

DEVELOPMENT OF ENGLISH LEGAL POSITIVISM FROM BENTHAM TO SALMOND AND BROWN: LEADING IDEAS IN THE CONTEXT OF THE COMMON LAW TRADITION

Abstract

This article examines the peculiarities of the evolution of English legal positivism, which was the only direction of understanding law formed by professional lawyers, expressing the specifics of their legal consciousness, focused on understanding positive law and the practice of its implementation. The authors examine the key concepts that define the historical trajectory and problem field of legal positivism in the Anglo-American tradition, analyzing the legal teachings of T. Hobbes, D. Hume, J. Bentham, J. Austin, M. Hale, W. Blackstone, J. W. Salmond and W. J. Brown. The attention is drawn to the fact that Salmond lays down objections to the concept of law as a rule of the state and considers its main shortcomings. In his work “Jurisprudence or the Theory of Law”, Salmond presents the flaws and omissions of the “imperative theory of law”, among the proponents of which he names T. Hobbes, S. von Pufendorf, J. Bentham and J. Austin. Brown believes that the essence of law can be expressed by a set of three concepts: “will”, “command” and “reason”, and the just conception of law implies recognition of the elements of unity, growth and growth that is consciously directed towards the realization and achievement of the goal.

Keywords: legal positivism, Anglo-American tradition, command theory, J. Bentham, J. Austin, J. Salmond, W. Brown.

Introduction

The relevance of a holistic historical reconstruction of the evolution of legal positivism in Anglo-American legal thought is due not only to the fact that analytical jurisprudence remains one of the leading areas of understanding of the law but also because its specific features are inextricably linked to one of the leading legal traditions – “common law”. The methodological basis of the concepts of legal positivism in England should be considered as the concept proposed by David Hume (1960), which implies the delimitation of the areas of “what ought” and “what is” and asserts as the object of scientific research only the area of “what is” (the essence). It is important to note that D. Hume challenged the posi-

tion of S. Clarke in his treatise “A Discourse Concerning the Unalterable Obligations of Natural Religion, and the Truth and Certainty of the Christian Revelations” (1706), which considered it possible “to deduce the original obligations imposed by morality from the necessary and eternal reason and proportionality of things” (Finnis, 2011, p. 62). Nevertheless, Hume was of the view that the basis of any judgement of “what ought” lies “in the feeling” and not “in the object” or in action (Finnis, 2011, p. 62): a negative judgement of the wrongness of an action involves an inner sense of reproach, which involves looking inwards (Hume, 1960) and which, not being a fact of reason, cannot be known by rational means through the categories of truth and error. For this reason, Hume (1960)

is convinced that “what ought” cannot be logically deduced from “what is”. Consequently, the “facts of what ought” cannot become an object of rational introspection and self-knowledge. As I. N. Gryazin (1983) notes, this thesis laid the foundation for the formation of “the unity of the entire positivist line of jurisprudence”.

The First Ideological Background of Early Legal Positivism in England

It should be stressed that the English philosopher Jeremy Bentham (2000) pointed out two purposes of a book of jurisprudence: (1) to determine what the law is (“a book of expository jurisprudence”); (2) to determine what the law should be (“a book of censorial jurisprudence, or a book on the art of legislation”). The founder of the school of analytical jurisprudence, John Austin (1995), made a strict distinction between the theoretical science of jurisprudence (“the science of jurisprudence”), which studies positive law, and the applied science of legislation (“the science of legislation”), which develops principles from which positive law is evaluated.

Many of the ideological premises of the “first” legal positivism in England were laid down by the political-legal doctrine of Thomas Hobbes (1996), in which some common features with the legal concepts proposed by J. Bentham can be identified, namely:

1. the nature of law is based on empirically derived knowledge;
2. the necessary quality of usefulness of knowledge about human nature and society, which contributes to the well-being of people and their happiness;
3. the individual nature of man, characterized and driven by egoism and the desire for pleasure, acts as a fundamental link in the teaching of English philosophers of law about positive law (for Hobbes – “appetites and aversions”, for Bentham – “pain and pleasure”).

Moreover, English thinkers define the con-

cept of law by formulating common attributes inherent in it. For example, in “Leviathan”, T. Hobbes (1996) pointed out that law is an order of a “public person” addressed to all who are bound to obey him and expresses the will of the sovereign through an oral or written rule prescribing to do or abstain from doing some action. In “Of Laws in General” (1970), J. Bentham defines law as the “will” of the sovereign, which is unconditionally binding, aimed at specific consequences as a motive to comply with it. Thus, it is fair to conclude that both Hobbes and Bentham associate the origin of law with the will of the sovereign and give the law the qualities of an imperative, coercive and non-personalized addressee. The fundamental characteristic that unites the early concepts of legal positivism in England is the denial of the possibility of the existence of an objective, rooted in nature and independent of subjective assessments of natural law (Postema, 2019).

In the teachings of John Austin (1995), the law in its proper sense is understood as rules “laid down for the guidance of an intelligent being by an intelligent being having power over him”. This includes both “laws set by God to his human creatures and laws set by men to men”. Thus, Austin equates laws established by God with natural law. The laws set by men are divided into two classes: (1) laws established by persons who are politically superior in an independent political society, and (2) rules of positive morality (Austin, 1995, p. 15; Houlgate, 2017, p. 37). Every positive law (“posited law, given its position law”) is established by a sovereign, an individual or a collective with political power, in whose independent political society it is sovereign or sovereigns (Austin, 1995). Sovereignty is based on the habit of the greater part of society to obey a particular general superior, the bearer of sovereign power, whereas the bearer of such power himself has no habit of obeying a particular superior. Thus, law, in Austin’s understanding, can be defined as a set of general commands (orders) emanating from the sovereign who

makes them effective through sanction, with law being both a pattern of conduct for administrators and judges as well as a warning to persons who commit some unlawful action in terms of that very command or order, trying to convey to them that there will be a sanction, that is a warning of responsibility. Didikin A. B. (2016) notes that Austin's theory of law emerged at the time of fundamental changes in the structure of the British society, the growth of liberal tendencies, the reform of state bodies and of the system of judicial proceedings. The key terms of Austin's theory are "command", "sanction", "duty", "sovereign" (Lobban, 2021).

The declaratory conception of the common law of M. Hale and W. Blackstone (1869), on the contrary, was based on the objective nature of the common law of England, its existence regardless of the private opinions of individuals, including judges themselves. In his "Commentaries on the Laws of England", W. Blackstone (1869) said that a judge is only called upon to declare and proclaim, not to create law (p. 327). However, J. Bentham fundamentally disagreed with the traditional justification for the operation of judicial precedent based on the declaratory doctrine of M. Hale and W. Blackstone. At the same time, Bentham gives an extremely negative assessment of the judicial case law: the thinker characterized the British system of precedents as "a perpetual conspiracy of lawyers against the people" – judges and lawyers have a direct interest in making the law as irrational as possible (Isaev & Lunts, 1947, p. 7). Bentham's project of a general codification of English law was therefore intended to reduce considerably the power of the lawyers, whose task would be reduced not to the interpretation of an ill-defined "common law", but only to the application of the law (Wacks, 2014, p. 22). J. Austin thought that since the sovereign does not interfere with the adjudication of cases and does not overrule their decisions by his "tacit command", he allows this practice (Lloyd, 1987, p. 297; Bogdanovskaya, 1993, p. 44). In so doing, J. Austin was forced to

create a legal fiction of "tacit approval" by the sovereign of the actual judicial practice because otherwise, it was impossible to reconcile the mode of establishment and operation of the case law with the "command" conception of law.

In our view, J. Bentham's revolutionary attempt to transform the common law system (Postema, 2019, pp. 186-212) by replacing judge-made "dog law" with a universal codification and the very fictitious entity of "law" with the real entity of "law" as an act of legislation (Bentham, 1977, p. 7) was legitimately defeated by deeply rooted in the professional legal consciousness of the English lawyers' attitudes and perceptions. Since for centuries, the central figure of the English legal system was the judge, who was not just the enforcer of the law, but the author of the law. The perception of law as a judicial tradition, developing evolutionarily and closely linked to the historical development of English society, was a deeply rooted view of the professional legal consciousness of English lawyers, and it is these traditional views that found expression in the legal teaching of the New Zealand lawyer, civil servant and judge John William Salmond (Frame, 1995).

J. W. Salmond's Contribution to the Evolution of English Legal Positivism

It is interesting to note that most of the key aspects of H. L. A. Hart's theory of law (1994), from his critique of Austin's theory of commands and the doctrine of sovereignty to his concept of the rule of recognition, can be considered as developed in J. Salmond's legal theory. In particular, Hart's ultimate rule, which provides criteria for defining valid norms of the legal system (Gryazin, 1988, p. 176), resembles Salmond's notion of "ultimate legal principles", which Hart rejected, qualifying it as "insufficiently elaborated" (Postema, 2011, p. 25). J. Salmond (1902) defines law as a system of principles and rules recognized and applied by the state in the administration of justice. "It is justice that speaks to

citizens as the voice of the state”, argues the New Zealand jurist (Salmond, 1902, p. 56); that is, every rule or principle of law is expressed in judicial practice (Salmond, 1893, p. 88).

In our view, this emphasis on judicial recognition and application of the rules constituting the content of the law is a clear expression of the specifics of the common law tradition in which, for several centuries, the law was seen as the “property” of the professional corporation of lawyers – judges and lawyers. As it is known, one of the basic principles of English law states: “The right is where the means of its judicial remedy” (“ubi jus ibi remedium”). This principle is an expression of the system of injunctions (writs) that has been in place for centuries of English legal history, indicating the historically established priority of procedural forms and generally “procedural” thinking of English lawyers (Mikhailov, 2015, pp. 38-43). Just as Roman law was the law of claims, so the common law of England has traditionally regarded justiciability (possibility of judicial remedy) as the necessary and leading feature of law. English case law since 1703 (Lord Ault’s position in *Ashby v White* (1703) 14 St Tr 695, 92 ER 126) explicitly recognizes that a remedy is a necessary component of a subjective right. It is therefore far from coincidental that J. Postema (2011) links Salmond’s definition of law to his direct experience as an attorney at law.

The focus of law on the maintenance and protection of a subjective right introduces a purposive element to its concept, which significantly distinguishes Salmond’s doctrine from the position of the founder of English legal positivism. Law in Salmond’s (1902) understanding has a purposive nature since it is an invention for the administration of justice and cannot be understood without reference to its end result. Therefore, the representatives of the “imperative theory of law”, who reduce law solely to the coercive orders of the sovereign, regard, according to Salmond, only one part of the true nature of law and completely ignore the other part of it – the exer-

cise of justice (Salmond, 1902, p. 56).

In addition, J. W. Salmond criticizes J. Austin for neglecting the question of the ethical meaning of law and attempting to separate this from the concept of law as such in principle. At least because of this one-sided approach, Salmond generally finds the imperative theory defective and unworkable. The New Zealand legal scholar notes the inconsistency of such a strong simplification in the form of excluding all the elements other than coercion from the concept of “law”, which does not allow for the existence of a link between law and justice, especially in the administration of justice in pursuance of the law. Law is an ideal combination of right and power, aligned with justice on the part of the state. Salmond assumes a theoretical, but not always practical, overlap between law and justice, for the realization of which law was created: in this connection, Salmond (1902), in essence, and in spirit, equates “courts of law” with “courts of justice”, which received this name due to the reasoning described above. It is interesting to note that Salmond attributes the concepts of “right”, “wrong”, and “duty” to both law and morality, in support of which he states that in many foreign languages, the terms equivalent to “right” and “law”, such as “jus” (lat.), “droit” (French), “das Recht” (German), “diritto” (Italian) have both ethical and legal connotations in a natural rather than accidental way (semantic argument). Accordingly, this fact is a refutation of the imperative theory, which views law solely as a command of the state and which loses its workability and plausibility, especially when, even from a purely linguistic point of view, the term “law” has also the meaning of “justice” (Salmond, 1902, pp. 56-57). Thus, J. Salmond makes ethics an integral, “internal” element of the law, understood as an instrument of justice. For Salmond, the law is not merely an overbearing precept of the state, but it also includes a public pronouncement of the principles of justice. This approach, of course, can no longer be seen as following the “separation thesis” of Austin’s command con-

cept.

The development of English legal positivism was also reflected in the changing understanding of the content of positive law. Salmond emphasizes that although the idea of command and coercive exercise of justice by the state is an intrinsic consequence of the law, it is incorrect to say that every legal principle can be expressed in a peremptory form, since only those rules of law that create legal obligations take this form, and even these by their intrinsic nature are something more than the imperative theory does not take into account. Other varieties of legal principles go beyond the peremptory definition and take the form of permission, as they confer freedoms rather than obligations. In particular, these include (1) rules of legal procedure; (2) permissive rules of law which declare certain acts to be optional or wrongful, “for example, a legal rule that witchcraft or heresy is not a crime, or that damage caused by competition in trade cannot constitute grounds for action” (Salmond, 1902, p. 58); (3) rules which refer to the existence, application and interpretation of other rules of law. The New Zealand lawyer disagrees with those authors who are trying to present non-imperative legal norms also in the form of orders, but sent to judges, and not to all people: in refutation, Salmond (1902) gives an example of cases when the performance of judicial functions is not delegated by the supreme authority but is carried out by the supreme legislative body or the monarch himself, therefore, in such cases, procedural rules cannot be forcibly applied to the judiciary, while, however, they do not cease to be rules of law, “the legal nature of which is a consequence of the fact that they are actually observed in the course of the administration of justice, and not because the judiciary is bound by legal sanctions to comply with them” (p. 59).

The legal doctrine of the New Zealand jurist shifts the focus from sovereign power (J. Bentham, J. Austin) to judicial practice as the ultimate basis of law for the first time in the history of English jurisprudence. Thus, the reality of law

is no longer based on the coercive command of the sovereign but on the rules and principles recognized by the judiciary and confirmed by their practices (Postema, 2011, p. 23). It is, therefore, not unreasonable to believe that it was J. Salmond who brought English analytic jurisprudence closer to the widely known social thesis of law as a fact of social life (Postema, 2021, p. 198). From J. W. Salmond’s (1893) point of view, the law is a heterogeneous and multi-component body of norms and principles that are both imperative and permissive in nature. In his view, Austin’s theory of commands fails to explain the existence of different kinds of law (in particular, permissive rules, procedural rules, evidence, etc.).

The Legal Doctrine of W. J. Brown as the Development of Legal Positivism

In addition to J.W. Salmond, critical arguments regarding J. Austin’s legal theory of commands (“command theory of law”) were formulated at the end of the 19th century by W. A. Watt in “Outline of Legal Philosophy” and subsequently systematized by the Australian jurist William Jethro Brown (1868-1930) in 1906 in the excursus E of “The Austinian Theory of Law Being an Edition of Lectures I, V, and VI of Austin’s “Jurisprudence” and of Austin’s “Essay on the Uses of the Study of Jurisprudence” with Critical Notes and Excursus”.

Attention must be drawn to the fact that W. J. Brown accuses J. Austin of perpetuating two errors: (1) attempting to give any legal rule the form of a command; (2) limiting the ultimate source and nature of commands to the arbitrary prescriptions of rulers to whom they are subject under penalty of punishment, rather than the prescriptions of the state as a totality of both rulers and governed, which would exclude the arbitrariness of regulation, since it is “imposed” – in other words, the law as a system exists – by the will of the totality which citizens themselves are part of (Brown, 1906, p. 344).

W. J. Brown develops an argument similar to that presented by J. W. Salmond that a significant part of the law cannot be expressed in the form of commands and that many rules of law do not concern imposing duties but granting privileges. Moreover, even in cases where the law can be expressed in the form of a command, the command is not its real essence. That is, the law is much more than a command: “The general purpose of the law is not to impose duties, but to grant rights; not to turn a citizen into a slave, but to ennoble him as a person; not in forcing him to follow prescribed paths, but in giving him opportunities for self-realization. In a word, the law is, first of all, a system of rights provided in the interests of the common good. Duties are imposed not for their own sake, but only for the purpose of securing rights” (Brown, 1906, p. 341). Decisions are made by judges not on the basis of a system of commands but on the basis of the principles of utility and general welfare, developed by independent reasoning from anyone based on the real facts of life. These conclusions allow us to conclude that Brown adheres to the social thesis as a fact of public life.

It is worth noting, however, that W. J. Brown’s (1906) definition of “a positive law” is quite close to Austin’s understanding and the terminology the latter uses: “Every positive law (or any law in the ordinary or strict sense) is established, directly or indirectly, by a sovereign person or body in relation to one or more members of an independent political society in which its creator has supreme power” (p. 235), that is, it comes from a superior, behind which there is a coercive force, to subordinates. Brown’s refutation of the concept of law as a command of the “real ruler”, to whom Austin attributes the origin and authority of all the law and with whom he identifies the state, appears to be an essential distinction. Thus, Brown argues that “law exists regardless of its formulation by the state”, nevertheless considers as paramount to jurisprudence the “legal norms which actually exist”, are “determined on the basis of the officially proclaimed

will of the state” and “enforced by the state power” (p. 235). Law, in its totality, is the voice of an organized society, addressed to all persons under its control and affirming the rules of life, which people can accept with the knowledge that society has the power to uphold them. It is the expression of the organized will of the society, backed by the organized power of the society (Brown, 1906, p. 344).

In Brown’s view, a just conception of law implies recognition of the elements of unity, growth and growth consciously directed towards the realization and achievement of the goal – that is, a variation of the “concept of the organism” proposed in relation to law by R. von Ihering: “Into each rule of law the spirit of the whole law enters” (Brown, 1906, p. 351). The conclusion of the Australian legal scholar seems fair that the definition of law should recognize the imperative element in law as well as some other elements that have found little or no expression in the analysis conducted by Austin, namely the purposive and the mental elements. Brown believes that the essence of law can be expressed by a set of three concepts: “will”, “command” and “reason” – an expression of the general will asserting an order to be enforced by the organized power of the state and directed towards the realization of some real or imagined good, with the existence of an organized state being seen as an essential precondition for the existence of positive law. Thus, in legal scholarship, the term “law” is to be interpreted as the organic set of rules pertaining to the external actions of the individual, together with the corresponding systems of rights and duties that these rules imply, approved by the state through official bodies, upheld by the organized power of the state and applied by the courts of the state in the exercise of their judicial functions.

Conclusion

It is problematic to argue with the fact that the specifics of the historical development, structural

organization and professional thinking in the family of “common law” determine the qualitative originality of concepts of Anglo-American legal positivism. At the same time, the integrity of the reconstruction of the tradition of Anglo-American legal positivism is also related to the need to demonstrate the manifestation of the specific features of common (precedent) law in the ideological content of the concepts of analytical jurisprudence.

It is fair to conclude that both Hobbes and Bentham associated the origin of law with the will of the sovereign and endowed law with the qualities of an imperative, coercive and non-personalized addressee. The fundamental characteristic that unites the early concepts of legal positivism in England is the denial of the possibility of the existence of an objective, rooted in nature and independent of subjective evaluations of natural law. It must be stressed that Bentham and Austin’s notions of the proper organization of the legal system were at odds with the common law tradition because the degree of centralization of law-making, according to the legal theories of these English legal scholars, is completely out of character with case law, which is hardly established by a particular sovereign, is scarcely built consistently on the principle of utility, as well as case law is also unlikely to be holistic and coherent.

In our opinion, J. Bentham’s revolutionary attempt to radically transform the common law system was quite naturally defeated, coming up against attitudes and perceptions deeply rooted in the professional legal consciousness of English lawyers, according to which for many centuries the central figure of the English legal system was the judge – not only the enforcer of law but the real lawmaker. The perception of law as a judicial tradition, developing evolutionarily and closely linked to the historical development of English society, found expression in the legal teachings of the New Zealand lawyer, civil servant and judge John William Salmond. In our

view, this emphasis on judicial recognition and application of the rules that constitute the content of the law is a clear expression of the specifics of the common law tradition, in which for several centuries, the law was viewed as the “property” of a professional corporation of lawyers – judges and lawyers. The focus of law on the maintenance and protection of a subjective right introduces a purposive element into its concept, which significantly distinguishes Salmond’s doctrine from the position of the founder of English legal positivism John Austin. Salmond makes ethics an integral, “internal” element of the law, understood as an instrument of justice. In the concept of justice, Salmond seeks to integrate what he sees as two intrinsic aspects of the law – the political, which is expressed in the imperative, coercive nature of the requirements of official law emanating from the state, and the ethical, which is expressed in the focus of justice on the maintenance and protection of a subjective right.

W. J. Brown develops a similar argument to that made by J.W. Salmond that a significant part of the law cannot be expressed in the form of commands and that many rules of law do not concern imposing duties but granting privileges. The essence of law can be expressed by a set of three concepts: “will”, “command” and “reason” – an expression of a common will, asserting an order to be enforced by the organized power of the state and aimed at the realization of some real or imagined good, with the existence of an organized state being seen as an essential precondition for the existence of positive law.

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