *superānus* is the inverse of the old French word *sovereign*, which is whence the word "sovereign" originates. "Above" is what the Latin word means. The head of state or head of local government can both be referred to as sovereigns. The term "sovereign" refers to the Indian constitution, which states that no other governing body or outside force has any authority over India. Every step in the creation and modification of Indian law is governed by constitutional sovereignty. Every Indian state has the authority to make its own judgments. As a result, India maintains its sovereignty, which is stated in the constitution's preamble. The Indian constitution's preamble, which declares that Indians are its original creators, serves as its introduction. It guarantees equality, justice, liberty, and the advancement of fraternity among all Indians. In the preamble for the attribution of the word "Republic," the word "sovereignty" was mentioned. It has stood for three concepts related to Indian law. The term "Sovereignty" refers to the idea that the "Republic of India" is a single entity. It stands for "one nation," "one voice," "one state," and "one will," all of which are essential elements of Indian democracy's emphasis on the "Sovereign Republic." The term "Republic of India" alludes to "sovereignty," which implies equality and independence with other members of the global community. Furthermore, India has the ultimate legal authority to amend its own laws.

⁹⁵⁵Analytical School of Jurisprudence, Blog Ipleaders, <https://blog.ipleaders.in/analytical-school-of-jurisprudence/>, Last Accessed on 21st October 2024.

⁹⁵⁶Supra Note 2.

It implies that the "Sovereignty" has complete authority over Indian laws and owner concerns. Consequently, it may be claimed that India is a sober nation, and the Indian constitution reflects this.⁹⁵⁷

The phrase "the people of India" refers to the Indian constitution and discusses the overriding of other authorities' authority to make Indian laws. The Indian constitution was drafted with the goal of preserving equality for all Indian citizens, according to the preamble analysis. Under India, it is clear that independent states uphold all regulating regulations. The Indian government has the authority to act independently on matters pertaining to the country. It is not governed by any foreign country or community. The resolution to uphold equality among all Indians in terms of access to political, economic, social, and other elements is taken up in the preamble. India's sovereignty is evident from each of these justifications.⁹⁵⁸

Importance of the Indian Constitution

The supreme law of the Republic of India is the Constitution. It establishes the foundation for the nation's political system, defining the roles and authority of governmental bodies, protecting fundamental rights, and laying out the tenets of governance. It is a collection of laws and guidelines that direct a nation's governance. The reasons behind it being extremely significant are as follows:-

- Rule of Law: The Constitution guarantees that no one is above the law, even public servants, by establishing the foundation for governance based on the rule of law.
- Protection of Rights: It protects citizens' freedoms of speech, expression, religion, and other fundamental rights and offers legal recourse in the event that those rights are violated.

- Governmental Structure: The Constitution lays out the government's structure, including the functions, authority, and bounds of the legislative, executive, and judicial branches. This division of authorities encourages checks and balances and keeps power from being concentrated.
- Democratic values: By guaranteeing citizens' participation in governance through free and fair elections, the constitution preserves democratic values through clauses such as a universal adult franchise.
- Stability and Continuity: By acting as a framework for directing succeeding administrations and averting sudden changes in the political system, the constitution ensures stability and continuity in governance.
- National Unity: By acknowledging and appreciating the diversity of the population and encouraging a sense of shared citizenship and patriotism, it promotes national unity.
- Legal Framework: The constitution gives the legal system structure and uniformity by acting as the cornerstone upon which all laws and regulations are built.
- Adaptability: The constitution ensures its relevance over time by offering a stable framework that permits required revisions to meet shifting society demands and beliefs.

Research Methodology

The research methodology that has been applied for this research paper is doctrinal research. Descriptive research shall also be incorporated. Works from scholarly journals, statutes, extracts from articles and references from various websites shall be included as a part of the doctrinal research. Any limitation in the scope of the paper shall be due to time constraints or geographical constraints.

⁹⁵⁷Sovereign,Unacademy,<https://unacademy.com/content/wbpsc/study-material/polity/sovereign/#:~:text=Sovereign%20is%20applied%20to%20the,India%20can%20take%20independent%20decisions>, Last Accessed on 22nd October 2024.

⁹⁵⁸Supra Note 4.

Austin's Positivism and the Indian Constitutionalism

India's judicial system has historically relied on Legal Positivism for its historic rulings and decisions. The constitution or other legislations that derive authority from it has established guidelines, which the judges have interpreted. The following cases show a few examples that amply demonstrate the effect of the positivist school of law.

Union of India v. R. K. Garg (the Bearer Bond case)

The legislature, which possesses ultimate legislative authority, enacted a law stating that the government would be immune to questions about the source of black money if it was invested in specific government bonds within a specified timeframe and used for constructive purposes. Article 14 of the Indian Constitution was invoked to challenge the law on the grounds of its arbitrary nature and its perceived encouragement of tax evasion. The court maintained the law's constitutionality and concluded that there is a discernible difference between bond investors and non-investors. The Doctrine of Pith and Substance was also applied, while clarifying the underlying objective of the law underpinning the verdict.⁹⁵⁹

Joyful George Verghese VS Cochin Bank

The Apex Court upheld the validity of a law that stipulates that someone who defaults on a debt may be imprisoned. It is important to remember that the aforementioned validity violated the United Nations Convention. As a result, the Supreme Court considered this legislatively drafted law and rendered a decision.

In the aforementioned cases, we can see that the court made a conclusion based on the text of the legislation even if it did not meet the requirements of a fair law. Legal positivism was taken into consideration when making

decisions and was a major factor in earlier rulings.

Hart's positivism and the Indian Constitutionalism

The "high point of legal positivism" is thought to be H.L.A. Hart's conception of the legal system, which combines primary and secondary rules. Primary rules are rules of obligation, whereas secondary rules rely on fundamental rules. According to these secondary rules, people have the ability to accomplish all of the following: they can abolish or modify existing main rules, behave or speak in a certain way to create new ones, and govern their occurrence or operation. While primary rules impose duties, secondary rules give authority, either public or private. In a fundamental social system, secondary rules are necessary to address the shortcomings that the static nature, ambiguity, and inefficiency of main rules in resolving conflicts may entail. As each remedy introduces several aspects that are ingrained in law, "certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system"; this is the first step from the pre-legal to the legal realm.

Hart's theory led him to conclude that although nations are obligated to abide by international law, it still lacks the characteristics of a legal system due to the absence of secondary rules. One could refer to the evolution of the international legal principle of jus cogens in recent years as a step toward the creation of a secondary rule of recognition. Therefore, "rules of recognition," "rules of change," & "rules of adjudication" treat the three flaws in the pre-legal system. Since a specific rule is identified in relation to rules of recognition, rules of change and adjudication are also tied to them. According to Hart, therefore, the existence of a specific rule is determined by the rule of recognition and the declaration of courts that a rule is valid rather than by an order from the sovereign. There are fundamental and secondary norms in the reasonably evolved

⁹⁵⁹ Austinian Concept of Law and its Comparison with Indian Sovereignty, Pro Bono India, <https://probono-india.in/blog-detail.php?id=210>, Last Accessed on 23rd October 2024.

Indian legal system. The final standard of recognition is found in the Indian Constitution. No rule of international law that conflicts with the Indian Constitution can be binding on the Indian people and courts, even though Article 51 of the Indian Constitution states that the State shall endeavor to promote international peace and security and respect its international obligation.⁹⁶⁰

The main sources of duty in the Indian legal system are statutes and customs that are recognized by the courts. The way customs are changing makes this clear. Even though the Privy Council held in *Collector of Madura v. Madoos Ramalinga* that Hindu law supersedes written language when there is clear proof of tradition, things have altered since independence.

Bentham's Positivism and the Indian Constitution

A political society with a body of individuals acting to convey the will of the people would exist, according to the Bentham Theory of Sovereignty. In other words, we can see relevance in the case of India in terms of a democratic system of governance that upholds the principles of participatory democracy. Indian laws are constructed with Jeremy Bentham's utilitarianism in mind. For instance, the Indian Constitution promotes equality, justice, and wellbeing for all. Numerous state and individual rights are incorporated into the Indian Constitution; however, some of these rights are not unqualified because the constitution restricts them by enforcing restrictions in the public interest. 14, 21, 16, 15, 39, 38, 41, 42, 51-A, 25, 48, 19, and so forth.⁹⁶¹

Kelsen's Positivism and Indian Constitution

A well-known representative of the "Vienna School" of legal philosophy, Hans Kelsen (1881–

1973), developed a "pure theory of law" that aimed to concentrate only on the technical and logically self-supporting aspects of law, free from outside influences such as social, historical, political, and psychological factors. The legitimacy of the entire legal system is derived from a foundational standard known as the "grund norm." In order for this grund norm to be effective, people must have faith in it. Depending on the legal system, the grund norm may be a written constitution or the will of a dictator.⁹⁶²

The legitimacy of a legal system rests on a presumed fundamental norm that is the source of all subordinate norms rather than coming from a higher authority, according to Kelsen's Grund norm theory. This essential principle is embodied in the Indian Constitution, especially in its Preamble and important clauses. According to Article 13, the Constitution is the "supreme law of the land," and any legislation that conflicts with it is null and void. This proclamation gives the Constitution a special status that is consistent with Kelsen's idea of a Grund norm: it acts as the benchmark for confirming or disproving other legal standards. The core values of justice, liberty, equality, and fraternity are stated clearly in the Preamble of the Indian Constitution. It represents the fundamental principles that serve as the cornerstone of Indian democracy, directing how constitutional provisions are interpreted and applied. According to Kelsen, the Preamble embodies the principles and goals that form the basis of all Indian legislation and reflects the fundamental characteristics of the Grund norm. The Constitution establishes itself as a normative order—what Kelsen would call a self-sustaining source of legitimacy—through the Preamble, irrespective of external sources or authority. Furthermore, in interpreting the Constitution and upholding its status as the Grund norm, the Indian judiciary—in particular, the Supreme Court—is essential. The concept of

⁹⁶⁰ Sheela Rai, *Hart's Concept of Law and Indian Constitution*, EBC India, <https://www.ebc-india.com/lawyer/articles/2002v2a1.htm>, Last Accessed on 24th October 2024.

⁹⁶¹ Relevance of Theories Given by Jeremy Bentham, Legal Service India, <https://www.legalserviceindia.com/legal/article-8756-relevance-of-theories-given-by-jeremy-bentham-and-john-austin-in-indian-legal-system.html>, Last Accessed on 25th October 2024.

⁹⁶² Analytical School of Jurisprudence, Law Bhoomi, <https://lawbhoomi.com/analytical-school-of-jurisprudence/>, Last Accessed on 26th October 2024.

judicial review, which was developed in seminal instances such as *Kesavananda Bharati v. State of Kerala* (1973), gives the judiciary the authority to protect the fundamental framework of the Constitution by blocking unconstitutional modifications or laws that compromise its essential principles. The "Basic Structure Doctrine," established by the Supreme Court's decision in *Kesavananda Bharati*, holds that even constitutional modifications cannot change the fundamental elements of the document, such as democracy, secularism, and the rule of law. Since it establishes the Constitution as an unchangeable grund norm with a stable core that must not be altered in order to maintain the integrity of the legal system, this doctrine is consistent with Kelsen's thesis.⁹⁶³

Criticisms and Suggestions

In order to address India's particular social, economic, and cultural difficulties, the Indian Constitution weaves together a variety of legal systems, creating a rich tapestry. The Constitution's structure reflects Analytical Positivism's dedication to legal certainty and the rule of law, but Natural Law's influence is equally noticeable, particularly in the Preamble and Fundamental Rights, which highlight justice, liberty, equality, and fraternity as fundamental human values. Beyond rigorous legal positivism, the judiciary frequently interprets Article 21's protection of life and personal liberty to include rights fundamental to human dignity, which is a strong reflection of Natural Law principles. Furthermore, aspects of sociological jurisprudence influence the directive principles of the Constitution, which seek to address social fairness and welfare and demonstrate an awareness of the wider societal effects of the law. The judicial review system clearly reflects the Realist School's impact, giving judges the authority to interpret the law in light of social reality and practical factors. Together, these

various jurisprudential influences guarantee that the Indian Constitution is a dynamic framework that can be adjusted to changing social demands and goals, balancing socioeconomic justice, ethical ideals, and strict law. Thus, Indian Constitution must be viewed by a balanced approach.⁹⁶⁴

Conclusion

A well-known method in legal philosophy, the Analytical School of Jurisprudence aims to comprehend and analyze the law by concentrating on its inherent logic, structure, and language. In order to produce lucid and impartial interpretations of legal regulations, it places a strong emphasis on a thorough analysis of legal concepts and principles. Advocates of this school, including John Austin and H.L.A. Hart, stress the importance of "law as it is" over "law as it ought to be." They argue that law should be viewed as a factual phenomenon rather than a moral or normative one because it is a creation of political powers and the result of human intent. The evolution of legal theory, especially in common law jurisdictions, has been greatly influenced by the Analytical School of Law, which has shaped debates regarding the nature and purpose of law in society. The theories given by the jurists of positivist school definitely aren't entirely applicable to the Indian context entirely. But, partial application of these has been observed at various instances and such application has also been found relevant in such situations.⁹⁶⁵

These philosophical underpinnings allow the Indian Constitution to remain responsive to contemporary challenges while preserving core principles that transcend changing times. For instance, the influence of the Historical School is visible in provisions that respect India's traditional and cultural heritage, such as the rights of religious and linguistic minorities, thereby harmonizing modern law with historical continuity. Furthermore, the Constitution's provisions on social and economic equality

⁹⁶³ Kelsen's Pure Theory of Law, Scholarship Law, https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?params=/context/tcl/article/2087/&path_info=03_Kelsen_s_Pure_Theory_of_Law.pdf, Last Accessed on 27th October 2024.

⁹⁶⁴ Supra Note 10.

⁹⁶⁵ Supra Note 9.



reflect Marxist ideals, aiming to reduce the wealth gap and uplift marginalized communities. This blend of diverse schools also strengthens the judiciary's interpretative power, enabling progressive judgments that align with evolving human rights standards and societal needs. Consequently, the Constitution becomes a living document, balancing rigidity with flexibility, legalism with justice, and tradition with modernity, making it uniquely suited to govern a pluralistic democracy like India. In essence, the Indian Constitution exemplifies a harmonious fusion of global jurisprudential thought, embodying a vision of justice that adapts to the aspirations of its people.⁹⁶⁶



⁹⁶⁶ Historical School of Jurisprudence, Indian Legal Solutions, <https://indianlegalsolution.com/historical-school-of-jurisprudence/>, Last Accessed on 1st November 2024.