

# NORMATIVE LEGAL THEORY: ITS EVOLUTION AND SEARCH FOR STRUCTURE AND UNITY IN LAW

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## 1.0 INTRODUCTION

This paper traces, examines and demonstrates the evolution of normative theory's search for structure and unity in law by reference to the work of Jeremy Bentham, John Austin, Hans Kelsen and HLA Hart.

The view that the real purpose of normative legal theory is to explore the integrity of legal ideas and legal reasoning thus assisting lawyers to rationalize legal doctrine by providing a coherent structure and systematic unity of the doctrine<sup>1</sup> is in our considered opinion valid and intellectually sound.

Inherent in the **evolution** of normative theory's search for structure and unity in law as examined in this essay is the **“determination to see things as they are, to resist metaphysical allurements and to probe analytically and with vigour into the fundamental concepts of law on which so much confused thinking existed;...it presents law as a phenomenon susceptible to scientific analysis and investigation.”**<sup>2</sup> (Emphasis ours)

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<sup>1</sup>See generally the views of Cotterrel R. “The politics of Jurisprudence. A critical introduction to legal philosophy,” (1989) London, Butterworths.

<sup>2</sup>Freeman MDA “*Lloyds introduction to Jurisprudence*” (2001) Seventh Ed, Sweet and Maxwell, London.

**Austin** for example attempted to establish the autonomy of jurisprudence as a separate field of study and place it on a factual and scientific basis.<sup>3</sup>

The effort made by normative legal theory to establish law from politics is readily apparent. What needs to be examined is just how successful this effort has been. Throughout this discourse therefore, we shall seek to answer the question; How successful has the effort of this tradition in establishing the independence of law from politics been?

## **1.1 IMPORTANCE OF NORMATIVE LEGAL THEORY**

In common parlance “Normative” means describing or setting standards or rules which should be followed.<sup>4</sup>

Normative legal theory attempts to explain the nature of law almost exclusively through philosophical analysis and clarification of the values concepts, principles, rules, modes of reasoning entailed in or presupposed by legal doctrine. Normative legal theory concerns itself to offering a general account of the nature of law and tends to entail the creation of some sharp internal- external dichotomy marking the legal from the non legal...; normative legal theory is often said to be concerned to answer the question “what is law?” philosophically, in terms of logical structures and rational foundations of doctrine.<sup>5</sup>

Normative legal theory has its weaknesses. But its strength has been in its commitment to make legal knowledge a system of reason.<sup>6</sup> Reference to the works of Bentham, Austin, Kelsen and HLA Hart in our view will help us understand normative legal theory in context and perspective of the social reality in which they lived.

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<sup>3</sup> *Ibid* page 220.

<sup>4</sup> Oxford Advanced Learner’s Dictionary ed As. Hornby. Oxford University press 1995

<sup>5</sup> Cotterrel R, *op cit* page 16

<sup>6</sup> *Ibid* page 235

Legal Theory is taken to refer to systematic theoretical analysis of the nature of law, laws or legal institutions in general. It seeks specifically to develop theoretical understanding of the nature of law as a social phenomenon. While philosophical justifications of particular aims or tasks of law are not irrelevant to this concern (and may follow directly from certain types of legal theory such as natural law) they are not central to it.<sup>7</sup>

It follows from this definition of legal theory that both legal philosophy and sociology of law can and do contribute to it. Cotterrel<sup>8</sup> terms legal philosophy's contribution to the legal theory "normative legal theory" and the sociology of law's contribution to it "empirical legal theory". He admits that the distinction or demarcation between the two concepts is more a matter of emphasis than of rigid demarcation - just as in legal philosophy's conceptual inquiries as opposed to those of sociology of law. Jeremy Bentham, John Austin, Hans Kelsen and HLA Hart have contributed greatly to the literature of legal philosophy. They have contributed to legal theory in such a significant way that their influence is still being felt today. Their work has shaped the jurisprudence of many parts of the world and continues to be of interest to scholars, Judges, governments and lawyers. What is legal philosophy's or normative legal theory's contribution to the wider world of political and legal activities? Lawyers seek rationality, system and order in legal doctrine. They seek to explore the integrity of legal ideas and legal reasoning so as to be able to rationalize legal doctrine. Indeed their ability to interpret that doctrine and predict the outcome of litigation or the effects of legal documents depends on this.<sup>9</sup>

Lawyers seek conceptual clarity in legal doctrine. Normative legal theory serves this function quite effectively in our view. Legal philosophy's contribution to modern legal theory has been predominantly by lawyers addressed primarily to lawyers. The justification of normative legal theory often emphasizes its practical role in the improvement of law.

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<sup>7</sup> *Ibid* page 4

<sup>8</sup> *Ibid* page 3

<sup>9</sup> *Ibid* page 6

Theory has been described as the ally of the scientifically minded lawyers “engaged in the external pursuit of the more exact”; the establishment of law’s principles upon accurately measured social desires (Holmes 1899).<sup>10</sup> Normative legal theory is typically concerned with system and unity in law. The problem of the internal-external relationship pervades it. This is explicit in the work of HLA Hart who distinguishes what he calls internal and external views of legal (and other) roles.<sup>11</sup>

Attempts at legal philosophy and normative legal theory to explain a unity, a distinctiveness or systematic character of law may have wider political significance. They may suggest for example how far law can be considered separate from politics. “Politics” and “political” connote **“Issues of the state; of government; of public affairs in general; of power** (emphasis ours).<sup>12</sup>

Politics has been taken to refer to **“the struggle to acquire and make use of power... (cf Weber 1948).”**

On such view the most widely visible and extensively organized politics naturally centres on what is thought of as “government” and the “state”. We subscribe to the view that law is clearly related to the political. The two are, as we shall demonstrate in this paper, inseparable.

Positivists (and in this paper Bentham, Austin, Kelsen and Hart are classified as positivists) have sought to portray law-the norm or rule-as independent from politics. This effort has been largely unsuccessful. Law flows from Government’s exercise of power. Oftentimes law represents an aspect of politics or expression of government policy.

Normative legal theory as has already been seen seeks to offer unity, system and distinctiveness to law. This in our view the positivists succeed in doing. Structure and unity in law are

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<sup>10</sup> *Ibid* page 7

<sup>11</sup> *Ibid* page 10

<sup>12</sup> As Hornby See Oxford Advanced Learners Dictionary *op cit* n.4

achieved. However distinctiveness does not mean separateness. As is demonstrated herein below law and politics are intertwined and “joined at the hip” as it were.

Normative legal theory in our view is best understood by locating its abstractions in specific historic contexts. This we shall do by referring to the works of Bentham, Austin, Kelsen and Hart. The Jurists had their legal experiences in particular historical contexts. It is vital, we submit, to examine the context of ideas and activities in which normative legal theory evolved.

## **2.0 NORMATIVE LEGAL THEORY AND POSITIVISM: AN OVERVIEW**

Bentham, Austin, Kelsen and Hart can as stated earlier be described as belonging to the positivist movement which began around the 19<sup>th</sup> century. The movement represents a reaction against *a priori* methods of thinking that characterized the preceding age. Prevailing theories of natural law shared the feature of turning away from the realities of actual law in order to discover in nature or reason principles of universal validity. Unverified hypotheses of this sort failed to satisfy the intelligence of an age nurtured in the critical spirit of scientific learning. Scrutiny of natural law postulates had damaging results as they were found to be without foundation or else the products of extrapolation.<sup>13</sup>

The term:” positivism” has many meanings which were tabulated by Prof. Hart as follows:<sup>14</sup>

- (i) Laws are commands. This meaning is associated with two founders of British positivism, Bentham and his disciple Austin.
- (ii) The analysis of legal concepts is
  - (a) Worth pursuing
  - (b) Distinct from sociological and historical inquiries.
  - (c) Distinct from critical evaluation
- (iii) Decisions can be deduced logically from pre-determined rules without recourse to social aims policy or morality.

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<sup>13</sup> See Dias RWM “*Jurisprudence*” Butterworths, London, 1985 page 331

<sup>14</sup> “*Positivism and the separation of Law and morals*” (1957-58) 71 Harvard Law review et p 601; see Dias RWM op cit. p 332

- (iv) Moral judgments cannot be established or defended by rational arguments, evidence or proof.
- (v) The law as it is actually laid down “positum” has to be kept separate from the law as it ought to be.

Today’s positivist movement has one common golden thread that runs in its reasoning. The law as it is actually laid down “positum” has to be kept separate from law as it ought to be.

Legal Positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English Jurist **John Austin** (1790-1859) formulated it thus;

**“The existence of law is one thing; its merit or demerit another, whether it be or be not is one inquiry; whether it be or not conformable to an assumed standard is another inquiry. A law which actually exists is a law though we happen to dislike it or though it vary from the text by which we regulate our approbation or disapprobation.”**<sup>15</sup> (Emphasis ours).

Positivists, in their search for structure and unity in law endeavour to take the objective way and look at law independent of morals, politics and any other externalities. They espouse the liberation of legal philosophy from the impurities of dogma.

## **2.1 TO WHAT EXTENT DO THEY SUCCEED?**

Our considered opinion is that they still end up where they did not want to go. They end up in politics. The command theory of Austin and Bentham is certainly political. Law is the command of the sovereign enforceable through sanction. Austin and Bentham’s “command”, it can be argued is political in so far as it emanates from a political body, the sovereign.

The notion portrayed by positivists generally, that once the sovereign has promulgated a norm or law, the said law is value-free politically and it should be construed by reference to itself is in

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<sup>15</sup> Austin, John(1832) *“The province of Jurisprudence Determined”* Ed. W.E. Rumble, 1995, Cambridge, Cambridge University Press p 157 ; Austin, John *“Lectures on Jurisprudence or Philosophy of positive Law”* “Two vols. R. campbel Ed 4<sup>th</sup> Ed London: John Murray 1995 (first published 1873)

our view unconvincing. Kelsen for instance starts out by a search for a pure theory of law but ends up promulgating a theory of law for use by politicians taking up power by revolution: (We shall examine in detail Kelsenian principles and the way they have been applied, in the next section). Kelsen's effort is commendable in our view to the extent that he wants us to construe law by reference to itself. The notion of law as a system of norms is easy to understand and is successfully presented.

In our view however the "Grundnorm" presents difficulties. It takes us back to politics. Kelsen's theory has often been criticized as advocating the notion that "might is right". To argue that a "norm" can be non political as Kelsen seems to do is in my view dishonest. We take the view that the grundnorm is not only a social fact but it is subject to politics.

Hart's rule of recognition can, in our view be traced back to the sovereign thus taking us back to the arena of politics. Rules are made by the sovereign or on the authority of the sovereign. In England for instance all law is promulgated in the name and by the authority of her Majesty the Queen. It can be argued then that laws made this way reflect her political will to a large extent. It cannot be denied, we submit, that law has a **power character**. It arises from power relationships in the society.

Positivists, it can be argued were the first to open our eyes to the political nature of law. They then progress to define rules, norms and their strict enforcement without any reference to politics and other externalities. Here is where in our view, they fail. We take the view that positivists are peddling the unrealistic idea that from the naked political power that created law, it has evolved into a non-political norm. This does not make sense in light of the experience of states and legal systems worldwide.

Positivists seem to be saying that we must enforce the political will of the promulgators of law; enforcement of the law is the legitimization of law. This in our view is quite unattractive to a lawyer seeking to rationalize legal doctrine as invariably he would also be concerned with the content of such law or the legitimacy of government that comes into power through the overthrow of the constitutional order.

Positivists, as the author understands it, argue that if you abandon objective interpretations of the law you open a door to politics. This argument cannot in our view stand if one considers the fact that the law is political in the first place in the sense that it is promulgated by the state, which is undeniably involved in the exercise of political power. But to be fair to positivists, they have to a large extent used normative legal theory to liberate law from the impurities of dogma. To the extent that they advocate clarity of concepts and teach us to separate the “is” from the “ought” they have succeeded.

Positivists succinctly and successfully in our view focus our minds to one very vital issue: If you want to develop a normative theory of law observe how the law operates in reality. Stop looking at God or nature or morals for the law. Through positivism we are able to see the political character of law. The effort of the positivists in establishing the independence of law from politics has in our view been largely a failure. A closer look at the works of Bentham, Austin, Kelsen and Hart confirms this. This should however not blind us to the success of this tradition in its endeavours to separate the “ought” from the “is” through scientific and objective study.

Bentham, Austin Kelsen and Hart all attempt to offer a general perspective on the nature of law. This is achieved by trying to search for and demonstrate some structure and unity in law. These jurists are in our view involved in a “search for a common source of authority for laws or what may be called **consistent patterns of legal reasoning which appear as law’s unifying characteristics.**”<sup>16</sup> (Emphasis ours).

Positivists can be credited with successfully distinguishing the legal from the non legal. They address the question of the need to mark what is “internal” to law and what is “external” to it. They largely succeed in our view, to distinguish legal from non-legal and they also show us how to explain and interpret the components of the legal without any reference to non-legal criteria. Their exposition of what is law helps us understand the law as social phenomenon related and intertwined with other institutions and concepts such as politics. Positivist legal thought finds the essence of law in its form (as sovereign command, rule or norm)

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<sup>16</sup> Cotterrel R *op cit* page 9



Today, it has been suggested, positivist analytical jurisprudence admits that the making of law is a political act, that what determines the content of legal doctrine are legislature's choices and judges discretions..., legal analysis has become strictly speaking a technical analysis of the regulatory forms through which government acts.<sup>17</sup>

Clearly then, law has always been an instrument of the exercise of government power. It has never been independent of politics. In the next section we shall look closely at the works of Jeremy Bentham, John Austin, Hans Kelsen and HLA Hart in an attempt to further demonstrate the evolution of normative legal theory's search for structure and unity in law.

### 3.0 JEREMY BENTHAM 1748 –1832

For Jeremy Bentham, the English legal reformer normative legal theory was central to a science of law, which would provide a secure foundation for rational reform.<sup>18</sup> Bentham belonged to the positivist school of thought that taught inter alia that positive law in the sense of the law of the state is something ascertainable and valid without subjective considerations. Hence it must be regarded as separate from morals (which were equated with natural law).<sup>19</sup> According to Bentham “**expository jurisprudence**” as opposed to “**censorial jurisprudence**” was concerned with the law as it is without regard to its moral or immoral character. (Bentham writings on expository jurisprudence became readily available only 30 years ago).<sup>20</sup>

Bentham saw expository jurisprudence as a prerequisite for systematic reform to enable the legal system to meet the need for rational and efficient government in a modern state.<sup>21</sup> Betham's agenda was clearly political. The legal system in this vision is related to the political system in a

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<sup>17</sup> 17. Ibid p 226.

<sup>18</sup> Ibid page 7

<sup>19</sup> Freeman MDA “*Llyods Introduction to Jurisprudence*” 7<sup>th</sup> Ed Sweet & Maxwell page 200

<sup>20</sup> Ibid page 203

<sup>21</sup> Cotterrel *op cit* page 218

direct way. “*Of laws in General*” is Bentham’s main contribution to Jurisprudence.<sup>22</sup> Bentham was a lifelong law reformer but he believed (And Austin was his disciple in this as well) that **no reform of the substantive law could be effectuated without a reform of its form and structure.** (Emphasis ours). A thoroughly scientific conceptual framework was thus but a prelude to reform.<sup>23</sup>

Bentham’s is an imperative theory of law in which key concepts are those of sovereignty and command. Bentham contributed immensely to the evolution of normative legal theory’s search for structure and unity in law. He was a “conscious innovator of new forms of inquiry into the structure of law and he makes his method and general logic of inquiry which no other writer in these topics does.”<sup>24</sup> Bentham is committed to the view that there are no laws which are neither imperative nor permissive. All laws command, prohibit or permit some form of conduct.<sup>25</sup> We are able to see the structure and unity of law through his eyes. Laws relate to power which emanates from the sovereign. Clearly this is political power. Bentham’s structure of law does not in our view establish the independence of law from the exercise of political power. The imperative theory is in our view political in nature so long as the imperative is derived from the political establishment, the sovereign. However as indicated earlier it helps us identify law by reference to its power content derived from the sovereign. Law has an imperative character. Bentham described those laws that do not impose an obligation as only “part of laws”.<sup>26</sup>

Bentham rejects the idea of ‘natural’ rights but he sought to incorporate values such as “liberty” “equality” and “property” in his normative legal theory. Thus duties enforced by sanctions lead to security and thereby greater happiness.<sup>27</sup>

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<sup>22</sup> HLA Hart ed “Rechtstheorie” 1971 pp 55; Hart “*Essays on Bentham*” 1982

<sup>23</sup> “*Of Laws in General*” Ed Hart 1970 chapter XIX; Lloyds. *Op cit* page

<sup>24</sup> Hart *op cit* (n.22); Freeman MDA *op cit* page 204

<sup>25</sup> Freeman MDA *op cit* page 205

<sup>26</sup> *Ibid* page 206

<sup>27</sup> *Ibid* page 206; *Ibid* page 227

### 3.1 JOHN AUSTIN (1790 – 1859)<sup>28</sup>

Austin represents the intellectual reaction against naturalism and a love of order and precision. Austinian theory made no headway until after his death, until after the Chartist movement had collapsed, and it then rapidly reached the zenith of its influence in the serene atmosphere of Victorian England.<sup>29</sup>

Austin put more emphasis on normative legal theory's rationalizing, systematic task – making sense of the chaotic jumble of legal materials and its educational value of providing a “map for the law” – a framework upon which the detail of legal technicality could be arranged.<sup>30</sup>

He viewed his theory of law and sovereignty as the key to a science of law upon which modern legal practice could be securely based.<sup>31</sup> Austin is considered by many to be the creator of the school of analytical jurisprudence as well as more specifically the approach to law known as “legal positivism”. Austin's particular **command theory of law** has been the subject of pervasive criticism, but its simplicity gives it an evocative power that cannot be ignored.<sup>32</sup>

Austin was arguably the first writer to approach the theory of law analytically (as contrasted with approaches to law more grounded in history, sociology or arguments about law which were secondary to more general moral and political theories. Analytical jurisprudence emphasizes the analysis of key concepts including “Law”, “Legal right” “Legal validity”.<sup>33</sup>

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<sup>28</sup> “*Critical accounts of Austin and his thought are: W Morrison*” John Austin (1932) W rumble “*The Thought of John Austin*” 1985.

<sup>29</sup> Dias RWM “*Jurisprudence*” Buterworths London 1985 page 332

<sup>30</sup> Cotterrel *op cit* page 7

<sup>31</sup> *Ibid* page 218

<sup>32</sup> See generally Austin John “*The province of Jurisprudence Determined*” W. Rumble Ed (ed) Cambridge: Cambridge University press 1995 (first Published 1832).

<sup>33</sup> Brian Bix “*On John Austin: Stanford Encyclopedia of Philosophy*” page 2 (Available online)

Though analytical jurisprudence has been challenged in recent years<sup>34</sup> it remains the dominant approach to discussing the nature of law. Austin specifically, and legal positivism generally, offered quite a different approach to law as an object of “scientific” study dominated neither by prescription nor by moral evaluation. Austin’s efforts to treat law systematically gained popularity in the late 19<sup>th</sup> century among English lawyers who wanted to approach their professional training in a more serious and rigorous manner.<sup>35</sup>

Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral descriptive (or “conceptual”-though this is not a term Austin used) theory of law.

Legal positivism does not deny that moral and political criticisms of legal systems are important but insists that a descriptive or conceptual approach to law is valuable both on its own terms and as a necessary prelude to criticism.<sup>36</sup>

Austin’s (and Bentham’s) theories represent an admirable search for structure and unity in law. They are concise and clear. They have survived the test of time in more ways than one. They make it possible for law to be conceptualized in a way that explains its hierarchical structure and unity stemming from the exercise of power by the sovereign through commands, permissions or prohibitions. Austin’s work was more influential in this area because Bentham’s jurisprudential writings did not appear in an even roughly systematic form until well after Austin’s work had already been published.<sup>37</sup>

Austin “endeavours to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is comprised.”<sup>38</sup> As to what is the core of law, Austin’s answer is that laws (properly so called) are commands of a

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<sup>34</sup> Such as by Leiter Brian “*Realism, Hard positivism and conceptual Analysis*” (1998). *Legal Theory* vol. 4 page 533 –547.

<sup>35</sup> See Cotterrel ROGER (1989) *op cit.* chapter 3.

<sup>36</sup> See Austin’s famous formulation of the “dogma” of legal positivism *Supra*; page 5.

<sup>37</sup> Bentham Jeremy “*Of laws in General*” (HLA Hart. Athlone Press 1970); Cotterrel *op cit* page 52-53.

<sup>38</sup> Austin John “*Lectures on Jurisprudence and the philosophy of law*” 2 volumes *op cit*, Lecture v page 117.

sovereign. He clarifies the concept of positive law (that is, man-made law) by analyzing the constituent concepts of his definition and by distinguishing law from other concepts that are similar. Austin also wanted to include within the province of “jurisprudence” certain exceptions; items that did not fit his criteria but should nevertheless be studied with other laws “properly so called”: “repealing laws”, “declarative laws” and “imperfect laws” – laws prescribing action but without sanctions (a concept Austin ascribes to Roman (Law) Jurists).<sup>39</sup> In our view Austin succeeded in delimiting law and legal rules from religion, morality, convention and custom. But he does not succeed in establishing law from politics.

Within Austin’s approach, whether something is law or not depends on which people have done what: the question turns on an empirical investigation and it is a matter mostly of power not morality. Power is exercised by the sovereign and its officials. Here again, we can see that law and politics in this normative legal theory are intertwined.

Austin in contrast to his mentor Bentham had no objection to judicial law making which Austin called “highly beneficial and even absolutely necessary”.<sup>40</sup> To the extent that Judges have been known to be political activists and advocate a political stance then judge-made law is not independent from politics. We subscribe to the view that Austin’s analysis emphasizes the connection of law and political power and this connection is at the forefront of his analysis.

Austin’s work was at the time revolutionary but it transforms our understanding of the very nature of law. We take the view that a paradigmatic shift in jurisprudence such as the one taken by Austin allowed for the development of increasing conceptualizations of what law is and its relation to what it ought to be. Normative legal theory in other words had taken a step forward in the right direction.

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<sup>39</sup> *Ibid* Lecture 1

<sup>40</sup> *Ibid* Lecture V page 163

### 3.2 HANS Kelsen (1881 – 1973)<sup>41</sup>

For Hans Kelsen normative legal theory could be justifiable as clarifying through conceptual inquiries the nature of law as a social phenomenon (HLA Hart takes the same view). Kelsen describes law as a “specific social technique (Kelsen 1941a) and sees his task as, in part, to show clearly through an examination of the nature of legal knowledge and reasoning where its specificity lies”.<sup>42</sup> Reference to social does not mean the theory proposed is sociological in orientation. It remains, like all normative legal theory grounded in philosophical speculation rather than in empirical examination of actual patterns of legal behaviour or actual social and historical contexts in which law exists.<sup>43</sup>

Kelsen’s writings recognize that normative legal theory cannot merely collect data of law and put it in systematic order and must deliberately construct a perspective on reality appropriate to its subject.<sup>44</sup> Kelsen is clear that the pure theory of law is not concerned with behavior such as judicial activity in deciding cases but solely with the logic of norms. What Kelsen offers is a pure science of normative logic. By explicitly and formally separating this science from all others which might aid the understanding of law he marks out a distinct field for normative theory.<sup>45</sup>

Law as portrayed by Kelsen’s normative legal theory is a web of normative ideas from which human agency is excluded. Kelsen’s analysis of the formal structure of law as a hierarchical system of norms and his emphasis on the dynamic character of this process are certainly illuminating and avoid some, at any rate, of the perplexities of the Austinian system.<sup>46</sup> Kelsen does not in our view succeed in drawing precise lines of demarcation between the legal and political function of law. A legal system as we know it is not an abstract collection of norms. It

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<sup>41</sup> See Generally Freeman MDA *op cit* page 255-307 on the “*Pure Theory of Law*”

<sup>42</sup> Cotterrel R. *op cit* page 7

<sup>43</sup> *Ibid* page 8

<sup>44</sup> *Ibid* page 230

<sup>45</sup> *Ibid* page 233

<sup>46</sup> For a discussion on Kelsen’s norm, Freeman MDA *op cit* chapter 5.

exists within a political environment. Kelsen's "pure" theory of law is inseparable from politics. As stated earlier it seems to justify the notion that "might is right". Kelsen's theory of law that fundamentally equates law with power will necessarily fail to distinguish the arbitrary rules of a dictator based on terror from the rules of a legitimate government.

Kelsen's theory for instance was expressly cited following a coup in Pakistan (*The state versus Dosso*),<sup>47</sup> one in Uganda (*Uganda -v- Commissioner of Prisons ex parte Matovu*)<sup>48</sup> and the Rhodesian Unilateral Declaration of Independence in 1965<sup>49</sup> as justifying judicial recognition of new regimes after a revolution. In the *State -vs- Dosso* it was held by a majority of the court that the President's proclamation of 7<sup>th</sup> October 1958 by which the constitution of 1956 was annulled and martial law was proclaimed constituted abrupt **political change** (emphasis ours) not within the contemplation of the said constitution i.e a Revolution; a victorious revolution is an internationally recognized legal method of changing a constitution. Laws which derive from the old order may remain valid under the new order only because their validity has expressly or tacitly been vested in them by the new constitution and it is only the contents of these norms that remain the same not the reason for the validity. The judges in the cases cited hereinabove apply Kelsenian principles which seem to justify the ceasing of the old order through a revolution. A new basic norm is presupposed. This new norm is the one according to which the new constitution is valid, a norm endowing the revolutionary government legal authority.<sup>50</sup> Kelsen argues that if a group of people attempt to seize power by force, if they succeed and if the old order ceases and a new order begins to be efficacious because individuals whose behavior the new order regulates actually behave by and large in conformity with the new order then this order is considered a valid order.

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<sup>47</sup> 1958 Pakistani SRC 180.

<sup>48</sup> 1966 EA 514.

<sup>49</sup> *Madzimbamuto -vs- LardnerBurke & Another* 1968 2 SA, 284.

<sup>50</sup> Kelsen "General Theory of Law and the state" 1961 Edn p 117; *Uganda -vs-Commissioner of Prisons Ex parte Matovu* (The Kelsenian argument adopted page 536).

It can be argued that Kelsen's theory implies that "might is law". The norms have a political value. They are not value-free. Kelsen tries to craft a theory of law that has the science of law inherent in it. In our view he begins by saying "let us separate the "is" from the "ought"- "let us have a pure theory of law". He is clearly trying to develop an amoral theory of law, an "apolitical" theory: he teaches us that we must understand jurisprudence as a science of law, a science of norms, a science of positive law. At the apex of Kelsen's norms is the grundnorm which is not necessarily a legal norm. He seeks, in our view, a coherent structure and unity in law by looking at the law as a hierarchy of norms. This he succeeds in doing. What he does not succeed on is his attempt to establish law as being independent from politics. Kelsen's contribution to the normative search for structure and unity in law is significant. He draws our attention to the normative structure that is law and the juridical construct called the state.<sup>51</sup>

Kelsen however seems to suggest that a norm is a positive postulation and it is possible to define law by reference to itself only. We take the view that the Kelsenian norm is not divorceable from politics. The norm can be traced up to the state power structures. To expect the norm to be politically neutral is not credible in our view especially since the grundnorm can be changed through a political act such as a revolution. The new norms carry with them the political philosophy of the new regime. They will import into law political notions and policies which will have an impact on the rule of law, constitutionalism, justice or lack thereof. Normative legal theory in my view must ultimately be rooted in some account of the political system.

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<sup>51</sup> Kelsen's works include: Kelsen Hans 1945 "*General Theory of Law and state*" Trans. A Wedbel repr. 1961 New York Russel & Russel (*op cit*); Kelsen Hans (1967) – "*Pure Theory of Law*" Trans. M Knight. Berkeley; University of California press.



### 3.3 HLA HART<sup>52</sup>

If law cannot be grounded in force or in law or in a presupposed norm, then on what does its authority rest? This in our view is a key question that **HLA Hart** tries to answer in his use of normative theory to search for structure and unity in law. Hart emphasizes the normative foundations of legal systems. For Hart the authority of law is social. The ultimate criterion of validity is neither a legal norm nor a presupposed norm but a social rule that exists because it is practiced.

HLA Hart is a theorist who is ambitious in asserting practical relevance of normative legal theory subsuming this in wider intellectual justifications. For Hart (as with Kelsen) legal theory could be justified as clarifying through conceptual inquiries the nature of law as a social phenomenon. Hart (1961) suggests that clarification of legal ideas can cast light on the social context in which they are used.<sup>53</sup> Hart seems to have a faith in the distinctiveness of the intellectual world of the lawyer and the separation of law from politics. A reading of his writings reveals his insistence on precision in legal argument which is seen to depend on an absolute defence of the distinctiveness of a realm of positive law and positive legal analysis separate from moral or political argument. Hart has built his system of modified positivism based on traditional positivism and his criticism of Austin's failures. He believes the legal system is a system of rules, "rules of recognition," "rules of change" and "rules of adjudication". His fundamental point in our view is that there needs to be an interaction of rules, which creates the substance of law. His is a logical system made up of these rules.

For Hart the "**rule of recognition**" is the most important for it specifies the ultimate criteria of validity in the legal system. Hart's **necessary and efficient conditions** for the existence of a legal **system are that those "rules of behaviour which are valid according to the system's ultimate criteria for validity must be obeyed and its rules of recognition specifying the**

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<sup>52</sup> Some of Hart's works include, "*Definition and Theory in Jurisprudence*" in Hart HLA Essays in Jurisprudence and philosophy (1983) Originally in (1954) LQR 37; "*Causation in the Law*" (Together with A Honore 1<sup>st</sup> Ed 1959; 2<sup>nd</sup> Ed 1985 ; "*Concept of Law (1994)*" *Positivism and the separation of Law and morals*" 71 Harv. L Rev 593 (1958).

<sup>53</sup> Cotterrel *op cit* page 7.

**criteria of legal validity and its rules of change and adjudication must be efficiently accepted as common public standards of official behavior by its officials**<sup>54</sup> (emphasis ours).

In our view Hart is essentially describing a political system. His system depends on “officials” (products of the political system) to run it. To this extent politics creeps into Hart’s normative theory of law. Thus Hart’s presentation of normative legal theory in a search for structure and unity in law cannot be said to have established the independence of law from politics. The two are intertwined as can clearly be seen. Hart’s theory in our considered opinion is informed to a certain extent by the political environment in which he lives. His theory ultimately is about the practice of power within society. It takes us back to politics. Hart does not reject the idea of a coercive sovereign command as forming part of the law and goes a head to make a second set of rules to make the first move appropriate.<sup>55</sup> He ends up in our view restating the classical positivist tradition in a contemporary form.

Using normative theory he searches for structure and unity in law and in our view finds it and vividly and with remarkable clarity describes it. He goes much further than natural lawyers who sought to find law outside law leading to obfuscation of issues relating to the content of the law and those relating to its criticism.

#### **4.0 CONCLUSION**

In this paper we have critically examined the work of Jeremy Bentham, John Austin, Hans Kelsen and HLA Hart and demonstrated the evolution of normative legal theory’s search for structure and unity in law. This evolution, it should be pointed out, is still progressing and the exploration of the integrity and rationalization of legal ideas and legal reasoning continues.

We have sought to answer the question: “How successful has the effort of this tradition in establishing the independence of law from politics been?” The answer has been largely in the

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<sup>54</sup> Hart HLA (1994) 1<sup>st</sup> Ed 1961 “*The concept of Law*” 2<sup>nd</sup> Ed. P Bullock and J Raz. Oxford Clarendon press page 116 page 117

<sup>55</sup> See generally HLA Hart, *Ibid* “*Hart Austin and the Concept of a legal System*” (1975) Yale Law Journal 584,607.

negative. Law and politics thrive together in the same environment. Law has a power character inherent in it. The state exercises its power through law. Bentham, Austin, Kelsen and HLA Hart open our eyes to the political character of law. They are successful in varying degrees in their search for structure and unity in law. Their methodology is more “scientific” and acceptable to modern scholars than that of the medieval natural lawyers who sought the “is” from outside the law.

Normative legal theory may seek to show how law and politics can remain distinct. However the works and experiences of the writers discussed hereinabove shows that the two fields are connected in significant and crucial ways. The search for “liberty” “justice” “rights” will compel any serious jurist to look beyond law into the arena of politics and sociology, for answers.

Analytical positivism as applied by Austin and others attains clarity of concepts unattained by natural law scholars and this necessarily enhances, in our view, the appreciation of legal phenomena. The scholars discussed in this paper may not have succeeded in distilling law from politics. But they have succeeded to a large extent in distilling law from a mass of other related concepts thus easing our task of trying to describe and understand legal phenomenon. Using normative legal theory as an approach it is easy in our view to pick out what is law from a myriad of concepts, ideas, norms, rules and philosophies.