The Elias Clark Group
www.elias-clark.com

GPO Box 5001
Melbourne, Victoria 3001
Australia

First Published 2014.

Text © The Contributors, 2014.

This book is copyright. Apart from any use permitted under the Copyright Act 1968 (Cth) and subsequent amendments, no part may be reproduced, stored in a retrieval system or transmitted by any means or process whatsoever without the prior written permission of the publishers.

Cataloguing-in-Publication entry

Editor: D'Souza, Aron Ping.
Authors: Nikolić, Zoran.
Baker, Roozbeh (Rudy) B.
Eisenberg, David A.
Bhandari, Surendra.

Title: The Journal Jurisprudence, Volume Twenty-Two.

ISBN: 978-0-9924123-6-8(pbk.)
ISSN: 1836-0955

Philosophy – general.
ABOUT THE TYPEFACE

*The Journal Jurisprudence* is typeset in Garamond 12 and thefootnotes are set in Garamond 10. The typeface was named forClaude Garamond (c. 1480 - 1561) and are based on the work ofJean Jannon. By 1540, Garamond became a popular choice inthe books of the French imperial court, particularly under KingFrancis I. Garamond was said to be based on the handwriting ofAngelo Vergecio, a librarian to the King. The italics ofGaramond are credited to Robert Grandjon, an assistant toClaude Garamond. The font was re-popularised in the art decoera and became a mainstay on twentieth-century publication. Inthe 1970s, the font was redesigned by the International TypefaceCorporation, which forms the basis of the variant of Garamondused in this Journal.
## Table of Contents

Call For Papers .................................................. Page 78
Subscription Information ........................................ Page 80

**Between Politics and Science: The Dilemma of Reason** ........................................ Page 81

Associate Professor Zoran Nikolić
Associate Professor of Sociology
University of East Sarajevo

Dr Roozbeh (Rudy) B. Baker
Lecturer in Law
University of Surrey

**In the Names of Justices: The Enduring Irony of Brown v. Board** ........................................ Page 101

Dr David A. Eisenberg
Adjunct Assistant Professor, Department of Political Science
Baruch College, City University of New York &
Assistant Director for Academic Affairs, Arts and Sciences
Columbia University

**Legitimacy, Authority, and Validity of Law: An Integrated Approach to Legal Positivism and the Methodology of Welfare-Grundnorm** ........................................ Page 117

Associate Professor Surendra Bhandari
Associate Professor
Ritsumeikan University
CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, The Journal Jurisprudence received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, The Journal Jurisprudence has now evolved into a distinct format. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people to tackle any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, intellectual arguments or any other method that answers philosophical questions applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.
Jurisprudence is published four times per year, to coincide with the four terms of the legal year, in an attractive paperback and electronic edition.

Each author who submits to this volume will be provided with a complimentary copy of the journal.

**Length:** Any length is acceptable, although readability to non-specialist is key.


**Submission:** You must submit electronically in Microsoft Word format to editor@jurisprudence.com.au. Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.


SUBSCRIPTION INFORMATION

The Journal is published four times per year in an attractive softcover book. Subscription to the Journal can be achieved by two methods:

1) Single issues can be purchased on amazon.com. Our publishers, the Elias Clark Group, set a retail price for each edition, typically AU$40. However, due to their agreement with amazon.com, the price may vary for retail customers.

2) A subscription to the Journal can be purchased for AU$150 per year, or AU$280 for two years. This price includes postage throughout the world. Payment can be made by international bank cheque, but not a personal cheque, to:

The Journal Jurisprudence,
C/o The Elias Clark Group
GPO Box 5001
Melbourne, Victoria, Australia.

Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.
BETWEEN POLITICS AND SCIENCE: THE DILEMMA OF REASON

ZORAN NIKOLIĆ

ROOZBEH (RUDY) B. BAKER

ABSTRACT

Curiosity, our deepest inner intellectual need and concern brought about what we today call science. This Article will try to address the problem of the interrelation between politics and science. There is no need to discuss which of the two came first, but rather the real question is to what extent can science influence the political process? Can it help proper decision-making and, if it can, to what extent? Decision-making is most often prefixed with the term political. Can the intellectual class representing the world of science have an influence on political decision-making? As C. Wright Mills rightly noticed, if an intellectual is a knowledgeable individual, he will not opt for any particular political direction. An intellectual's politics is, therefore, the politics of truth. Does an intellectual have a legitimate right (or not) to be active in practical politics? Should not the enormous body of knowledge that science has accumulated in the intervening centuries be harnessed to the ordering and governing of society? Perhaps, but the paradox that then emerges is the harsh reality that this corpus of knowledge that science has provided to mankind in the past centuries has not been able, to date, prevent wide-scale violence and decadence. This is one of the biggest paradoxes of civilized society and the key issue that this Article will attempt to address.
INTRODUCTION

This Article explores the role of the intellectual in the political sphere. It seeks to answer the question of what happens when the intellectual enters the political arena and sacrifices the world of empirical knowledge for the harsh normative realities of political decision-making. In a nutshell, the dilemmas posed by this question encapsulate what this Article terms as “the intellectual’s dilemma” --- the dilemma the intellectual faces between dedicating his life to the pure pursuit of knowledge versus sacrificing the pursuit of knowledge for that of power and consequently entering the world of politics. The dichotomy between the exercise of “thought” and the exercise of “power” is key here. Power, especially political power, is in one way antithetical to the development of science (for at its basest it relies not on pure reason, but rather instead on force), but in another way essential to the development of science, for without power and the order that oftentimes accompanies it, a civilized society cannot develop and advance.

What is politics and what is science? Does politics necessarily hinder the development of science or is this too strong of a statement? On the one hand politics most definitely does not obey fundamental scientific principles. The interaction of these two forms of social action, politics and science, produces a series of complex and dynamic social processes. Apart from wars and violence, science and what we mean today by politics, were the main factors that brought about the industrial and technological development in the various societies and cultures that can be found throughout history and the present day. The question which then emerges is can science help proper decision-making and proper strategic planning? How great is the importance of scientific analysis in such matters and how important is the empirically based way of thinking and problem solving? In other words, can the gap between politics and science be narrowed?

The intellectual today faces many constant and changeable dilemmas. These dilemmas originate from the principles of scientific knowledge and ethical codices but, most of all, from the area of complex social directives (at the root of which is some sort of real center of power). These social dilemmas can be sublimated into the following questions:

1 For the purposes of this Article (following the line first set out in the pro-Dreyfusard “Manifesto of the Intellectuals”) an intellectual is defined as a person who uses reason (critical analysis of problems) in order to comment, study, and critique the important issues of the day. See also infra § I (C).
2 For the purposes of this Article, politics is defined as the process through which a ruling organization within a set territory exercises its power. See also infra § I (A).
3 For the purposes of this Article, science can be defined as an inquiry into truth. A philosophy of science seeks to observe phenomena and, perhaps more importantly, come up with verifiable methods to study and categorize said phenomena. For an excellent review of the literature on this topic, see Cassandra Pinnick & George Gale, Philosophy of Science and History of Science: A Troubling Interaction, 31 J. Gen. Phil. Sci. 109 (2000).
4 See supra note 2.
(a) whether to participate in the harsh realities of politics; or (b) opt out of the political world for the scientific one devoted to the categorization of knowledge? Should the intellectual or, more precisely, does the intellectual have a legitimate right (or not) to be active in practical politics? Should not the enormous body of knowledge that science has accumulated in the intervening centuries be harnessed to the ordering and governing of society? Perhaps, but a paradox that then emerges in opposition to this proposition is the harsh reality that this corpus of knowledge that science has provided mankind in the intervening centuries has not been able, to date, prevent wide-scale violence and decadence in history. This is one of the biggest paradoxes of civilized society and the key issue that this Article will attempt to tackle.

I. Defining the Terms

Before any meaningful discussion of the interplay between politics, science, and the role of the intellectual can occur these terms must first be defined in sufficient detail. The need for a political system is a vital part of every society, but what is politics? Along these same lines, the interests of human curiosity and creative disposition have given birth to science, but is this exploration a part of defining philosophy or more of a methodology? These issues of conceptualization aside, what is the role of the individual in these debates?

A. Politics

Together with economic, military, and cultural systems, a political system is a vital part of every society. What is politics? In the narrow sense, politics is the skill of running the state and building relations with other states. This narrow sense also comprises those viewpoints that place an emphasis on political behavior as a type of social behavior. In the wider sense, politics is portrayed as any conscious organization of social relations (i.e. as an activity directed towards achieving all types of preset goals). In this way politics is considered to be the practical action of governing in all areas of social life. Apart from these two general definitions of politics, there are other definitions: politics as the art of illusion, the art of governance, the art of the possible, a public affair, as well as politics as a contract and agreement, of power, etc. In ancient Greece politics was seen as a community (political canon), that is, as a public affair (res publica). To achieve general good was the main goal that was set by one-self, and thus this is why it was defined as a practical ethic.

---

5 LJUBOMIR TADIĆ, NAUKA O POLITICI 48-52 (Beogradski izdavacko-graficki zavod 1996); DRAGAN SIMEUNOVIĆ, TEORIJA POLITIKE 18-32 (OPN praktikum 2002); ANDREW HEYWOOD, POLITIKA 11-29 (Jovan Jovanović trans., Clio 2004).
In the medieval period politics and morality were determined by the Church, and in the modern era Niccolo Machiavelli developed the realistic view on politics, considering it merely a merciless fight for gaining and keeping rule. However it should be said that Machiavelli is not the preacher of evil. Do good things, he says, if they guarantee success to you or at least the biggest chance of success. In other words, be a hypocrite and do not care about moral norms for our lives are a struggle. Politics is only a reflection of the ancient societal order, and of man’s domineering traits in a society that was established, organized, regulated, and controlled in that way.

B. Science

The needs and interests of human curiosity and creative disposition gave birth to science. Science then in this sense can, in part, itself be defined as a methodology, for in order to gather and organize scientific information, the researcher has to respond to the following requests: to be organized and to plan his research, empirically base said research on rationally formulated methodical ways of gaining knowledge, define laws as the basis for explanation and prediction, and synthesize the epistemological and practical in order not to lose the connection between the subject of the research and scientific-theoretical aspects (as a reflection of the subject of research). Science is a form of social consciousness, a clear set of objects to be studied, research goals, scientific principles, and a categorical system. Being a systematized notional knowledge, science programmatically performs research of empirical facts, thus achieving the synthesis of the cognitive and the practical, as well as the verifiability of its conclusions. To put it more simply, science is a systematized notional knowledge which can be verified and is gained through certain methods.

As a specific branch of science, sociology studies the society as a unity of interrelated phenomena (if one is talking about general sociology), or it studies a specific area of social reality through its interaction with other problems, as well as with society in general. Society in general can help the development of science, can benefit from its findings, and indeed incorporate them into progressive social development. Such things are possible, but not necessarily probable, for history teaches us that sooner or later the findings of science, directly or indirectly, will be used by the powerful in the society for the purpose of keeping and reinforcing power. Political regimes move the amplitude of such a relation in one or the other direction, seldom keeping it in balance point of the societal requirements which are manifested as common social interest and the interests of those who run the wheel of power in a society.
C. The Intellectual

The intellectual class is made of highly educated individuals who are characterized by spiritual, scientific, and artistic creation as well as of those individuals dealing with the reproduction of the accepted cultural values by imbuing them with a certain amount of creativity and inventiveness. In the middle of the 19th century in Russia, and later on in Eastern Europe, the term *intelligence* was beginning to be used, while in Western Europe they used the term *intellectual*. No significant difference can be established when it comes to these two words. It is more likely that they are synonymous. Neither science nor laymen can agree on the objective meaning of the word *intellectual*. The only dilemma is whether intellectuality is gained through higher education or if higher education is only its stepping stone. It is possible to extract the basic requirements that have to be met in everyday and professional life if it is wished to be determined whether somebody is an intellectual or not:

*Figure 1: The Basic Requirements of an Intellectual*

<table>
<thead>
<tr>
<th>Requirements:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>▪ Creativity</td>
<td></td>
</tr>
<tr>
<td>▪ High education</td>
<td></td>
</tr>
<tr>
<td>▪ Top professional training</td>
<td></td>
</tr>
<tr>
<td>▪ Awareness of one’s role in society</td>
<td></td>
</tr>
<tr>
<td>▪ Conscientiousness regarding one’s intellectual work and the importance of one’s achievements in the community</td>
<td></td>
</tr>
<tr>
<td>▪ Criticality and the freedom of thought</td>
<td></td>
</tr>
<tr>
<td>▪ Professionalism at work (i.e. dedication to one’s profession)</td>
<td></td>
</tr>
</tbody>
</table>

Trying to describe and explain an intellectual’s profile in contemporary society, Ayn Rand pointed out that they have to be able to use their reason in their attempts to decipher the riddles of contemporary civilization, and to be prepared to take the initiative in the progressive development of society as well as their own actions.⁹ Rand

---

also noticed the fact that true intellectuals were not particularly practical, and that the ethical character of their deeds outweighed their usefulness. New modern conditions of life and work require the intellectual to bring the moral and practical dimension together in his actions. The question of which class is to be given the special status of the intellectual depends on the elementary characteristics of type of society one is dealing with. In the Hindu caste system, those that were given this status were the Brahmans (priests), in ancient Greece it was the philosophers, and in medieval Europe it was the spiritual nobility. In each of these historical periods, the intellectual class played one of the key roles in societal development. The factor of knowledge and expertise was the key component in the creation of the optimal conditions for the society’s functioning.

Knowledge, expertise, and scientific achievements are always necessary for societal order and the subjects that shape it. However, the social status of the intellectuals does not correspond to the importance of their spiritual achievements. They need something else to be able to move up the vertical ladder. This is, before anything else, the readiness to reach a compromise with the factors of real power in society. Knowledge and expertise are one of the most important factors and footholds of power in a society. This does not mean however that they hold power themselves. Knowledge is the precondition of power, especially in the contemporary society, but those who have it do not necessarily have the power proportional to the importance of their knowledge. It is more likely that obedience and suitability will provide social promotion, more than colossal and independent intellect will. It is not a rare occurrence that in order to get closer to the powerful elite in such a social environment, an intellectual chooses to place his intellect in the hands of the powerful, thus becoming their tool and support. The compromise of this kind means giving up on one’s intellectual freedom and conscience for personal gain, mostly for the purpose of achieving a more comfortable and peaceful existence. If they lose the freedom of critical thought, the intellectuals’ wings are clipped. Gone is their freedom of speech and power of thought —— it is as if they are put in a cage. In Knowledge and Power, C. Wright Mills concluded that if only half of the knowledge that is at the disposal to the mankind were utilized by the ideals about which various leaders talk about, those ideals would materialize in a short span of time. Hypocrisy is one key characteristic of the epoch we live in, no matter what its origins. The same author pointed out that there are many well-known illusions today, and that knowledgeable people, though they are aware of these are illusions, are inclined to keep quiet or even support them more than they are prepared to reveal the truth about them.

II. The Problematic Relationship Between the Intellectual and Politics

11 Id. at 15.
The problem of the relationship between the intellectual and politics dates from the beginnings of philosophy and extends till the present day of Western civilization. As Plato famously said in *The State*, the rulers have to become philosophers, whereas philosophers have to become rulers. In his *Laws* he corrects himself by claiming that it is better to have wise laws than wise rulers, since if laws are wise, even those who are not possessed with wisdom will be able to run the state in a proper way. Aristotle, on the other hand, views man as *zoon politikon* --- a political being. Outside politics there is only God or the barbarian. Human mind and the ability of speech result in *logos* which is the basic assumption of political life. Therefore, Aristotle promotes science into the matrix of successful politics, for only then will politics represent public practice of morality.

Immanuel Kant pointed out that the possession of authority and power corrupts the application of the mind. The intellectuals, therefore, should not practice politics. To apply one’s mind without constraints is the elementary precondition for a man who, without doubt, has the intellect enough to rise to the true intellectual. Politics, as Kant believes, completely takes away one’s ability to become an intellectual. Niccolo Machiavelli proves that the possession of power projects the need for its constant gaining and augmentation. This is also what Thomas Hobbes notices and elaborates upon. Power then serves as a positive feedback loop, continually reinforcing itself. For Hobbes, taking pleasure in power not only clouds one’s mind and limits his freedom, but it also hinders the valorization of the general interests that are the reason a social community exists.

The magnates of sociology, Auguste Comte and Max Weber, however, pointed out the need for the sociologist to be active in politics, because central societal aims can only be achieved in that way. Both of them pleaded for and were active in practical politics. C. Wright Mills, on the other hand, thought that if one was a knowledgeable man, he would not strive to enter politics. Rather instead his politics was first and foremost the politics of truth. Practical politics, especially in the process of the deterioration of traditional democratic institutions, only hindered the creativity of intellectual, turning him into a slave or dissident.

III. The Inter-relationship Between Politics and Science

Political leadership (in order to advance and develop) needs science. As such, this relationship is not one-sided nor is the influence of politics on science exclusively a one-track one. Political leadership that aims to be successful and to stay at the top needs the findings that science offers. This does not only concern practical governance. Indeed, to gain people’s trust, the authorities need to make citizens feel content or at least need to diminish their discontent to the least possible degree. To do that, ideally, scientific findings need to be implemented in all spheres of a society. Such circumstances are
productive for the expansion of scientific development and the status of the intellectual. However, the position of the intellectual here depends on the willingness to compromise, with compromise appearing in the shape of a series of experiential modalities. None of them are favorable for what Kant calls the freedom of the mind. Indirectly they contribute to the stagnancy or involution of scientific understanding. Extremely repressive regimes do not care about scientific achievements unless such findings can be incorporated into the structure of their rule. The intellectual represents the true or imaginary danger for absolutist and totalitarian regimes or in any case, that is what he is potentially. To know the truth may not be a problem if it is more difficult not to see it than to see it. The process of finding a way to project a strategy for the resistance to, and bringing down of, a repressive order, requires knowledge and adequate usage of that knowledge. Science and laymen are familiar with the issue of the seen but unnoticed. The screen over the intellectual’s eyes does not have to be the result of careless observation, failure in analysis, etc. It is most often the result of the factor of power in a society which in that way reveals itself as the factor of perception.\footnote{Zoran Nikolić, Fenomen percepcije moći 243 (NDS 2003).}

A. Participation and Political Decision-Making

The participation and changeable influence of the intellectuals on political decision-making has been known in history: ever since the Sophists, Plato, Aristotle, Erasmus of Rotterdam, Marsilio da Padova, Niccolo Machiavelli, Thomas Jefferson, and all the way to Joseph Nye. Several theories and their modalities exist in science regarding strategies, tactics, methods, and technique of planning and realizing political decisions. The analytics of practical politics\footnote{Policy is an expression denoting practical and concrete politics in various social spheres. Practical politics denotes those human actions that bring about the creation, promotion, protection or change of the rules of social life.} has been intensified through scientific explorations in the 1960s and 1970s. To enhance and to ensure the efficiency of practical politics is the basic goal of political analytics. The planning of practical politics depends on the type of organization: that is, whether one is talking about a democratic or centralist organization.\footnote{Strategy is a widely used term that comes from the military doctrine, but is today used in the game theory, theory of systems, politics, sports games, science, etc. It can be defined as clearly planned project which comprises a set of interconnected actions leading to reaching the set aim.} The group size can also influence the success of projecting and valorizing what was conceived.\footnote{The term tactics cannot be used the same as strategy, although it is related to it, i.e. it is derived from it. Tactics can be contrasted to strategy in that it can be seen as a sublimation of skills, methods, and capabilities in achieving the tasks that were set while doing interrelated actions. Therefore, it is narrower than the category of strategy.} Smaller groups are more suitable for bringing ideas into practice than the bigger ones. Andrew Heywood analyzes four basic models of decision-making: (1) the rational actor model, (2) the incremental model, (3) the organizational process model, and (4)
the belief system model. It is through exploring these models that one can see the method through which intellectuals can engage in politics.

B. Models of Decision-Making: How the Intellectual Enters the Political Sphere

Utilitarianism is the basis of the rational actor model. The anthropological dimension of this model is obvious because the theory of rational choice incorporates human nature, individualism, but also the egotistical traits people exhibit in wanting to satisfy their own needs and to reach material gain. How useful and satisfying is it to reach a decision? In order to make a decision it is necessary to take into consideration the following aspects: the nature of the problem, the definition of goals starting from the hierarchy of personal priorities, the evaluation of the means available for reaching a goal on the basis of success and cost, and choosing the means that most definitely can guarantee success. In any case, the model requires formulating the degree of usefulness and satisfaction and eventual dissatisfaction. The accuracy of the information regarding the problem that the decision is about is a top priority. The difficulties that can arise regarding this problem inspired Herbert Simon to devise the concept of bounded rationality. Human rationality is context specific, in that it is the product of the environment in which it is formed. Institutions, as “collections of interrelated rules and routines that define appropriate actions in terms of relations between roles and situations,” can be key to understanding how individuals have their preferences shaped not by any individual calculation of maximizing “values” and / or “expectations,” (i.e. a pure rational actor model as described above), but rather by the “rules of behavior, norms, roles, physical arrangements” that encapsulated the institutional structure of their environment. The ideological and value connotation of decision-making then are completely irrelevant. This model is particularly applicable in smaller social groups (precisely because of the need to coordinate various interests) and, ideally, it is optimal when the projection of the strategy of a particular decision concerns an individual.

Incrementalism is a theory according to which decisions are made by adapting to new social conditions and circumstances, and not by clearly defining the goals and the vision that those making the decisions have. David Braybrook and Charles Lindlebloom devised this model as a theory about coping and managing new situations. Innovation is almost completely excluded from this concept precisely because of this general orientation, but

---

16 HEYWOOD, supra note 5, at 737-745.
17 Id. at 737-738.
19 Id. at 160.
also because of the awareness of the lack of information as well as possible faint comprehension of the present and the future. The reactions of the objects of the past decisions determine the present course of decision-making. To avoid problems and not to deal with them, regardless of the consequences, is the credo of this model of decision-making. It goes without saying that such a model can be catastrophic for a community in the near future.

The organizational process model and its several variants is basically a simple theoretical concept according to which the basis of decision-making is within the organization. Key here are the internal organization rules (and patterns of behavior that result from them), and the values that characterize the given organization.

The belief system model is based on beliefs, ideologies, and values (or value orientations) as patterns of behavior and also as the foundation for political decision-making. Paul Sabatier developed the concept of policy subsystems which are supposed to contribute to the firmer integration of ideas, beliefs, and convictions. The need for policy makers to achieve set goals leads them towards a desire to learn more about the issues facing them and to turn towards constructing an environment where research and information is freely debated and exchanged, leading to a clearer understanding of policy impacts over time.

IV. Case Study: Hans Kelsen, the Supreme Court of Pakistan, and Revolutionary Legality

Though at first glance an eminent Austrian legal philosopher and the Supreme Court of Pakistan would seem to have little in common, this is not the case. Intellectual Hans Kelsen though active in politics in his native Austria had, by the 1950s, moved to the United States and focused his efforts almost exclusively on teaching and scholarship. It would be up to the Supreme Court of Pakistan, in its infamous decision rendered in the case The State v. Dosso and another, in 1958, to push Kelsen, or at the very least his scientific theories, back into the realm of politics --- the results would be equally tragic and catastrophic and serve as a cautionary tale for the intellectual in the world of politics.

Hans Kelsen can be considered an intellectual of the first order. Born in Prague in 1881 (then part of the Austro-Hungarian Empire) and raised in Vienna, Kelsen became a

---

renowned expert on public administrative law and philosophy of law and, by the end of World War I, not only was a full professor at the University of Vienna, but was also one of the principle drafters of the post-World War I Austrian Constitution. Kelsen was later appointed a justice on the Austrian Constitutional Court, and during the inter-war period gained great renown for the publication of his jurisprudential works, General Theory of Law and State and the Pure Theory of Law. Following the rise of the Nazi Party, Kelsen left his native Austria for the United States, where he would assume a professorship at the University of California at Berkeley. Kelsen continued his career in the United States until his death in 1973.

A. Norms, Efficacy, and Legality: Kelsen’s Theories Explained

In Pure Theory of Law Hans Kelsen defined law as consisting of merely a system of interlocking norms. A law was only a law if it was based on a norm, which in turn Kelsen defined as something that controlled action and compelled subjects to behave as the norms required --- in other words, the test for normativity was bindingness. Further expanding on this definition in later works, Kelsen further stated that the only source for a norm could be another norm --- history, past social practice, etc. could never qualify as a norm (for how one “ought” to do something cannot logically emerge from how one “is” doing something). Given this, Kelsen held that all legal systems could be traced (through their various norms) to the hypothetical grundnorm, or basic norm. Law then was, under the Kelsenian system, both non-moral and internally validated.

Utilizing this definition of law as laid out in Pure Theory of Law, Kelsen in his later years attempted to formulate a scientific theory on the origins of law. Exploring this theme in the revised English edition of his work General Theory of Law and State, Kelsen claimed that law consisted of two elements: (1) the basic form (a new concept); and (2) the basic norm (as first outlined in Pure Theory of Law). The rule of law simply consisted of a system in which what were purported to be laws in fact were --- nothing more. The basic form held that laws consisted of punishments (“delict”) to be performed on people if they did not comply. Law then as properly understood was simply a direction to relevant

25 Though the post-world War I Constitution Kelsen helped draft is no longer in effect in Austria today, large portions of it inspired the current Austrian Constitution. Kelsen can also be credited with creating the European model of judicial review which, in opposition to its Anglo-American counterpart, sets up a separate court with powers of judicial review (i.e. instead of imbuing courts of general jurisdiction with this power).

26 HANS KELSEN, PURE THEORY OF LAW 3-17 (Max Knights trans., University of California Press 2nd ed. 1967).


28 Id. at 131, 395-396.

29 Id. at 50-57.
officials on what punishments they were to inflict on those who did not follow it. Following from this conceptual framework, Kelsen then attempted to formulate an understanding of what in fact triggered the demise of one constitutional order and its replacement by another. Kelsen surmised that the criterion for the replacement of an old constitutional order with a new one was whether the new order could: (a) be successful in replacing / overthrowing the old order; and (b) be efficacious in its actions. It would be the demise of an old constitutional order in Pakistan in 1958 and its replacement by something terrible and new that would thrust Hans Kelsen, or at the very least his theories, back into the world of politics.

B. Kelsen’s Theories Put into Action: The Supreme Court of Pakistan and The State v. Dosso and another

Pakistan in many ways can be considered an invented country. Carved out of the old British Raj of India, it was designed to serve as a homeland for the sub-continent’s Muslims. Native opposition to British rule in the Indian sub-continent had originally centered on the multi-confessional Indian National Congress (INC), which had been founded in 1885 with the modest goal of increasing native participation in the political administration of the British Raj. Eventually the INC would come to gravitate towards demanding the full independence of the Indian sub-continent from Great Britain and take a key role in agitating for this goal. Within a few decades however, growing splits emerged as many of the key Muslim leaders in the sub-continent began to diverge from the demand of an independent united India, and instead called for the sub-continents Muslim areas to be split off into a separate independent state. Increasingly these Muslim leaders gathered around Muhammad Ali Jinnah, a former member of the INC, and his All-India Muslim League (AIML). By the time the British authorities agreed to grant independence in 1947, the consensus had emerged that the sub-continent would indeed be divided or “partitioned” into two separate independent states, India, and a Muslim homeland to be called Pakistan.

Partition, the birth of Pakistan, was a violent and traumatic affair. Huge population transfers of Muslims and Hindus took place, often accompanied by bloody massacres, as many of the sub-continent’s Muslims moved into the boundaries of the new Pakistan and vice-versa. Most of the old British Raj’s industrial capacity fell within the new state of India, with the result being that the new Pakistan, largely agrarian, was separated from

30 Id.
31 Id. at 41-42, 117-118.
32 The name “Pakistan” is an amalgamation of the five, mainly Muslim majority, northern units of the old British Raj: Punjab, Afghan Province, Kashmir, and Sind-Baluchistan.
33 Pakistan’s 1951 Census put 10% of the 70 million population as refugees. See IAN TALBOT, PAKISTAN: A MODERN HISTORY 101 (St. Martin’s Press 1998).
what had been the traditional markets for its raw materials. Geo-politically, the new state also faced hurdles, facing a hostile Afghanistan of one flank and an even more hostile India on the other. Politically, the new state was robbed of its most capable leader when, Muhammad Ali Jinnah, who had become the country’s first Governor-General, died after little over a year in office. Jinnah’s death would mark the beginning of a period of deep instability in the new nation. It took fully nine years for the state to promulgate a Constitution amid rivalries and in-fighting amongst various political groups. The chief philosophical difference between the political groups rested on the question of whether Pakistan should be a strongly centralized unitary state or a looser federation of quasi-autonomous provinces. Given the multi-ethnic make-up of the new state, this question was an important one. The 1956 Constitution centralized power and dissolved the traditional provincial boundaries that had existed at independence in an effort to marginalize the populous province of East Bengal. Far from creating any sense of stability however, the re-drawn provincial boundaries created more chaos as political leaders scrambled for control. On October 8, 1958, the President of Pakistan, Iskander Mirza, proclaimed martial law in the country and appointed the head of the armed forces, General Ayub Khan, as the Chief Martial Law Administrator (CMLA). By the end of the month President Mirza himself had been forced to leave Pakistan and Ayub Khan and the Pakistani Army were in full charge of the country.

Under the Martial Law regime put in place in October 1958, the martial law authorities headed by Ayub Khan (as the CMLA) replaced the majority of the elected civilian officials. Federal and provincial parliaments along with political parties were disbanded — many politicians were also arrested. The 1956 Constitution was replaced by Martial Law Regulations, though the Martial Law Regulations charged the new authorities to run the civil institutions of the country, to the extent possible, under the 1956 Constitution. The Civil Courts, including the Supreme Court of Pakistan, were not dissolved, but their powers were severely curtailed and they were prevented (by the Martial Law Regulations)
from challenging any ordinances promulgated by the martial law authorities.\textsuperscript{41} On October 27, 1958, a mere three weeks after the promulgation of martial law, the Supreme Court of Pakistan was faced with ruling on the legality of the proclamation of martial law and the rule of Ayub Khan as CMLA in the case \textit{The State v. Dosso and another}.\textsuperscript{42}

At issue in \textit{The State v. Dosso and another} were the 1901 Frontier Crimes Regulations (FCR) which regulated governance in the ethnically Pashtun dominated tribal areas (principally the North-West Frontier Province). Prior to the declaration of martial law in October 1958, writs challenging the FCR as contravening Article 5 of the 1956 Constitution had been laid out, and the High Court of West Pakistan had found the FCR in contravention of the 1956 Constitution. In a far reaching decision that went beyond the scope of the original case before it, the Supreme Court of Pakistan, in a near-unanimous verdict (with only one justice dissenting), held that the FCR could no longer be held to be in contravention of Article 5 of the 1956 Constitution as said Constitution was on longer in effect. Relying on Hans Kelsen and his theories of how old constitutional orders were replaced by new ones, the Supreme Court of Pakistan held that revolutions could become, if successful, “law creating fact[s].” As the imposition of martial law was indeed judged to be successful, the abrogation of the 1956 Constitution through the Martial Law Regulations was legal.\textsuperscript{43}

The majority decision in \textit{Dosso}, led by Chief Justice Muhammad Munir, anchored its analysis in \textit{legal positivism}\textsuperscript{44} and, as such, focused its attention on the Constitutional-legal framework of the country. Taking a page from Kelsen’s \textit{grundnorm} or basic norm, Munir held that the validity of all laws in a polity could be traced to the “first Constitution” of a state (i.e. it’s founding principles) and the way in which all other secondary laws followed.\textsuperscript{45} Munir continued his analysis by discussing instances in which constitutional orders are disrupted by revolutions. Such revolutions could be either violent or peaceful and have varied motivations, but the important theoretical question was, according to Munir, what effect the revolution would have on the existing constitutional order.\textsuperscript{46} Munir answered the question in the following manner:

\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Dosso}, [1958] P.L.D. Supreme Court.
\textsuperscript{43} The specific Martial Law Regulation the Supreme Court considered was the \textit{Laws Continuance in Force Order}, President’s Order No. 1 of 1958 (Gazette Extraordinary, Oct. 10, 1958).
\textsuperscript{44} \textit{Legal positivism} holds that law (as a general ideal) consists of that which has been promulgated (“posited”) by the proper authority. Law is not held to have any timeless or universal principles of note as claimed by, for example, \textit{natural law theory} which holds that here are certain principles inherent to the law itself.
\textsuperscript{45} \textit{Dosso}, [1958] P.L.D. Supreme Court at 538.
\textsuperscript{46} \textit{Id}. at 538-539.
If the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success.  

For Munir it was the “efficacy of the change” (i.e. its effectiveness or success) that presumed the revolution’s validity and therefore legitimacy. In making such claims Munir relied totally upon Kelsen and his theories of how old constitutional orders were replaced by new ones. Citing Kelsen’s *General Theory of Law and State* in his opinion, Munir quoted Kelsen’s formulation that legitimacy in legal orders emerged from efficacy and how the criterion for the replacement of an old constitutional order with a new one was whether the new order could: (a) be successful in replacing / overthrowing the old order; and (b) be efficacious in its actions. Holding that a “successful coup d’Etat is an internationally recognized method of changing a Constitution,” Munir justified illegal seizures of power (e.g. a coup d’Etat) as legitimate, and indeed legal (if successful) method of political contestation.  

The holding forwarded by Chief Justice Munir in *Dosso*, which would come to be known by the shorthand of *revolutionary legality*, would have far-reaching negative consequences for Pakistan’s political development as Ayub Khan’s coup would be the first of many military seizures of government. By legitimizing the military’s foray into government, Munir in *Dosso* set the stage for the military’s permanent involvement in the politics of the state. Though certain scholars, most notably Paula R. Newberg, have attempted to “rescue” Kelsen by claiming that Munir in *Dosso* misread Kelsen’s theories on legitimacy in legal orders, these claims fall flat. Newberg’s main defense of Kelsen is that Munir misread the connection between efficacy and the validity (i.e. legitimacy) of laws that Kelsen had formulated. While it is true, as Newberg points out, that Munir over-emphasized the role of efficacy in creating valid laws, holding it to be an “essential condition,” whilst Kelsen only held it to be a only a “necessary condition,” one cannot draw out from this over-emphasis on the part of Munir in *Dosso* that he misread Kelsen. Kelsen is crystal clear in *General Theory of Law and State* when he states that efficacy is a key component in determining the replacement of one legal order with another.  

---

47 *Id.* at 539.  
48 *Id.* at 539-540.  
49 *Id.*  
50 See *NEWBERG*, *supra* note 36, at 73-75  
51 Later intellectuals, chief amongst them Joseph Raz, have attempted to correct some of the defects they perceive in Kelsen’s conception of law and legitimacy and the struggle between viewing legitimate authority as morally justified versus viewing legitimate authority as an internal, non-moral, system. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 124-147 (Oxford University Press 1979).
indeed Munir was sure to quote the following passage from *General Theory of Law and State* verbatim in *Dosso*:

No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order --- to which no political reality any longer corresponds --- has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.

Successful revolutions create their own legitimacy or, to put it in a cruder way, might, if successfully employed, can make right. Kelsen was exploring these ideas and themes on a purely hypothetical basis, but the chain of events that *Dosso* put into place in Pakistan were anything but hypothetical --- they would have terrible long-term consequences for millions of people.

V. The Eternal Intellectual’s Dilemma: The Question of Double Offer and Choice

The case of Hans Kelsen and the Supreme Court of Pakistan’s ruling in *The State v. Dosso and another* serves as a cautionary tale of what happens when the world of science inhabited by the intellectual is invaded by that of politics. Kelsen’s entry into Pakistani politics is even more interesting due to the fact that his entry was an involuntary one. Unlike the models of decision-making described previously, Kelsen’s entry into Pakistani politics was purely involuntary --- his theories were taken by others and used for political ends in ways that Kelsen, the intellectual concerned with hypothetical *grundnorms* and the origin of legal orders, never necessarily intended.

---

53 See *Kelsen*, supra note 27, at 118.
54 It would take nearly fifteen years and the restoration of democracy for the Supreme Court of Pakistan to overturn *Dosso* in *Asma Jilani v. Government of Punjab*, [1972] P.L.D. Supreme Court 139. The Supreme Court, in *Asma Jilani*, ruled that Kelsen’s theories on revolutions as law creating facts and the *revolutionary legality* doctrine derived from them in *Dosso* would no longer be valid in Pakistan.
55 See supra § III.
56 It should also be noted that the use of Kelsen’s theories on revolutions and their replacement of old constitutional orders was not limited just to the Supreme Court of Pakistan. Both the High Court of Uganda in *Uganda v. Commissioner of Prisons, ex p. Matovu*, [1966] E.A. 514, and the High Court of Rhodesia in *Madzimbamuto v. Lardner-Burke N.O.*, [1968] 1 R.L.R. 192, used Kelsen’s theories in much the same way.
The true intellectual dedicated to science must, in the end, seek to continually expand his realm of knowledge whilst, at the same time, staying away from the realm of politics. Compromise is the expression of the man’s rationality, but reaching a compromise with the often destructive forces of politics does not belong to the realm of the rational, and especially not to the realm of the rationality that is produced by the intellect combined with conscience. Has the saying that the intellectuals represent humanity’s conscience faded away? Conscience results from morality, the morality of the universal kind, which is the indicator of the true values that mark one as a human being. In the examples of decision-making models presented earlier, the intellectual is given a choice: He is asked, he offers solutions, he builds his knowledge into the mechanisms of power, and this power is mainly built upon ego. An extremely authoritarian regime can be disguised under the democratic cane. This regime can function in only one interest --- its own. The rings of power diffusely rising around its core give only a portion of power. Power, in its essence, aims at its own augmentation. How can one expect to keep others under control except by repression, fear, and manipulative rewards? Modern authorities need scientific information for something like this. The intellectual can enter politics through the examples of decision-making models discussed, but in doing so he compromises himself.

Who is the best possible legal democratic bearer of political power? Is it the one whose name most people are not familiar with? The one who trades wallowing in privileges for strict professionalism, for his own sacrifice so he can contribute to the good of the institution he is running and whose true servant he is? As Mark 10:44 advises: “Whoever wants to be first must be slave of all.” Yet unless he can create the core of followers and unless he is the first among the equals, he is, sooner or later, doomed to failure. The compromise itself of entering politics and the world of power is doomed to failure because the intellectual ultimately lacks influence. This is one of the many reasons why people in some communities oppose reform. The conditions of chaos and disorder are good for decadence, and they result from time to time in the need for destruction, decomposition. In such a condition, those who were raised to accept such a pattern of behavior can easily organize to act on the basis of the irrational. In their own representations of auto-suggestive deceit, they represent the irrational as rational. Their cooperation and integration is not based on liking one another, on mutual respect, nor on serving the idea which is the product of the morale of virtue, and which is focused on the well-being of the other. Such people are not capable of understanding such ideas. Evgeny Evtushenko warned us about this by saying: “Since a long time ago I have noticed that the bad people of this world flock together, although they hate one another. In that lies their strength. Good people are alone and that is their weakness.”

Conscientiousness does not automatically equal intellect. Top intellectuals put their knowledge, quite legitimately, on the market, where it can be sold like any other good. This act would not be bad in itself if we knew who the buyer was. Dictators in all
institutional planes need those who know how to manipulate the masses. Scipio Zigele concluded that the psychology of the mob is based on impulsiveness, being prone to violence and suggestion. The psychology of the pack is known in practicing other forms of violence over an individual, which we today dub mobbing. Gustave Le Bon said that the crowd is an organized, and in various degrees continuous, social group. The individuals in the crowd think, work, and feel quite differently that they would do if they were separate from said crowd. Who is the one that can devise the primary strategy of the psychology of the mob? --- the intellectual.

The issue of conscience and wisdom was not clearly formulated, even by Socrates. Socrates’ inner voice is not exclusive when it comes to the balance of wisdom and conscience of an individual or a group. It is the question of choice based on reason --- whether to do something or not, in the way influenced by circumstances, transposed by the mind in the individual or collective consciousness and reflected through conscientiousness. This does not mean that intellectuals should reject conscientiousness altogether, for indeed in the end the true path of the intellectual must be resistance to tyranny. He can choose to fight using his mind and knowledge: by way of uncovering lies and by telling the truth, as well as by taking small or large scale radical action. He can opt for other modes of opposition as well --- even if this means cooperating with the bearers of power and decadence. This strategy can be based on the effort to agree on everything that could be called “common interest” under the guise of the protection of the interests of the powerful. This strategy however is burdened by a multitude of aggravating factors, for both the actor and the result of the action. To get caught and punished without finishing what was intended to be done is the biggest drawback. The subject has to be aware of the limited time and space for action, and do as much and be as efficient as he can in a shortest span of time --- a problematic situation to say the least.

An intellectual should not opt for a political direction. If he is a knowledgeable individual, his politics is the politics of truth in the first place, and he has the ability to state this truth in due course to the right people, as C. Wright Mills stated. These words explain then that the best guidelines intellectuals should follow is a political option of the mind and consciousness. In the end, the true role of the intellectual, the only role, is to speak truth to power.

CONCLUSION

The more knowledge one possesses the more hindrance. In this sentence lies the crux of one of the series of paradoxes of modern civilization. If there is no will to achieve the

58 Id.
59 Mills, supra note 10, at 5-27.
irrational and problematic compromises that have been discussed throughout this Article, then the power of knowledge leads to the objective social lack of power. This tragedy of the intellectual is not a matter of personal experience --- it is the reflection of objective circumstances on which a society is based on. The system of organized irresponsibility, typical for modern society, is fed by and maintained partially by verified and confirmed scientific information. This is one option out of the two possible ones, but this does not mean that by making a choice the intellectuals become bearers of real social power. No, they put their knowledge at disposal the fundamentals of power in a society.\textsuperscript{60} Modern society is awash in illusions offered to the public at large. Some of them are quite well known, others more hidden. Regardless, those who seriously dedicate themselves to science know that these are mere illusions. Those who silently or explicitly confirm these illusions rather than try to discover the truth about them take away freedom from their very own minds, and without freedom there can be no true science.

\textsuperscript{60} Zoranić, Miloša Kritička sociologija 48 (NDS 1998).
In the Names of Justices: The Enduring Irony of Brown v. Board

David A. Eisenberg*

When the United States’ seat of government moved from New York City to Washington, no allowance had been made for housing the Supreme Court. This was hardly an oversight. Implicit in the omission was the understanding that amongst the coequal branches of government, some were more equal than others. The incident lent greater force to Alexander Hamilton’s argument, put forward in the Federalist, that the judiciary “is beyond comparison the weakest of the three departments of power” and “will always be the least dangerous to the political rights of the Constitution.” For a time, Hamilton’s perspicuity was borne out both in theory and practice.

That time has long since passed. Whatever may be the merits of Hamilton’s argument on theoretical grounds, there is no doubt that in practice, the Court has ceased to play the passive part it had been assigned. Just how forcefully the Court’s passivity and with it, its tertiary role, have been repudiated can be gleaned in the pronouncements of the modern court: “the federal judiciary is supreme in the exposition of the law of the Constitution;” “the ultimate interpreter of the Constitution.” When one considers that these pronouncements come from the very institution that the nation’s first chief justice refused to be a part of, precisely because it lacked sufficient “energy, weight and dignity,” one begins to grasp the magnitude of the change. Once an office that, as Hamilton put it, enjoyed neither force nor will, but judgment only, the Court has become an entity that, in the words of a current Associate Justice of the Court, can “yield

* Adjunct Assistant Professor, Department of Political Science, Baruch College, City University of New York and Assistant Director for Academic Affairs, Arts and Sciences, Columbia University (de2205@columbia.edu).

2 Cooper v. Aaron, 358 U.S. 1, 18 (1958) (emphasis added).
4 John Jay, the nation’s first chief justice, “left the bench perfectly convinced that under a system so defective [the judiciary] would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.” John Jay to John Adams, January 2, 1801 in The Correspondence and Public Papers of John Jay, ed. Henry P. Johnston (New York and London: G. P. Putnam's Sons, 1893), IV: 285.
better law”\textsuperscript{6} and “decide a case in a way that \emph{radically changes} the law.”\textsuperscript{7} Either Hamilton and Jay had misunderstood the nature of judicial power or, since their day, that power has changed, not merely in degree, but in kind.

The evolution of the Court, protracted as all evolutions tend to be, has advanced precipitously of late. While John Marshall’s role in defining the Court was monumental and while his celebrated dictum in \textit{Marbury v. Madison} (1803) is adduced frequently by those who champion an activist court, judicial activism is a thoroughly modern phenomenon, one that scarcely was inchoate by the end of the nineteenth century and one that did not see its full apotheosis until the latter part of the twentieth. Indeed, in the first seventy years of this nation’s history, on only two occasions did the Supreme Court see the need to strike down a federal statute (\textit{Marbury v. Madison} (1803) and \textit{Dred Scott v. Sanford} (1857)). In the final four decades of the nineteenth century, twenty statutes were struck down. This seemingly gross disparity would be eclipsed by the thirty statutes that were struck down in the final decade alone of the twentieth century.\textsuperscript{8}

Judicial supremacy’s incunabulum is not difficult to descry. While the apperception of cause and effect in the social sciences may be wanting in the precision that is enjoyed in the physical sciences, the prevailing consensus on the matter leaves one rather assured in identifying the occasion. The year was 1954; the case, \textit{Brown v. Board of Education}.

Activism alone does not account for what distinguishes the post-\textit{Brown} Court. To be sure, the Court experienced a rather extended period of activism that began shortly before the turn of the twentieth century. During this period, the Court routinely struck down attempts to regulate economic affairs in its effort to protect and promote its understanding of \textit{laissez faire} capitalism. But although the Court undoubtedly was active during this time, its activism remained fairly circumscribed, rarely impinging on issues that were unrelated to economics. Beginning with \textit{Brown}, this constraint is, at least tacitly, disregarded; in time, it will be renounced unreservedly. “By the 1970’s, it almost seemed as if it were difficult to find an issue in which some federal judge somewhere might not intervene to lay down ‘the law.’”\textsuperscript{9} What distinguishes the activism of the post-\textit{Brown} Court is that seemingly no matter lies beyond the Court’s purview. It is this aggrandized

\textsuperscript{7} Id. p. 119 (emphasis added).
scope of review\textsuperscript{10} and the marginalization of the Constitution that often comes with it, that distinguishes the modern period of the Court from all earlier periods.

Arguably “the most celebrated constitutional decision of the U.S. Supreme Court,”\textsuperscript{11} Brown is also one of the more problematic, precisely because it is so celebrated. A commensurately poorly reasoned decision that did not redress an odious societal ill would have been condemned to oblivion, ridicule, or, perhaps, infamy. By fighting for justice, not in the legal or constitutional sense, but in the social or political sense, the Brown Court inspired succeeding justices to take it upon themselves to combat the inequities and iniquities of society. Henceforth, morality not the Constitution would be their highest authority; their highest duty no longer to expound the latter, but to dispense the former. A judiciary thusly inspired is especially pernicious to a free people for the obvious reason that there is no effective limit to the court’s scope of review. Wherever there are injustices to be found or, rather, perceived, there the court can claim jurisdiction. But more fundamentally, a court that metes out the moralism of its day can afford no permanence to the judgments it hands down. If evidence of this is required, one need only look to Brown.

No list of landmark Supreme Court cases would be complete without Brown. Indeed, to situate it anywhere far from the top would be injudicious. While it has been argued that

\textsuperscript{10} “The last two decades have been a period of considerable expansion of judicial responsibility in the United States. Although the kinds of cases judges have long handled still occupy most of their time, the scope of judicial business has broadened. The result has been involvement of courts in decisions that would earlier have been unfit for adjudication. Judicial activity has extended to welfare administration, prison administration, and mental hospital administration, to education policy and unemployment policy, to road building and bridge building, to automotive safety standards, and to natural resource management.

In just the past few years, courts have struck down laws requiring a period of in-state residence as a condition of eligibility for welfare. They have invalidated presumptions of child support arising from the presence in home of a ‘substitute father.’ Federal district courts have laid down elaborate standards for food handling, hospital operations, recreation facilities, inmate employment and education, sanitation, and laundry, painting, lighting, plumbing, and renovation in some prisons; they have ordered other prisons closed. Courts have established equally comprehensive programs of care and treatment for the mentally ill confined in hospitals. They have ordered the equalization of school expenditures on teachers’ salaries, established hearing procedures for public school discipline cases, decided that bilingual education must be provided for Mexican-American children, and suspended the use by school boards of the National Teacher Examination and of comparable tests for school supervisors. They have eliminated a high school diploma as a requirement for a fireman’s job. They have enjoined the construction of roads and bridges on environmental grounds and suspended performance requirements for automobile tires and air bags. They have told Farmers Home Administration to restore a disaster loan program, the Forest Service to stop the clear cutting of timber, and the Corps of Engineers to maintain the nation’s non-navigable waterways. They have been, to put it mildly, very busy, laboring in unfamiliar territory.” Donald L. Horowitz, The Courts and Social Policy (Washington, DC: The Brookings Institution, 1977), 4-5.


(2013) J. JURIS. 103
its “most significant result... may have been to encourage judicial activism,”\textsuperscript{12} it is indisputable that \textit{Brown} impacted far more than the future trajectory of the Court. As one author stated, “\textit{Brown} may be the most important political, social, and legal event in America’s twentieth century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it created and overthrew.”\textsuperscript{13} Even those inclined to regard this statement as an overstatement should acknowledge that there is more than a modicum of truth contained therein.

However considerable its historical significance may be, one should be wary of overestimating its initial influence. The lack of both purse and sword putatively render the Court relatively impotent, leaving it largely dependent on the other branches to uphold and implement its pronouncements. Therefore, it comes as little surprise that in practical terms, the immediate impact of \textit{Brown} was rather limited. In the decade following \textit{Brown}, “the courts contributed virtually \textit{nothing} to ending segregation of the public schools in the Southern states.”\textsuperscript{14} The Court played no palpable part in Little Rock in 1957 nor in the passing of the Civil Rights Act in 1964 nor the Voting Rights Act the following year. In short, “before Congress and the executive branch acted, courts had virtually no direct effect on ending discrimination in... education.”\textsuperscript{15} But while its direct effect may have been inconsequential, the Court’s indirect influence very well may have been inestimable.

\textit{Brown} was the first case in which the Court clearly threw its weight against the Jim Crow system of segregation. Even if one discounts the practical impact of the Court’s own efforts, \textit{Brown} and its progeny were thus significant (indeed, perhaps indispensable factors) in creating the moral and political climate that produced the Civil Rights Act of 1964 or the Voting Rights Act of 1965 - two statutes which have produced undeniable real world changes.\textsuperscript{16}

Though there was a monumental incongruity between what the Court decreed and what actually transpired, one would be hard pressed to argue that the civil rights movement did not benefit all the same. The absence of any tangible achievements resulting from the Court’s inability to enforce its decision was far less inimical than the symbolic effect

\textsuperscript{12} Herman Belz, \textit{A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective} (Lanham, Maryland: Rowman & Littlefield, 1998), 9.
\textsuperscript{15} \textit{Id.}, p. 70.
that would have resulted from a different ruling, namely one that found *de jure*
segregation constitutional.\(^{17}\)

This renders *Brown* an especially intriguing decision. In contrast to later landmark cases,
most notably *Roe v. Wade* (1973), the decision of *Brown* has been heralded, and with near
unanimity no less, as a prodigious moral triumph in American history. Far from eliciting
any analogous consensus, *Roe* – more than any other contemporary decision – has rent
the nation and has done so, it would seem, irremediably. Yet *Brown*, no less than *Roe* has
been the subject of immense criticism. The 1954 landmark decision has been lambasted
by scholars, regardless of their political leanings. Members of the left, no less than those
of the right, have demonstrated serious misgivings about the reasoning of the Court.\(^ {18}\)
In short, it would appear that the Court reached the right decision though not for the
right reason(s).

Supposing this to be true, important questions arise. To put it broadly and simply, do
the ends justify the means? Is it justifiable, as one current Supreme Court Justice has
argued, for judges to employ “consequences as a yardstick” to measure the rectitude of
their decisions; to be concerned more with the repercussions of their decisions than the
logic employed to reach them?\(^ {19}\) When grievous and pervasive injustices plague society,
should the Court assume the responsibility of righting those wrongs, particularly when
both Congress and the President neglect to do so? Similarly, are the courts justified in
actualizing the people’s will, especially when their will is being ignored or obstructed by
the elected branches? Would the principle of representative democracy be subverted by
such measures, or do the courts, precisely because of their insularity and removal from
the electoral process, have a unique opportunity and, indeed, responsibility to educate
the people and teach them right from wrong? Is the Court, as the law clerk to Justice
Felix Frankfurter understood it, “a great and highly effective educational institution[?]\(^ {20}\)
And should “constitutional text and tradition… be disregarded if they stand in the way
of achieving social justice[?]”\(^ {21}\) An affirmative answer to these questions, in effect,
vindicates the Court, however shoddy its jurisprudence may be.

---

from the southern states are truly amazing. For ten years, 1954-1964, virtually nothing happened. Ten years
after *Brown* only 1.2 percent of black children in the South attended school with whites. Excluding Texas
and Tennessee, the percent drops to less than one-half of one percent (.48 percent).” Rosenberg, *The
Hollow Hope*, 52.
York University Press, 2002).
20 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale
21 Uhlmann, “The Road not Taken: Brown v. Board of Education at 50.”

(2013) J. JURIS, 105
Though decided in 1954, *Brown v. Board of Education* first reached the Court in 1952 at which time Fred Vinson was its Chief Justice. After the first round of arguments and briefs, the Court was deeply divided over whether *Plessy v. Ferguson* (1896) could be overturned and segregation in public schools outlawed. It was believed that four of the justices, among them the Chief Justice, were prepared to uphold the ruling of *Plessy*. “All of the justices knew that a 5-4 or 6-3 decision that overturned *Plessy* would be a recipe for major civil unrest.”

The presumption was that a divided Court on so divisive an issue merely would affirm, and thereby exacerbate, the entrenched racial discords that already sundered the nation. In light of this, the Court decided to hold the case for further briefs and arguments. Specifically, the Court was concerned with the original understanding of the Fourteenth Amendment and what remedies would follow a ruling that overturned *Plessy*. While the Court bided its time, Vinson passed away and Earl Warren became the fourteenth Chief Justice of the United States. With Vinson gone and Warren in command, internal divisions were overcome and the unanimity that had been longed for was secured.

Chief Justice Warren’s unanimous opinion appears a rather curious one. As a reporter for the *New York Times* noted the day after the case was decided, “[it] reads more like an expert paper on sociology than a Supreme Court opinion.” A pithy decision that is exceeded in length by its own footnotes, perhaps what is most striking about the ruling is the Court’s pervasive reliance on psychology and its pronounced disregard of precedent, law and the Constitution. In the end, its most glaring weakness is that it provides no legal, historical or constitutional foundation.

After recapitulating the facts of the case, Warren turns his attention to the Fourteenth Amendment. “The plaintiffs contend that segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws” guaranteed under the 1868 amendment. Warren points out that the Court, in light of the complexity of the question with which it was confronted, had ordered a second round of oral argument “devoted to the circumstances surrounding the adoption of the Fourteenth Amendment.” Although reargument “covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment,” the Court concluded that the findings were “not enough to resolve the problem.” A more candid court might have appended to that conclusion, “as we would like to resolve it.”

---

25 *Id.* 489.
Having concluded that what those in Congress and the state legislatures had intended cannot be deciphered from the arguments they put forth, the Court points to “[a]n additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools:] the status of public education at that time.”

In the South, education generally was a matter that belonged to the private rather than the public domain and, moreover, almost exclusively was reserved for white children. Though public education in the North had “advanced further,” it still was a rather primitive business, the standards of which “did not approximate [to] those existing today.” From this the Court concludes that “it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.”

What is surprising, at least for the reader of this pronouncement, is the prevaricative tenor of the Court’s argument.

Without a doubt, the history of the Fourteenth Amendment is tortuous and what its original intention was remains a greatly contested issue. The meaning of the text itself is not immediately clear from a reading of it. The Constitution does not make known what are “the privileges or immunities of citizens of the United States” nor is there any explanation of what constitutes “the equal protection of the laws.” Moreover, the congressional debates on the Amendment are rife with “contradictory statements about the meaning of different clauses, not just between the amendment’s sponsors and opponents, but among its sponsors as well.”

The only sure conclusion that Justice Jackson could divine from its legislative history was that “it was a passionate, confused and deplorable era.” Yet even in the face of this uncertainty, it would be wrong to deduce that nothing decisive could be determined. What is troubling about the Court’s tabling of the Amendment’s history is that for all the obfuscation surrounding it, there were some details about which there could be no dispute. Perhaps the most important of these, with respect to the matter at hand, concerned not so much the words of Congress, but its deeds.

It is well known that the very same Congress that passed the Reconstruction amendments maintained segregated schools in the nation’s capital. Indeed, not only were segregated schools in Washington upheld by Congress at that time, but they

26 Id. 489.
27 On the state and development of public schooling in nineteenth century America, see Elmer Brown, The Making of Our Middle Schools: An Account of the Development of Secondary Education in the United States, especially Chapter XIV pp. 297-322, as well as Appendix D: “The First Public High Schools in the 160 Cities now having over 25,000 Population,” pp. 519-522. The overwhelming majority of the cities listed did not have public high schools prior to the Civil War. The lateness with which public high schools were established in the south is especially evident, e.g. Atlanta, GA (1872), Knoxville, TN (1875), and Birmingham, AL (1883).
moreover were approved by every succeeding Congress for decades thereafter. That is not to say the practice should have been maintained simply because it had been approved in the past. Reform inescapably would be precluded by a perspective so parochial. But what it does suggest, rather forcefully, is that with respect to its intended effect on public education, the history of the Fourteenth Amendment is not nearly as incomprehensible as the Court had contended. In light of the fact that the same Congress that gave birth to the Amendment sustained racially segregated schools, it is reasonable to infer that the Amendment was not intended to ban segregation in public education. That the Court outright ignores this detail should give pause to all those who celebrate its ruling.

The Court’s perfunctory dismissal of Plessy is no less troubling. The 1896 landmark decision had established the “separate but equal doctrine.” Homer Plessy was, in the now antiquated parlance of the times, an octoroon, being one-eighth black and seven-eighths white. Under Louisiana law, this rendered him black. When Plessy refused to relinquish his seat in the "White" car and transfer to the “Colored” car of the East Louisiana Railroad, he was jailed. Plessy challenged the law, arguing that the Separate Car Act violated the Thirteenth and Fourteenth Amendments and therefore was unconstitutional. In a 7-1 decision authored by Justice Henry Billings Brown, the Court averred that it was “too clear for argument” that the Separate Car Act did not violate the Thirteenth Amendment, which had abolished slavery, not legal distinctions between the white and black races. More importantly with respect to Brown, the Plessy Court claimed that so long as the facilities provided to each race were equal, segregation did not violate the Equal Protection Clause. According to Justice Brown, the “underlying fallacy of the plaintiff’s argument” was that it relied on “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”31 Whatever the merits of this decision may be, and there may not be any, by the time Brown was decided, Plessy had been on the books for more than half a century. To overturn such a longstanding precedent, one would think a coherent legal theory would be needed.

The Brown Court was well aware that with respect to the case that had been brought before it, the “separate but equal doctrine,” as it originally was understood, had not been violated. As Warren acknowledged, “there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”32 Confronted with these findings, it would seem that the Court had but two choices: rule

31 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
against the plaintiffs or overturn the ruling of *Plessy*. Remarkably, the Court did neither. Like the history of the Fourteenth Amendment, *Plessy* proves problematic for the members of the Court, not because of its incoherence or inscrutability, but because it impedes their ambition, namely the abolition of segregation in public education. Rather than resolving the problems that are raised by *Plessy* and the Fourteenth Amendment, the Court circumvents them altogether. “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.” Having dismissed both history and precedent, one cannot help but wonder with what recourse the Court is left. Though the Court’s solution is bewildering, it is far less so in light of everything that paved the way for it.

It must be kept in mind that the Court was set on reaching a particular goal; just how that goal would be reached was a matter of ancillary importance. Thus, with the acknowledgment that all significant “tangible factors” have been, or are in the process of being, equalized, comes the following declaration: “Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases.” This conclusion hardly follows from the premise, unless, of course, the Court was bent on promulgating a particular pronouncement. In other words, given that the decision, in effect, would be the same no matter what the facts were, the Court, according to its own discretion, could discount those facts that threatened to occlude its course. Because the tangible factors clearly do not support the result the Court desires, intangible factors are considered in their stead.

In what is perhaps the most widely quoted portion of the opinion, the Court concluded “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” From this oft cited passage alone, it is not clear why separate educational facilities are inherently unequal. The wherefore is provided earlier. According to the Court, “to separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” This is a rather peculiar conclusion to be reached by a group of justices whose expertise is in interpreting the law and expounding the Constitution. The Court acknowledges that it did not arrive at this insight without help and that the finding is not without foundation. In the eleventh footnote of the opinion, the Court cites a number of works that bear titles such as *Personality in the Making, “The Psychological Effects of Enforced Segregation: A Survey of Social Science*

33 By avoiding “the inconvenience of having to address its prior precedent… *Plessy* was inerentially, but not explicitly overruled.” Uhlmann, “The Road not Taken: Brown v. Board of Education at 50.”


35 *Id.*, 492.

36 *Id.*, 495.

37 *Id.*, 494.
Opinion,” and “What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?” The most famous of these is Kenneth B. Clark’s “Effect of Prejudice and Discrimination on Personality Development,” which is better known by its more euphemistic appellation, the “doll test.”

Equipped with such scholarly and scientific works, the Court concludes that “[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.” Thus, in the end, the Court’s opinion is not so much that Plessy was bad law, but that it was bad psychology.

Does this make Brown a bad opinion? By its very nature, a court opinion that disregarded history and precedent and relied instead on psychological factors would be, at a minimum, dubious. “It is emphatically the province and the duty of the judicial department to say what the law is,” not to expound the latest trends in psychology. But Brown was not just any case. Setting aside all the quibbling about its immediate practical effects, symbolically, Brown was, and still remains, a profoundly important decision. The judiciary stood up and defended social justice at a time when no other branch would. Thus, in determining whether or not it was a bad opinion, the questions broached earlier should not be ignored. In short, does the rectitude of the decision redress the fallacies contained therein?

In asking this, another question immediately presents itself: Was the Court left with no other recourse? Was the Court faced with the alternative of either writing a dubious opinion or supporting social injustice? Could the same goal have been reached by a more sound approach? It frequently is presumed that a more sensible answer to the problem(s) raised in Brown would have been to fashion an opinion that corresponded to Justice Harlan’s dissent in Plessy v. Ferguson (1896). Providing the lone dissenting voice, Harlan predicted that the judgment made that day would “prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.” Harlan, a reformed slave-owner and champion of black civil rights, eloquently averred that

in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

---

38 Kenneth B. Clark, along with his wife, Mamie Katherine Phipps Clark, administered a series of tests in which black children were given a choice between two dolls that were identical, save for the fact that one was white and the other black. From a very early age, black children often showed a preference for the white dolls. From their studies, the Clarks concluded, “It is clear that the Negro child, by the age of five is aware of the fact that to be colored in contemporary American society is a mark of inferior status.” Kenneth B. Clark and Mamie P. Clark, “Emotional Factors in Racial Identification and Preference in Negro Children,” The Journal of Negro Education 19 (1950), 341-350.


40 Marbury v. Madison, 5 U.S. 137, 137 (1803).
constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal... has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.\footnote{John Marshall Harlan, dissent \textit{Plessy v. Ferguson}, 163 U.S. 537, 559 (1896).}

However, the problem is that notwithstanding the rhetorical merits of his dissent, to say nothing of the loftiness of its sentiment, Harlan did not champion the notion that segregation necessarily violated the Constitution. In a number of cases, including one involving segregated schools, Harlan had countenanced race-based classifications.\footnote{See, for example, \textit{Cumming v. County Board of Education}, 175 U.S. 528 (1899).} Harlan understood what had been understood generally: the Fourteenth Amendment did not embrace the broad notion of colorblindness.\footnote{A careful reading of the \textit{Plessy} dissent makes plain that what Harlan found to be “[i]nconsistent with the Constitution of the United States” was not segregation \textit{per se}, but the infringement of particular “civil rights common to all citizens.” A perfunctory reading would leave it at Harlan’s early pronouncement: “In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.” But later pronouncements qualify this seemingly sweeping assertion. “If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.” \textit{Plessy}, 557. And later: “The arbitrary separation of citizens on the basis of race while they are on a \textit{public highway} is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.” \textit{Plessy}, 563 (emphasis added).}

This tension in Harlan’s juridical philosophy need not have precluded the Warren Court from adopting a line of reasoning similar to the one Harlan used in his \textit{Plessy} dissent. That celebrated dissent was not the only time in the Court’s history that an exposition of the Constitution’s color blindness had been postulated. In \textit{Hirabayashi v. United States} (1943), Chief Justice Stone, delivering the opinion of the Court, declared that “distinctions between citizens solely because of their ancestry are by their very nature

\begin{flushright}
(2013) J. JURIS. 111
\end{flushright}
odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”

Though the Court actually upheld the constitutionality of President Roosevelt’s orders and the implementation of the curfew that affected persons of Japanese descent, its justification for doing so was the gravity of the danger with which the nation was confronted at the time, namely that “of espionage and sabotage, in time of war and of threatened invasion.”

The principle recognized by Stone emerges again in Missouri v. Jenkins (1995), a case that post-dates Brown. Because of the significant connection between Brown and Missouri, it is worth reflecting on the latter case, so as to further illumine the former. Like Brown, the central issue of Missouri v. Jenkins revolved around segregation in public schools. The history of the case, which first arose in 1977 and had been before the same United States District Judge for seventeen years, is, not surprisingly, long-winded and involute. Its many twists and turns would require considerable space to document. Synoptically, in 1977 the District Court determined that the state of Missouri had not done enough to desegregate schools in the Kansas City, Missouri School District (KCMSD). The original plan involved bus transfers to balance out racial inequalities, but in time, the court issued a series of remedial orders that required significant increases in funding for inner city schools. The presumption was that by improving the quality of the schools, white students from the suburbs would be inclined to attend them. The state challenged the orders of the District Court and in a 5-4 decision, the Supreme Court ruled in favor of Missouri and overturned the ruling of the lower court, finding, in short, that the District Court had abused its remedial powers.

The particulars of the Court’s logic need not be explicated here. With five separate opinions (three concurring, two dissenting), Missouri v. Jenkins provides enough subject matter to warrant a separate essay. What deserves attention in light of the present descant is Justice Thomas’s concurring and, one might add, protracted opinion. While Justice O’Connor had used her concurring opinion to emphasize the narrowness of the Court’s holding, Thomas’s twenty-seven page opinion amounted to a general assault on desegregation jurisprudence. His remarks on Brown are particularly revealing, as it appears he understood the problem, and its appropriate remedy, better than the Court did in 1954.

Brown I did not say that "racially isolated" schools were inherently inferior; the harm that it identified was tied purely to de jure segregation, not de facto

---

44 Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
45 Id. 100.
46 Brown I refers to the 1954 decision and is distinguished from Brown II, which was decided the following year and addressed the question of relief. In the latter case, the Court famously ordered that schools should be desegregated “with all deliberate speed.” Brown v. Board of Education, 349 U.S. 294 (1955).
segregation. Indeed, Brown I itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race. As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of `separate but equal' has no place. Separate educational facilities are inherently unequal." Brown I, 347 U.S., at 495. At the heart of this interpretation of the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime, see Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944)) has proven automatically fatal.

Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources - making blacks "feel" superior to whites sent to lesser schools - would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination - the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.47

Thomas, like Stone before him, understood what Warren ostensibly could not: in the eyes of the Government, its citizens are first and foremost citizens and only tangentially members of racial, ethnic, or religious groups. Thus, not only is Brown a poor opinion, but it is a needlessly poor opinion at that.

The Brown opinion affords many lessons that doubtlessly were not intended by those who appended their names to it. Not the least important of these is that psychology serves as a poor foundation for judicial decisions. For one, it is commonly understood that the social science evidence the Court relied on was rather shoddy, especially the leading piece of evidence, Kenneth Clark’s “doll test.”48 But to leave it at this is to miss the larger point. The problem is not simply that the sociological and psychological evidence used in the case was flawed, but that such evidence, regardless of its accuracy,

48 For a critical examination of Clark’s study, see, for example, Edmond Cahn, “Jurisprudence,” New York University Law Review 30 (1955), 151-169.
affords virtually no guarantees when it comes to constitutional matters. The behavioral and social sciences are innately labile. What is demonstrated to be true one day is shown to be false the next. The precipitous rise and fall of Freudian psychology serves as a powerful attestation to the verity of this phenomenon.\(^{49}\) One never should lose sight of the fact that before \textit{Brown}, the prevailing scientific views of the day often were used to legitimize segregation no less than they were used to delegitimize segregation in 1954.\(^{50}\) Can a principle of justice that teeters upon such tenuous foundations really be just?

The intentions of the nine justices who occupied the Court in 1954 very well may have been beyond reproach, but their honorable intentions did nothing to prevent the establishment of a dangerous precedent. Poorly reasoned decisions such as \textit{Brown} are little more than \textit{ad hoc} assertions of power and though that power may have been exercised in the name of good on May 17, 1954, there is no guarantee that future justices

\begin{flushleft}
\textit{49} In this vein, one could consider Thomas Robert Malthus and his neo-Malthusian epigones, perhaps the most famous being Paul R. Elrich. Elrich’s claim to fame, \textit{The Population Bomb}, sold over two million copies and, in time, proved to be risibly inaccurate. Elrich’s “scientific” prophecies included the deaths of hundreds of millions of people in the 1970’s due to starvation and the inability of India to sustain itself beyond 1980. Paul Elrich, \textit{The Population Bomb}, (New York: Balantine Books, 1968).

A more timely example, both because of the recent publication of the Fifth Edition of the \textit{The Diagnostic and Statistical Manual of Mental Disorders} (DSM-V) and because of the debates surrounding gay marriage, concerns the dubious diagnostic abilities of the American Psychiatric Association, which, in 1968, designated homosexuality a disease. “The DSM-II (1968) made homosexuality a mental disorder, a decision revoked by vote in 1973. In the general excitement about that progressive decision, few noted that voting didn't seem to be the most scientific way of determining mental illness. Narcissistic Personality Disorder was voted out in 1968 and voted back in 1980; where did it go for 12 years? Doctors don't vote on whether pneumonia is a disease.” Carol Tavris (May 17, 2013). “How Psychiatry Went Crazy.”\textit{The Wall Street Journal.} Retrieved from http://online.wsj.com/article/SB10001424127887323716304578481222760113886.html?mod=googlenews_s wsj

\textit{50} In this regard, consider the writings of the American psychologist, Lewis Terman, inventor of the Stanford-Binet IQ test. While addressing the low IQ test scores of two Portuguese boys, Terman observed:

“It is interesting to note that. . .[these cases] represent the level of intelligence which is very, very common among Spanish-Indian and Mexican families of the Southwest and also among negroes. Their dullness seems to be racial, or at least inherent in the family stocks from which they come. The fact that one meets this type with such extraordinary frequency among Indians, Mexicans, and negroes suggests quite forcibly that the whole question of racial differences in mental traits will have to be taken up anew and by experimental methods. The writer predicts that when this is done there will be discovered enormously significant racial differences in general intelligence, differences which cannot be wiped out by any scheme of mental culture.”

“Children of this group should be segregated in special classes and be given instruction which is concrete and practical. They cannot master abstractions, but they can often be made efficient workers, able to look out for themselves. There is no possibility at present of convincing society that they should not be allowed to reproduce, although from a eugenic point of view they constitute a grave problem because of their unusually prolific breeding.” Lewis Terman, \textit{The Measurement of Intelligence} (Boston : Houghton Mifflin Company, 1916) pp. 91-92.

(2013) J. JURIS. 114
will be animated by motives that are commensurately commendable. Anyone who has survived the twentieth century and has witnessed, from however afar, the advent of fascism and totalitarianism, as well as the recrudescence of barbarism in its many forms, should understand that progress is not ineluctable. A people that regards liberty as one of its unalienable rights should be wary of permitting a small cohort of unelected judges to perform as a “day to day constitutional convention”\(^{51}\) where the collective will of those judges can be promulgated as law. It is not unreasonable to think that someday, a group of justices with intentions far less laudable than those who decided *Brown* will occupy the Court. One need not envision a group of brutal despots to be troubled by the prospect. Freed from the constraints that traditionally bound the Court, there will be little to restrain its members as they vie to turn their feelings and biases into law. Without any obligation to ground their opinions in the fundamental law of the land, the adduction of the latest scientific research will suffice. It would be more than a little ironic, and not altogether inappropriate, if one day a Court, bent on undermining or repealing some established notion of justice, cited *Brown* as precedent. But that is the enduring irony of *Brown*: Though there can be no caviling about the rectitude of the decision, the manner in which it was reached not only paved the way for future injustice, but itself was fundamentally unjust.

\[\text{Hugo Black, dissent Griswold v. Connecticut, 381 U.S. 479, 520 (1965).}\]

\[\text{(2013) J. JURIS. 115}\]
This paper examines why legal positivism has not only been customarily contested by non-positivist jurists, but is also internally fraught with theoretical inconsistencies due to its vulnerability in theorizing the nature of law. The first section of this paper investigates the issue of theoretical inconsistencies endured by mainstream positivism, and argues that these inconsistencies are the offshoot of deficiencies caused by ignoring the need of an integrative approach to the explanation of the nature of law. By mainly focusing on the Hartian concept of the internal point of view, and the Razian idea of authority, the first part of this paper shows how the Hartian and Razian theories are inadequate and unsatisfactory in offering a comprehensive explanation of the nature of law, and addresses the gaps persisted by the mainstream positivism in the explanation of the nature of law. The second part of this paper explains the integrated approach to law. The integrated approach employed by this paper explicates the nature of law as built upon the inseparable association of three fundamental conceptual features of law: legitimacy, authority, and validity. The aim of this paper is not to tender any suggestion to discard positivism, but to further explore and strengthen legal positivism. Thus, the second part of this paper defends positivism in the form of an integrative approach to law. The third part offers a methodology of welfare-grundnorm to foster the integrated approach to law, especially by addressing some epistemic questions regarding transmutation of normative standards into positive standards that are critical to the conceptual account of legitimacy and validity. The final part summarizes the main propositions of this paper.
SECTION I: THEORETICAL INCONSISTENCIES OF POSITIVISM

1.1 BACKGROUND

The main scheme of this paper is to explain law as a standard that is legitimate, enforceable, and valid. With this fundamental proposition in perspective, this paper discusses why a theory that disregards one of these fundamental features: legitimacy, enforceability, and validity (hereinafter LEV), cannot provide a systematic explanation of law. Additionally, this paper contends that any explanation about the nature of law suffers from inconsistencies, parochialism, and inaccuracy if the explanation either ignores or disassociates the LEVs from their dynamically integrated coherence. Correspondingly, LEVs offer an integrative theory about the nature of law. This paper elucidates how the LEVs separate a positive standard from a normative standard in ascertaining the essential properties of law, and in unambiguously providing a systematic explanation of the nature of law in instituting the positivity of law.

Conceptually, this paper presupposes law as a product of a legal system. A legal system by its existence engenders the nature of law. Analogously, a legal system adopts either an integrative approach to law (IAL) or a disintegrative approach to law (DAL). Under the IAL, all three fundamental features of law, i.e., LEVs exist coherently. On the contrary, under the DAL, only some of the features of LEVs may exist or partly exist, thus the DAL suffers from the deficiency of positivity. Primarily, the DAL remains normative both in its structure and orientation. That is to say, law retains positivity only because of the coherent existence of the IAL. This presupposition brings forth another consistent corollary that laws are not made positive with the mere fact of a position or promulgation.

In fact, the ‘mainstream positivism’ plainly discounts our presupposition and its corollary by reducing law into the subjection and instrumentality of political power, i.e., political determinism. Indeed, for mainstream positivism, there is no distinction between laws posited by a dictator and laws posited through a democratic process. As a result, like Austin, Hart and Raz anachronistically endorse DAL, as to be consistent with the positivity of law. Hart’s famous argument that, ‘morally iniquitous rules may still be law’ is not objectionable for the IAL on the ground that it denies moral contents of law, but

1. See Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System 3 (Clarendon Press, 2nd ed., 1980). Raz also maintains that a general study of the nature of law reflects the systematic nature of law. Raz further claims that, “... a theory of legal system is a prerequisite of any adequate definition of law, and that all the existing theories of legal system are unsuccessful in part because they fail to realize this fact.”

2. This paper uses the term ‘mainstream positivism’ to denote the theories of John Austin, H. L. A. Hart, and Joseph Raz.

it is faulty because it ignores two important components of the IAL: the legitimacy and validity of law.

A piece of law might be legitimate but not enforceable or valid. Similarly, a piece of law might be legitimate and enforceable but not valid. Or, it might be valid and enforceable but not legitimate. In all these situations, as a regime, a legal system either maintains a unity among the LEVs or ignores their unity, in turn reducing law from its central tendency of positivity to the periphery of normativity. Consequently, under a normative condition or DAL, a dictator is free to posit any law with the political power in hands ignoring the legitimacy and validity aspects of law.

Therefore, one of the major challenges to any theory of law is to systematically offer a methodology that distinguishes the conditions and characteristics of DAL and LEVs in separating positive standards from normative standards, which this paper terms as the ‘integrated approach to law’. This paper is a modest attempt towards the direction of explicating the nature of law with the application of IAL. In this attempt, along with its main proposition (i.e., Proposition I), this paper also discusses and supports two complementarily propositions. They are as follows:

**Proposition I:** Law is a legitimate, enforceable,\(^4\) and valid standard.

**Proposition II:** The mainstream positivism has ignored the ‘Proposition I’. Thus, an integrated approach to law is needed to defend and strengthen positivism by fixing the theoretical and methodological inconsistencies committed by the mainstream positivism.

**Proposition III:** All posited laws are not positive laws. Only those laws are positive laws, which meet the requirements of the ‘Proposition I’ because it is the foundation of the positivity of law. In other words, systematically transformed normative standards into positive standards constitute positive laws.

These three propositions are closely linked to each other and thus logically corroborate each other. Therefore, without any watertight demarcation, these propositions are analytically explained in different sections of this paper. Nevertheless, the first section mainly focuses on the Proposition I. Thus, it begins with a brief analysis of the basic conceptual framework of a legal system followed by the exposition of a few theoretical inconsistencies inherent in the mainstream positivism. In this connection, by analyzing

---

\(^4\) The term ‘enforceable’ is used to denote ‘authority’ and ‘rights’ or the legitimate power, which is further elucidated in section 2 of this paper. Contextually, in more specific and limited sense ‘authority’ is used to denote enforceability.
the Hartian concept of the rule of recognition, and the Razian idea of authority, the first section of this paper shows how the Hartian and Razian theories are inadequate and unsatisfactory in offering a comprehensive explanation of the nature of law.

To address the gaps persisted by the mainstream positivism in the explanation of the nature of law; the second section of this paper explains the integrated approach to law, mainly focusing on the Proposition II. The integrative approach employed by this paper explicates the nature of law as built upon the inseparable association of three fundamental conceptual features of law: legitimacy, enforceability, and validity. The aim of the IAL is not to propose any suggestion to discard positivism, but to further explore and strengthen legal positivism. Thus, the second section of this paper defends positivism in the form of an IAL.

The third section mainly explains the Proposition III, offering a methodology of welfare-grundnorm to foster the integrated approach to law, especially by addressing some epistemic questions regarding transmutation of normative standards into positive standards, which are critical to the conceptual account of the IAL. The final part briefly summarizes the main arguments of this paper.

1.2 AN INTEGRATED STRUCTURE OF A LEGAL SYSTEM

Unequivocally, any inquiry about the nature of law invites ‘the primary question of the whole discipline of law.’ Some legal philosophers, for example, Austin, Hart, and Raz have spent their major works in conceptualizing and theorizing the nature of law. However, some observers consider the quest for the ‘nature of norms’ and ‘the nature of rights’ as ‘fruitless parallel debates.’ Conversely, Kelsen mentions that to fully

---

5. See Aron Ping D’Souza, *Editorial: What is Law?*, 1 THE JOURNAL JURISPRUDENCE 9, 9-10 (2008). In the very inaugural edition of the Journal Jurisprudence, the editor brilliantly summarizes the crux of the jurisprudence. Mr. D’Souza argues that unlike sciences, law does not exist sui juris. In fact, human societies create law within purposeful histories. Thus, law has utility, but to discover that utility requests a delimitation of its boundaries. This paper in a modest sense is a quest for those boundaries.

6. See Jur. Eric Engle, *Law: Lex vs. Jus*, 1 THE JOURNAL JURISPRUDENCE 31, 31-50 (2008). Mr. Engle claims that he offers a ‘functionalist definition of law’ but he also permits the common problem of abandoning the distinction between positive standards and normative standards to the hindsight of scientism. He contends that law is not nomothetic; nevertheless, it is quantifiable, verifiable, and predictable. He considers unless law is susceptible to these scientific tools, the nature of law—what is law—could not be answered at all. However, he suffers from at least four deficits. First, he blends both positive and normative aspects of law, which he calls ‘descriptive’ and ‘prescriptive’ or ‘practical law’ and ‘scholastic law’, which is unhelpful to make any separation between normative and positive standards, which is critical to explain the nature of law. Second, the tools of scientism are invariably applicable both to normative and positive standards. Thus, these tools alone cannot establish the nature of law distinct from the nature of normative standards. Third, his idea of ‘if…then’ conditionality and imperativeness of law is useful to explain the nature of individual rule but he assigns the normative character to the prescriptive aspects of law and calls the descriptive aspects as ‘merely positive’. Probably, the other way around could be more
Understand the nature of law, the mere understanding of a single or an isolated rule is insufficient. Since a legal system constitutes the nature of law, thus, to understand the nature of law the relationship between a legal system and the law needs to be clearly appreciated. However, the mainstream legal positivism has failed to characterize a legal system from the benchmark of the unity of LEV. For example, Hart treats validity as a concept built into legitimacy, and Raz examines legitimacy and validity almost conterminous to authority.

Legal systems are not the center of the analysis of this paper. Despite this fact, to complement the analysis of the IAL, it is essential to deal with the basic concept of a legal system. In this respect, the importance of the 'traditional classification of legal systems cannot be ignored, but it is hard to justify them as fully satisfactory classifications in reflecting the dynamics of modern legal developments. Among other factors, with the emergence of global constitutionalism, a comprehensive recognition

Logical a concept. Fourth, he simply configures the legislative and judicial outcomes as ruling class statements, which undermines the constitutionalization process and commits the same defects as suffered by the class based explanation of law.

7. See Hans Kelsen, General Theory of Law and State 3 (The Lawbook Exchange Ltd., 2009/1945). Kelsen states that, “... Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system. It is impossible to grasp the nature of law if we limit our attention to the single isolated rule. The relations which link together the particular rules of a legal order are also essential to the nature of law. Only on the basis of a clear comprehension of those relations constituting the legal order can the nature of law be fully understood.”

8. See Hart, Concept of Law, supra note 103. Hart states that, “For the word ‘valid’ is most frequently, though not always, used, in just such internal statements, applying to a particular rule of a legal system, an unstated but accepted rule of recognition. To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.” See also Scott J. Shapiro, On Hart’s Way Out, in Jules Coleman ed., Hart’s Postscript: Essays on the Postscript to the Concept of Law 190 (Oxford University Press, rep. 2005). Shapiro clarifying the Hartian position on validity, states that, “Any norm that is law in a given system is legally valid in that system, . . .”


10. Traditionally legal systems are classified mainly into five categories: a civil law system, a common law system, a religious legal system, a socialist legal system, and a mixed legal system. See generally Konrad Zweigert & Hein Kotz, Introduction to Comparative Law (Trans. by Tony Weir, Clarendon Press, 1998); Rene’ David & John E. C. Brierley, Major Legal Systems of the World Today (Stevens & Sons, 1985).

11. See Surendra Bhandari, Global Constitutionalism and the Constitutionalization of International Relations: A Reflection of Asian Approaches to International Law, 12 Ritsumeikan Annual Review of International Studies 1-53 (2013); see also Christine E. J. Schwoebel, Global Constitutionalism in (2013) J. Juris. 121
of the separation, check, and balance of power among the state organs, and a universal institutionalization of the legislative process of law making, the nature of the traditional categories of legal systems has undergone a paradigm shift, which the mainstream positivism is reluctant to acknowledge.\footnote{See Jason A. Beckett, \textit{The Hartian Tradition in International Law}, 1 \textit{Journal Jurisprudence} 51-83 (2008). Mr. Beckett argues that the developments in public international law illustrate the limitations, indeed the outright failure, of the Hartian approach to legal theory.}

Today, there are only a few differences between common law and civil law systems.\footnote{See Ragnhildur Helgadottir, \textit{The Influence of American Theories on Judicial Review in Nordic Constitutional Law} (Martinus Nijhoff Publishers, 2006); see also Gustav Fernandes de Andrade, \textit{Comparative Constitutional Law: Judicial Review} 3 U. Pa. J. Const. L. 977 (2001); Susan Gluck Megey, \textit{Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada}, 32 \textit{International and Comparative Law Quarterly} 689-707 (1983).} In fact, the same is true for other legal systems too. In essence, more than any time in history, almost all legal systems have converged to a certain extent by commonly incorporating the features of Proposition I. Despite these commonalities, the level of incorporation of the ‘Proposition I’ is not uniform. Especially in terms of rules, procedures, and institutions there still exist important differences among these various legal systems around the world. In connection with this discrepancy among legal systems, this paper refers legal systems in the world into three categories: the rule of law legal system, a rule by law legal system, and a hybrid legal system.\footnote{For detail discussion see generally John Henry Merryman, \textit{The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America} (Stanford University Press, 3rd ed., 2007); John Henry Merryman, \textit{On the Convergence (and Divergence) of the Civil Law and the Common Law} 17 \textit{Stanford Journal of International Law} 357-388 (1981). The author argues that, “...in the short term but massively and with apparent inevitability if one takes the longer view indicates that the Common Law and Civil Law are, in the most fundamental sense, converging toward fuller realization of the values of Western culture.” See also B Markesinis, \textit{Judicial Style and Judicial Reasoning in England and Germany}, 59 \textit{The Cambridge Law Journal} 294-309 (2000); B. Markesinis (ed.), \textit{The Gradual Convergence: Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century} (Clarendon Press, Oxford, 1993).}

\begin{flushright}
\end{flushright}
A rule by law legal system suffers from serious problems of disconnects and neglect of the Proposition I. For instance, North Korea presents a succinct example of the rule by law legal system, where political determinism is a sufficient condition for the existence of a legal system and laws. The rule of law legal system meets all the requirements of the Proposition I and therefore harmoniously unifies the three fundamental features of law. Generally, liberal democratic countries in the world belong to this category of a legal system. A hybrid legal system meets the standard of authority but partly lacks the standards of legitimacy and validity. Thus, in its precise appreciation only the rule of law legal system can uphold the unity of LEV in institutionalizing the positivity of law. To put it clearly, laws are the masters in the rule of law legal system, whereas laws are mere political instruments in other legal systems.

Before examining the IAL in section two of this paper, let us briefly examine the theoretical inconsistencies endured by the mainstream positivism. In the following subheadings this paper shows some key aspects of the inconsistencies of the mainstream positivism.

1.3 THEORETICAL INCONSISTENCY OF THE MAINSTREAM LEGAL POSITIVISM

The terms ‘legal positivism’, ‘positive method of law’, ‘positive theory of law’, ‘positivity of law’ and ‘positive law’ seem fascinating, but it is not easy to understand what exactly they mean and convey. Unless the context requires specific use of these terms, this paper uses the term ‘positivism’ to refer all of these different terms.

Epistemologically, standards regulating and facilitating human and institutional behaviors can be divided into two broad segments: positive and normative. This paper argues that a ‘positive standard’ is a legal standard that confirms the coherent existence and application of the LEV. On the contrary, a ‘normative standard’ denotes a concept contrasting with a positive standard. More specifically, the terms ‘normative,’ ‘normativism’ and ‘ideological’ mean or denote a system of values associated with and espoused by religion, culture, political engagements, beliefs, morals, or ethical precepts, which lack legitimacy, enforceability, and validity. In short, normative standards might acquire or hold social acceptability in judging and deciding human and institutional relationships, but still lack the coherent existence of the LEV.

Undeniably, the normative standards can accomplish the processes of the LEV in the forms of rights or authority. For example, a right to religion, a right to conscience, a right to culture and so on evidence the possibility of the transmutation of normative standards into positive standards. Nevertheless, the challenge to the legal philosophy transpires in regard to conceptualizing and developing a theory to explain how the myriad of normative relationships transmute into positive relationships through the mechanism of
legal institutional process. Indeed, the mainstream positivism has failed to address this very challenge.

Moreover, the mainstream positivism has mired in uncertainties in answering the basic question, ‘what does positivism mean?’ It is especially poignant because a number of variations have emerged in the domain of positivism itself. Gardner contends that legal positivism has been united only by themes and not by thesis or common proposition, which questions legal positivism so far as a school. Despite these criticisms and variations, one common point germane to all the variations is a conceptual theory that explains the nature of law.

In this context, some interpret positivism as a theory that is not evaluative in explaining the nature of rules; therefore, it is not value-laden. However, these features of ‘not evaluative’ and ‘not value-laden’ cannot postulate sufficient conditions in unambiguously offering the nature of law. Further, the variations themselves are attributable to responses to the question: can there be any value-neutral social fact? In responding to this question, the mainstream positivists have often departed from the value-free nature of positivism to accepting minimum content of value or practical reason in their explanation of the nature of law. Against this background, some argue that positivism is

---


17. See John Gardner, Legal Positivism: 5 ½ Myths, in Aileen Kavanagh & John Oberdiek eds., Arguing About Law 153 (Routledge, 2009, Kindle Edition) . Gardner argues that, “. . . all those designated as ‘legal positivists,’ for the label attaches by virtue of common themes rather than common theses. But things are different when the label ‘legal positivism’ is used in philosophical argument. In philosophical debate our interest is in the truth of propositions, and we always need to know which proposition we are supposed to be debating. So there is nothing philosophical to say about ‘legal positivists’ as a group unless there is some distinctive proposition or set of propositions that was advanced or assumed by all of them.”


either dead or has lost its originality and, therefore, should either be completely buried or fundamentally revived with a sufficiently clear explanation and analysis.  

The task of the explanation and analysis of positivism has also become overwhelming, especially because of the incommensurable variations within the mainstream positivism. There are at least half a dozen variations in the mainstream positivism. First, analytic theory argues that rules are value-free because the meaning of a rule is free of value. That is to say, the meaning of a concept is already contained in a rule, which is closed and cannot be changed by the value system. This version of positivism is particularly associated with Joseph Raz. Second, imperative theory describes rules as value-free concepts immune from the experience of the subject. That is because the value or experience of a subject cannot change the meaning of a concept contained in a rule commanded by the sovereign. John Austin is considered the godfather of this version of positivism. 

Third, semantic theory claims that rules reflect a boundary concept. That is to say, concepts are bounded rules followed by linguistically determined meaning, which itself is a social fact. In this sense, rules are supposed to be empirical and not normative. But ‘social facts’ themselves cannot be positive, rather they are often normative. This version of positivism is associated with H. L. A. Hart. Fourth, as rules are social facts, they logically involve social values and therefore adopt minimum contents of norms. Though, as social facts, rules are fundamentally descriptive and not evaluative. However, this proposition eludes the basic normative nature of social facts. This version of positivism is also associated with H. L. A. Hart.

Fifth, the separability thesis claims that law and morality are two mutually distinct concepts and, therefore, morality has nothing to do with the validity and authority of

---


20. See generally HUTCHINSON, PROVINCE OF JURISPRUDENCE DEMOCRATIZED, supra note; see also Karl Llewellyn, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 372 (The University of Chicago Press, 1962).


23. See HART, CONCEPT OF LAW, supra note, pp.185-86, & 244-54.

24. See HART, ESSAYS IN JURISPRUDENCE, supra note, pp. 49-87, & 265-277.

(2013) J. JURIS, 125
rules. This version of positivism is associated with H. L. A. Hart & Joseph Raz. Sixth, as rules are purposive social instruments, they cannot completely depend on plain facts alone. They have to consist of practical reason. Therefore, Joseph Raz and Ronald Dworkin claim practical reason as the ground of positive rules, but in sharply different ways.

In addition, the use of the term ‘normativism’ to mean standards that are value-free and therefore close in meaning to positivism poses another deep contradiction in the domain of legal positivism. This obfuscation is especially contingent in the case of explaining and understanding Kelsenian normativity or normative order. Kelsen’s norms are both value-laden and value-free. In both of these contexts, they validate one another. This smokescreen further leads to the invention of a concept like ‘normative positivism,’ which is unbearably elusive.

Further, the concept of normativism becomes even more complicated when the mainstream positivists like Hart and Raz admit the role of a value system in recognition of rules. Hart observes that both Bentham and Austin never denied that, as a matter of historical fact, the development of legal systems has been powerfully influenced by moral opinion, and conversely, law has profoundly influenced moral standards, so that the content of many legal rules mirror moral rules or principles. Normative jurists like Liam Murphy suggest that the cause of positivist discord is actually inevitable. It is because of the equivocal positivist explanation of law and its epistemic uncertainty that gives rise to normativism as an alternative legal thought to positivism. However, critics argue Murphy’s primary reason for rejecting morally and politically neutral legal theory is the supposedly insurmountable epistemic difficulty of knowing the real grounds of law. Most notably, normativism inspired many jurists to begin with the truism of viewing law as a normative social practice.

---

28. See Hart, Concept of Law, supra note, at 54.
29. See Liam Murphy, The Political Question of the Concept of Law, in Hart’s Postscript, supra note, pp. 371-409; see also Burge-Hendrix, supra note, pp. 9-10.
30. Id. at 14-15.
Despite the contradictions in the mainstream positivism, this paper argues that law is distinguishable from all normative standards of social, political, cultural, moral, and economic orders because of its unique property, i.e., positivity. Barring positivity, law is indistinguishable from normative standards. This paper argues that positivity is a minimum as well as an optimum condition of law. There are no less and no more conditions for law than positivity itself. This claim requires showing the features establishing positivity of law by separating it from normative standards, which is in fact at the core of the inquiry of this paper. For analytical convenience, this paper terms all these normative standards as the ideologically determined political order. It is because the political condition is one, which governs human relationships and facilitates cooperation on the basis of ideology, religious belief, ethics, morality, socio-economic arrangements, socio-cultural networks, and organizational, and institutional setups among others.

There always appears a critical co-relationship between the political order and the positivity of law. Often, a political order as the apparatus of power tends to define legitimacy and validity within the framework of authority, which disapprovingly undermines legitimacy and validity aspects of law. Nevertheless, for mainstream positivists the authoritative political condition is the only determining feature of the nature of law. As a result, the mainstream positivism fails to explain the distinction between the rule of law, a rule by law, and a hybrid legal system. The root of the theoretical inconsistency of the mainstream positivism, thus, emanates from its reliance on the unsatisfactory realm of the political determinism of law.

Political determinism is the common unifying theme of the mainstream positivists, especially amongst Austin, Hart, and Raz. The Austinian idea of law as the command of a sovereign is a comparable bedfellow to Mao Zedong’s idea of politics, which projects the power of state or politics as the only factor determining both base and superstructure including law. In one or another form, the concept of political determinism of law reflects the supremacy of politics over law. With the overtone of political supremacy, for positivist jurists like Austin, Hart, and Raz, among others, the mere fact of the existence of law is a sufficient condition for the positivity of law; although, methods of the explanation of the existence of law vary among them.

For Austin it is the command of the sovereign, whereas for Hart it is the rule of recognition that makes the union of primary and secondary rules possible. For Joseph Raz it is authority that brings law into existence. Despite these distinctions, as mentioned above, the core epistemology of all these three jurists corresponds to the idea that the mere existence of law is the sufficient condition for positivity. Thus, the mainstream positivism clearly denies any role for positivity at the stages of the making of law. For Hart, the making part of law is the union of primary and secondary rules, where the mere recognition of officials is enough to establish the existence of law as a social fact.
However, one of the weaknesses of the Hartian idea of ‘social fact’ is that it eludes the normativity internalized in social facts. Further, if both primary and secondary rules reflect the same social facts then logically both should be equally normative and consequently the union should make no difference in the normativity of social facts. For Raz, the ‘content’ of law alone, which is ‘authoritative,’ engenders the very existence of law. In fact, the Razian term ‘authoritative’ is synonymous to Austinian ‘command’. Besides self-claimed positivity through the existence, the mainstream positivism ignores the state of positivity in each of these three stages of law (e.g., making, application, and interpretation), which reduces law from the realm of the rule of law to the system of a rule by law. Although, it does appear that Hart somehow tried to moderate the extremist form of Austinian political determinism, while Joseph Raz seems reinventing it in the form of a rule by law system.

Besides recognizing Hayek’s observation on the rule of law as one of the clearest and most powerful formulations of the ideal of the rule of law, Raz finds that some of the conclusions of Hayek could not be supported. The Razian discontent to Hayek’s idea of the rule of law springs from his belief in the political conception of law. Raz claims, “The rule of law is a political ideal which a legal system may lack or may possess to a

32. See Joseph Raz, Introduction, in AUTHORITY 2 (Joseph Raz ed., Basil Blackwell, 1990). Raz states that, “Authority . . . is a right to command. Perhaps, ‘command’ is too narrow a term here. What we really have in mind is a right to make laws and regulations, to judge and to punish for failing to conform to certain standards, or to order some redress for the victims of such violations, as well as a right to command.”

33. Feminist and Natural law jurists primarily focus on the making of the law. Lon Fuller and John Finnis are some of the leading natural law jurists; in particular, they emphasize the process of making law. In this regard, Fuller offers eight principles applicable in the making of law. However, among his eight principles, two of them are related to the application of law as well. For example, (i) rules that require conduct beyond the powers of the affected party, and (ii) a failure of congruence between the rules as announced and their actual administration; are related to application of the law. See LON FULLER, THE MORALITY OF LAW 38-39 (Yale University Press, 1964).

34. Realist, sociological, and feminist jurists emphasize on the application side of law (including interpretation, and social realm). Also, Ronald Dworkin’s interpretative theory focuses on the application side. Ronald Dworkin’s account of the rule of law as the rule of liberal principles is not just law book rules but also the rule of principles. See Jeremy Waldron, The Rule of Law as a Theater of Debate, in DWORKIN AND HIS CRITICS 319-336 (Justine Burley ed., Blackwell Publishing, 2004).

35. See F. A. HAYEK, THE ROAD TO FREEDOM 112 (Bruce Caldwell ed., The University of Chicago Press, 2007/1944, Kindle). Hayek writes, “Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”


37. Id.
greater or lesser degree.”38 Raz further argues that there is no conceivable connection between the rule of law, justice, and democracy. It is because in a society where there is no democracy, where there is poverty, inequality, lack of human rights, racial segregation, gender discrimination, et cetera, society can still have the existence of law.39 Thus, he reduces the rule of law into a rule by law by arguing that, like political doctrines, the rule of law varies in details and thrives in a variety of political and cultural environments with different meanings. For Raz, the rule of law is not a universal moral imperative.40 Joseph Raz’s explanation of the rule of law is utterly reductionist and unsatisfactory because neither it adequately distinguishes the concepts of the rule of law and a rule by law, nor it brings the normative political authority (command) within the methodological framework of positivism.

Similarly, Hart’s concept of the rule of recognition, which he considers a sufficient condition to determine the nature of law, also sustains a number of flaws; among them, it is typically alien to the idea of judicial review over legislative acts. In fact, in the UK, which adopts parliamentary supremacy, the idea of judicial review of the legislative action was missing for a long time. For example, let us say, a piece of legislation (statute) adopts a principle that limits judicial review. Can recognition by parliament of the principle of limitation on judicial review stand as a principle governing the legal system? It was true for Hart and the UK as well, especially before the adoption of the Human Rights Act in 1998,41 the institutionalization of the supremacy of EU laws over domestic laws,42 and the emergence of the WTO legal system that requires domestic laws to be compatible with the WTO rules.43

38. Id., at 211.
39. Id. Raz argues that, “We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph . . . the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.”
40. See RAZ, ETHICS IN THE PUBLIC DOMAIN, supra note, at 370.
42. See generally Richard Rawlings, Peter Leyland, & Alison L. Young (eds.), SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES (Oxford University Press, 2013); see also (2013) J. JURIS. 129
For many legal systems it would be inconceivable to deny the review of the validity of the legislative action by the judiciary. For instance, in the United States, judicial review was regarded as a natural function of the judicial department even before the adoption of the Constitution. In India, on a number of occasions, definitively beginning with the famous *Golak Nath* case of 1967, the Indian Supreme Court has struck down any legislative attempt that curtailed the power of judicial review in any form. Even in the UK, after the enactment of the Human Rights Act, the doctrine of judicial review has been expanded from the narrow scope of only reviewing the administrative actions to the review of legislative actions as well.

Against this background, the question may arise, ‘is the mainstream positivism doctrinally certain?’ The simple answer is “no.” This uncertainty persists because of the three fundamental reasons in the tradition of mainstream positivism. They are:

- Philosophical dissonance;
- Narrow and unrealistic engagement of mainstream positivism; and
- Faulty explanation of social facts.

There might be more than these three reasons for doctrinal uncertainty of positivism. However, this paper considers these three as the fundamental ones, which are briefly discussed below.

---


44. *See Gustavo Fernandes de Andrade, Comparative Constitutional Law, 3 JOURNAL OF CONSTITUTIONAL LAW 977, 977-989 (2001); see also* ALEXANDER HAMILTON, *FEDERALIST NO. 78: THE JUDICIAL DEPARTMENT* (New York, McLean’s Edition, May 28, 1788). Hamilton writes, “For I agree, that there is no liberty, if the power of judging be not separated from the legislative and executive powers. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”

1.3.1 Philosophical Dissonance

Conceptual analysis of law is at the core of positivism. Nevertheless, philosophical dissonance lies at the very heart of the mainstream positivism in regard to conceptual analysis of law. This dissonance is due to the failure of mainstream positivism to clarify the nature of a ‘concept’ itself. The question about the nature of a concept is one of the most enduring legal philosophical questions. It is so alluring that the division of the schools of thought between Plato and Aristotle, and since then among philosophers and jurists, is particularly associated with the very question of the nature of a concept. Hart’s view about ‘concept’ offers a threshold to enter into this lasting theoretical treasure and debate. A concept, for Hart, is a general framework of legal thought; or more explicitly speaking, a concept is about the meanings of words. In particular, a concept is a tool that distinguishes ‘internal’ and ‘external’ dynamics or meanings of rules, which ‘depend on social context.’

The internal and external meaning of an object entails a long philosophical underpinning from Plato, Aristotle, Wittgenstein, Hohfeld and indeed many other jurists and philosophers most notably Bentham and Hart. In a more generalized or simplistic form, the nature of a ‘concept’ is considered positive if the internal meaning of an object determines the concept without any external influence. In this sense, the concept is independent of the values of a decision maker. Thus, the Austinian command of a sovereign, Hartian internal point of view, and Razian authority all fail to offer methodology by which the legal concept would be independent of the values of the decision maker. In other words, only if the concept is not normative, then it is positive. Hence, the nature of a ‘concept’ is contemplated normative if the external factors determine the nature of an object. That is, the concept is dependent on the values and experiences of a decision maker, which is the case of the command theory, and the rule of recognition.

The dissonance in positivism emerges from this very issue: whether a ‘concept’ is dependent on the values and experience of a decision maker or is independent of them. For example, in a dialogue between his tutor, Socrates, and Euthyphro, Plato highlights the importance of internal property as a factor for an explanation of a positive concept. The dialogue was about an indictment. Euthyphro, a prosecutor, was preparing an indictment against his father, who had allegedly murdered a slave (servant). Euthyphro’s idea is that one should not look at who acts, but should look at what is acted. If the act is wrong, then no matter who does it, they should be liable. It would be impious not to

46. See HART, CONCEPT OF LAW, supra note, at iv-v.
prosecute. However, Euthyphro’s relatives and family members believed that prosecuting one’s own father was impious.

On the standards of the determination of the form or appearance—pious or impious—Euthyphro and Socrates differ diametrically. Transcendental judgment—wherein if god likes something, it is pious and if god dislikes something, it is impious—was the standard for Euthyphro. For Socrates, it is not pious because god likes it and it is not impious because god dislikes it. In fact, it is pious, which is why god likes it; and it is impious, which is why god dislikes it. The judgment of pious or impious does not depend on the discretion of a decision-maker or the external factors. Rather, the internal property is the impeccable standard of judgment. Therefore the decision-maker should be bound to have a judgment based on the nature of a ‘concept,’ independent of the decision-maker (a positive standard of a concept). In this dialogue, Socrates is the interlocutor espousing Plato’s views. Surely, it would be apt to know whether law-makers (decision makers) adhere to the standards of Euthyphro or the standards of Socrates. In short, it is important to know that whether making rules is governed by a normative standard of a concept or by a positive standard of a concept.

The Platonic idea of the nature of a concept is undoubtedly valuable to explain and or analyze the nature of making rules. However, Plato left the question unanswered: why was the concept not understood or recognized by Euthyphro and his family members similarly (i.e., positively), independently of experiences, values, interests, and prejudices? A satisfactory answer to this question is what we need in our quest for transforming concept into construct (a positive standard) in the making, application, and interpretation of rules.

Aristotle, who studied for twenty years with Plato, turned out to be the most elegant and fervent critic of Plato. Nevertheless, Plato appreciated Aristotle as the mind of his school, the appreciation for which every academic was zealous. The major difference between these two great philosophers was about their view on noumena and phenomena. For Plato concepts were noumena (i.e., independent of human biases). For Aristotle no such thing would exist out of human mind and experience, but rather in the human senses alone (i.e., phenomena). For Plato, phenomenon was not a form but an appearance based on human experience of an ad hoc nature and therefore readily changeable. In opposition to Plato, for Aristotle the concept was phenomenal (i.e., an abstraction of the rational process based on senses and experiences). In short, the value-free nature of the concept of Plato and the value-laden nature of the concept of Aristotle are apt to divide
the whole philosophical regime and schools of thought.\textsuperscript{48} Ironically, both Plato and Aristotle are designated as normativist and positivist interchangeably.

Following Aristotle, reason, induction, experience, experimentation, verification, and empiricism obtained a key place both in philosophy and social science. The Western world was exposed to these developments in the late twelfth century when scholastic traditions combined Aristotelian reason with theology, especially the movement led by Saint Thomas Aquinas.\textsuperscript{49} In the fourteenth century scholastic philosophers, including William of Occam,\textsuperscript{50} paid much attention to reason, induction, experimentation, and experience rather than revelation, as the sources of knowledge, but at the same time they were also engaged in combining theology and Aristotelian reason into a single philosophical framework. In the sixteenth century, Bacon used the inductive method for scientific inquiry but he was as much a critic of Aristotle as Aristotle was of Plato.\textsuperscript{51}

Most interestingly, rationalism in the sixteenth and seventeenth century retained reason as the tool of analysis and a source of knowledge but rejected sensory, experimental, empirical, and inductive methods.\textsuperscript{52} Rationalism did not only refute Aristotelian induction but tried to combine reason with Platonic deduction. However, Rene Descartes, the leading figure of the rationalist philosophy\textsuperscript{53} in the eighteenth century rekindled the Aristotelian reason, combining it again with induction, experimentation, experience, and empiricism. The age of enlightenment gave birth to some great philosophers like Jeremy Bentham, August Comte, Adam Smith, and others.

Before the development of Western philosophy, positive concepts and normative concepts had almost a clear distinction and different category. However, when Western philosophy emerged after the twelfth century despite its great contribution to the field of science and philosophy, it also happened to blur the distinction between positive and normative concepts. As a result, Platonic positivistic concepts started to be treated as

\textsuperscript{48} See Abraham Edel, Aristotle and His Philosophy 61-74, & 183-246 (Transaction Publisher 1995); see also Otfrid Hoffe, Aristotle 23-30 (Christine Salazar trans., Sunny Press 2003).


\textsuperscript{52} See J. M. Robertson, Rationalism 1-6 (London, Constable and Co. Ltd. 1912); see also W. E. H. Lecky, History of the Rise and Influence of the Spirit of Rationalism in Europe (New York, D. Appleton and Co. 1882).

normative and Aristotelian normative concepts started to be treated as positive. This development ultimately led to a number of variations in the understanding of positivism itself. As a result, Hart found a minimum content of morality in positivism\(^\text{54}\) and Joseph Raz, the contemporary defender of the mainstream positivism, has found positivism in practical reason.\(^\text{55}\)

Wittgenstein, the legendary figure, who refutes his own earlier philosophy, is touted as the representative of twentieth century positivism. He was supposed to solve the problem fraught with reception, rejection, and innovation of the Greek philosophy in the Western philosophy.\(^\text{56}\) He characterizes a ‘concept’ as a common reference in his *Philosophical Investigations*.\(^\text{57}\) For example, a ‘game’ is a concept. There are many types of games, but when we refer to something as a ‘game’ we can find commonalities, similar characteristic features (family resemblances) between different games. In other words, concepts are ‘formulated boundaries,’ which refer to kinship. For Wittgenstein, the commonality is a ‘family resemblance’ and the ‘rule following.’

Now a question arises: did Wittgenstein solve the problem of philosophical dissonance, as claimed by Russel? How does his philosophy of ‘rule following’ help making positive rules? Let us take a classical example from the most-favored nation treatment (MFN), a rule developed at the domestic level and extended to the international level during the formation of the General Agreement on Tariffs and Trade (GATT)\(^\text{58}\) as a case for testing the idea of Wittgenstein. The negotiating history of the MFN clause shows that the US and the UK could not harmonize their concepts into a single construct. At the end of the day, they fit them into a single odd framework of different constructs.\(^\text{59}\) This example

\(\phantom{\text{.}}\)

\(^{54}\) See Hart, *Concept of Law*, supra note, pp. 193-200, 248, 250, & 254. Hart admits that his theory is not a plain-fact theory of positivism since amongst the criteria of law it admits values, not only plain facts (at 248). Hart also says that his theory of rule of recognition conforms to moral principles or substantive values as criteria of legal validity (at 250). In a penumbral situation, the judge’s duty will be to make the best moral judgment he can on any moral issues he may have to decide (254); see also Hart, *Essays in Jurisprudence*, supra note, at 64. In the Essays, Hart explicates his idea of necessary intersection between law and morals. See also S. B. Drury, *H. L. A. Hart’s Minimum Content Theory of Natural Law*, 9 Political Theory 533-546 (1981).

\(^{55}\) See Raz, *Practical Reason*, supra note, pp. 9-10. The main idea of Raz can be summarized as follows: norms are reasons for action. Norms are explained in terms of reason for action. The success of any theory of norms depends in part on practical reason. See also Christopher W. Morris, *Well-Being, Reasons and Politics of Law*, 106 Ethics 817-833 (1996).


\(^{58}\) See Article 1 of the General Agreement on Tariffs and Trade, available at <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> visited on March 1, 2014..

also demonstrates the complexities of transmuting concepts into a construct in making rules.

Against this backdrop, we can say that the methodology of ‘rule following’ offered by Wittgenstein could not help harmonizing the different concepts between the US and the UK on the MFN. This is because the rules the US and the UK followed in forming the concept were different and incompatible. In many cases, the same is true in making rules at the domestic level. For example, it is not necessary that all concepts produced by different Members of a legislative body follow the same standard while designing their concepts. Therefore, Wittgenstein’s methodology, despite being an important innovation, is not very helpful in our pursuit of transforming normative concepts into positive constructs.

A further question arises: why do actors (e.g., members of a legislative body) differ on a concept? Plato left this question unanswered. Wittgenstein engaged in answering this question. For him, the difference occurs because of the very nature of the concept itself. Suppose someone points to a vase and says, ‘look at the marvelous blue—the shape isn’t the point.’ Or, ‘look at the marvelous shape—the color doesn’t matter.’ Without a doubt, individuals will do something different when they act upon these two invitations. Why does this variation take place?

Wittgenstein says it is because of the very nature of the concept; it is not the things by themselves that make us differ. Wittgenstein’s idea of ‘concept’ reflects the variations associated with normative experiences. Thus, it can be asked whether we are left in a position to justify both the contradictory concepts of the US and the UK about the MFN issue as mentioned above. Should content-indifferent but value-laden experiences govern the domain of making rules? The argument of this paper is ‘no.’

Further, Wittgenstein explains this variation as a result of the differences in interpretation, which may consist of how one makes use of the object stimulated by characteristic experiences. The ‘characteristic experience’ is influenced by the possibility of various learning, understanding, and uses offered by the concept itself. For example, the concept ‘to point to this thing’ (e.g., an MFN treatment) can be used in a number of different ways. The most important contribution of Wittgenstein on concept is that ‘concepts are independent of the existence of a thing or an object.’ This idea about a ‘concept’ of Wittgenstein is widely considered a positive concept, but it is truly a normative one for Plato. Or, it can be said that how a concept should be treated—

61. Id. para. 35.
positive or normative—is not free from controversy, which the mainstream positivism could not solve and consequently persisted in the doctrinal uncertainty.

A. J. Ayer, who is considered one of the leading figures of logical positivism, claims that there is nothing in the nature of philosophy to warrant the existence of conflicting philosophical schools. He therefore proclaimed he would provide a definitive solution to the problems that have been the chief source of controversy among philosophers—the nature of ‘concept’ itself.\(^62\) To solve this controversy, Ayer held a position that no concepts that transcend the limits of all possible sense-experience could possibly have any literal significance. Rather, it would produce nonsense.\(^63\) The criterion Ayer used to come to this conclusion is the criterion of verifiability.\(^64\) For him, only verifiable concepts are useful and non-verifiable concepts are useless. He claimed that metaphysical concepts are not verifiable, thus they are useless. All verifiable concepts are positive concepts for Ayer. He focuses the debate between metaphysical and positive concepts. Most importantly, all sense-experienced concepts are positive concepts. In this way, Ayer is one of the typical representatives of the European philosophical style that blends positivism with normativism, which at the end of the day fails to solve the problem of doctrinal uncertainty because normative standards also recollect sense-experienced concepts.

Joseph Raz specifically recapitulates that philosophers have failed to offer a clear explanation and analysis of a ‘concept.’ It is because they have failed to distinguish between the nature of a concept and the explanation of the nature of the concept itself.\(^65\) In this context, this paper makes two points. First, philosophically, the mainstream positivists are unable to explain the nature of a ‘concept’ independent of normative engagement. Second, there is no uniform version of positivism; consequently, the mainstream positivism in its existing form is mired in doctrinal uncertainty and detached from solving practical problems related to the nature of law.

---

\(^63\). Id. at 14.
\(^64\). Id. at 16.
\(^65\). See Raz, Can there be a Theory of Law, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, Ch. 23, Kindle Location 7553 (Martin P. Golding & William A. Edmundson eds., Blackwell Publishing, 2005). Raz says that for many philosophers, including H. L. A. Hart, “... there was no difference between an explanation of concepts and of the nature of things which they are concepts. Some may even claim that there is no conflict between these two ways of understanding concepts, a view which dates back at least to the beginning of the century and the growth of conceptual analysis as a prime method of philosophical inquiry, which was often equated with analysis of the meanings of words and phrases.” He further claims that, “... there is some truth in both approaches. But both are mistaken and misleading. Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other.”
1.3.2 Narrowness of the Mainstream Positivism

As discussed above, there is no specific version of positivism. In this regard, Alf Ross observes that positivism has tried to secure its identity by dissociating itself from natural law. However, the form of positivism is confused, owing to a lack of clarity as to the meaning of ‘legal positivism,’ a term rarely if ever defined with precision.  

Further, it is clear from the above discussion that the European tradition has often blurred positivism with normativism, being heavily influenced by Aristotle and trying to harmonize Platonic ideas with Aristotelian ideas. The impact of this European tradition is particularly noticeable in analytical jurisprudence, which claims the analytical jurisprudence as a Western philosophical product. Analytical jurisprudence depicts a value-neutral concept as positive. Thus, the major venture of the mainstream positivism is to explicate law as a value-neutral institution. In this regard, it tries to separate law from morality by characterizing law as a command of sovereign or the union of primary and secondary rules. It is interesting to note here that some jurists claim there is no such thing as value-neutral. Professor Bhala’s response is that this attempt at separation is itself a value-based assessment. Therefore, it is still abstruse regarding how Austinian command or Hartian internal point of view could be value neutral. Indeed, on major historical turning points, despite standing on vulnerable grounds, command theorists succeeded in hoaxing common people for the benefit of their ruler.

It is in no way a convincing claim to state that the command of a sovereign or the internal point of view is a value-free standard of law making. It is also equally preposterous to claim that the command is positive on the ground that the sovereign is unlimited and thus does not yield to a command of others, and implements his command through a threat of punishment. This idea of Austin is not only shocking, but disliked by many including by H. L. A. Hart. It was understandable to Hart that the separation of command (law) from morality alone could not offer a methodology with sufficient justification to assign it with the feature of positivism. Therefore, Hart tried to refine positivism from the deficiencies embedded in earlier versions of positivism,

67. See HART, CONCEPT OF LAW, supra note, at 146.
68. See AUSTIN, LECTURE ON JURISPRUDENCE, supra note, pp. 60-68.
69. Referred in BHANDARI, MAKING RULES, supra note, at 145.
70. See HART, CONCEPT OF LAW, supra note, pp. 18-20, 79, & 81; see also HART, ESSAYS IN JURISPRUDENCE, supra note, at 64; Candace J. Groudine, Authority: H. L. A. Hart and the Problem with Legal Positivism, 4 JOURNAL OF LIBERTARIAN STUDIES 272-288 (1980).
especially in Austin’s theory. Therefore, he offered a methodology of the ‘union of primary and secondary rules’ that brought mainstream positivism at the center of the legal philosophical discourse.

For Hart, law enacted by the sovereign is positive because it is internally accepted and the meaning assigned by the sovereign cannot be changed by external values or moral considerations. However, for Hart, law could consist of minimum moral content in two contexts—in the form of primary rules before they are turned into secondary rules and in a situation of penumbra. Not only that, the internal acceptance is itself a value-laden act. Nevertheless, the differences between Austin and Hart create two categories of positivist thought: exclusive positivist, and inclusive positivist. Austin was thus designated as an exclusive positivist because he completely denies the role of moral considerations in law, whereas Hart is designated as an inclusive positivist because he accepts the minimum content of morality in law. Joseph Raz does not agree with either Austin or Hart. He claims that law is not identical with the concept of law, which Hart and other legal philosophers of law sought to explain.

The Hartian concept of the internal point of view assumes acceptance and awareness of the rules by its officials and also by its people. However, Raz criticizes the concept of internal point of view claiming that, “. . . there is nothing else in the concept of law, which requires that people be aware of their institutional structure as a legal system in order for their institutions to constitute a legal system.” But Raz himself argues that ‘different cultures have different concepts of law and there is no single concept of law’. It is because the concept of law is “entrenched in our society’s self-understanding.” Moreover, for Raz, “. . . law can and does exist in cultures, which do not think of their legal institutions as legal, and a theory of law aims to give an account of the law wherever it is found, including in societies which do not possess the concept of law.” In short, as argued elsewhere, the mainstream positivism appreciates the mere existence of law as the adequate condition for the positivity of law.

---

72. See HART, CONCEPT OF LAW, supra note, pp. 79-99.
73. See Kenneth E. Himma, Inclusive Legal Positivism in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY (Jules Coleman and Scott Shapiro eds., 2002); see also William H. Wilcox, Inclusive Legal Positivism 106 THE PHILOSOPHICAL REVIEW 133-135 (1997).
74. See HART, CONCEPT OF LAW, supra note, pp. 193-199.
75. See RAZ, BETWEEN AUTHORITY AND INTERPRETATION, supra note, at 20.
76. Id., at 40.
77. Id., at 31.
78. Id., at 41.
From this discussion it is clear that the way mainstream positivist jurists are explaining and trying to justify positivism is fraught with both theoretical and methodological problems. Theoretically, they are narrowly engaged in separating law only from morality and not from other normative standards, and methodologically they are erroneously confined to project command (practical reason, or authority, or the rule of recognition) as the tool or source of positivism. In short, for them, a formalized human experience is a positive concept in the form of a rule. Due to their theoretical and methodological narrowness some critics hurl severe criticisms at positivist jurists saying that the analytical focus of positivist jurists has done much more harm than good, their presumptive refinements have been outweighed by their narrowness and abstraction. Against this backdrop, Karl Llewellyn once remarked that it would be much better if the analytical project were abandoned. These criticisms against positivism cannot be easily ignored. This is because of the failure of the mainstream positivism in distinguishing positive and normative concepts, and its excessive engagement in abstraction rather than developing a specific methodology. However, it would be unfair to level all these criticisms to the same extent against Jeremy Bentham. In his book, *Theory of Legislation*, Bentham offers a modest solution to these problems of conceptual inseparability and gaps in methodology. He upholds that social concepts or facts are primarily normative; therefore, are often flexible and uncertain. For him, the task of making law is to turn these uncertain normative concepts into a construct of certain meaning as rules, for which a specific methodology is needed. For this reason, Bentham offers utilitarianism as the methodology.

Against this backdrop, it is understandable that the process of legislation may encounter with politically varied, normatively sustained, and socially contested concepts. But the question is: how does the Benthamite utilitarianism help to transform these contested normative concepts into positive constructs? The answer the Benthamite utilitarianism offers rests on the application of the utilitarian calculus by recognizing the greatest happiness of the greatest number, which may lexically ignore the aspirations of minority. Therefore, it apparently redounds to a majoritarian bias. The utilitarian idea built on a naïve democratic process of majoritarianism may unleash the ‘majoritarian tyranny,’ as questioned by John Rawls. These deficiencies in the utilitarian concept need to be removed by creating a condition that does not compromise or limit the welfare of the

key stakeholders; rather, it would help to expand the welfare and choices of all stakeholders. Successively, the methodology of welfare-\textit{grundnorm} addresses these weaknesses of utilitarianism, which is discussed in section 3 of this paper.

The discussion above suggests two major challenges ahead. The first challenge is to address the problem of philosophical uncertainty inherent in the mainstream positivism by suggesting a doctrinal certainty. The second challenge is to offer a methodology that could be applied in transmuting normative standards into positive standards through making rules. The idea of doctrinal certainty is discussed under section 2 of the paper and the methodological issue is discussed under section 3 of this paper. However, before we discuss these issues, one important issue relating to social facts needs to be dealt, which follows herein after.

1.3.3 \textit{Are Social Facts Invariably Positive?}

The controversy between Plato and Aristotle on \textit{noumena} and \textit{phomena} is fundamentally due to an imprecise epistemology regarding the distinction between positive and normative aspects of a natural and social ‘concept.’ However, it should be noted that often it is difficult to have a clean delimitation or individuation between natural and social concepts. The Platonic idea that internal properties of entities exist beyond human values or norms and are therefore positive is basically a concept associated with natural things or facts. Taking the same example discussed above about the dialogue between Socrates and Euthyphro on the murder of a slave, it can be observed that the murder is both a natural and social fact. The death of the slave could not be changed by human experience or values. What could be changed or be subjected to human values is the system of penalty. Where Plato did make a mistake is that he tried to offer the same standard for both natural and social concepts. He did not see a major distinction between the positive and normative aspects in natural and social concepts.

The complexities in explicating social fact involve because social facts encompass both positive and normative concepts. For example, ‘dumping’ is a socio-legal fact. When it takes place the nature of dumping cannot be changed by human values. What is subject to human values is how we define dumping and calculate dumping margin. Plato denies the intricately involved positive and normative aspects of social facts; whereas, Aristotle committed an error by subjecting all social facts to human experiences and values. After the end of Dark Ages, the European philosophers tried to blend Platonic and Aristotelian concepts but ended up producing confusion and epistemological uncertainties. In the twentieth century, some European and American jurists tried to solve this epistemic uncertainty by offering a method of ‘normative positivism.’ Among them, Kelsen, Hart, and Roscoe Pound are examples of some of the more prominent.

Kelsen claims that social facts primarily consist of two elements. First, they are acts or happenings as external manifestations of human conduct; and second, they are given a certain meaning by law. For example, physically (objectively) a death penalty and a murder are similar facts, but legally they are treated with different meanings. The legal meaning is an assigned meaning, specifically derived from and interpreted according to the norm. Therefore, the norm functions as a scheme of interpretation. Consequently, any concept that is legitimized is derived from normative interpretation, but norms themselves are created by human acts. One norm validates another norm. As a result, there will be a chain of norms validating each other. One norm validates another norm to act and create yet another norm.84

In this way, a norm consists of two elements: an authorizing, permitting, or commanding element, and an element of reason for doing, observing, or following. The norm that demands or commands doing certain things in a certain way qualifies as ‘is’ and therefore it is positive because the meaning is certain. Similarly, the norm that provides reason to do things is an ‘ought’ and the reason is formed based on a social value system that assigns meaning; therefore the ‘ought’ is normative.85 In short, Kelsen brilliantly analyzed the normative and positive contours of a concept and explained how social values form the reason and source of rules.

Kelsen more precisely states that legislative acts in fact create or posit a norm. However, the legislature is also supposed to act in a certain way. The content of the norm posited by legislature is validated or derived from another norm that is a higher norm, which can be a constitution or a social practice that provides the reason for forming the content of a norm, and it therefore acts as a higher norm. Any norm can be a higher or basic norm (grundnorm), provided that it would justify or validate the norm-positing act.86 For Kelsen, each norm consists of a positive and normative concept. That is why Kelsen offers the methodology of ‘normative positivism’ to analyze the nature of a norm.

Yet, it is still a matter of inquiry whether the Kelsenian method of ‘normative positivism’ could help solve the problem of methodological uncertainty. Kelsen’s contribution in this regard is particularly important in the sense that he points out that a norm as a social fact consists of both normative and positive concepts that are closely interlinked but have separate identities. However, his weakness lies in his failure to offer a methodology of individuation that could dissociate positive concepts from normative ones and further could transmute the normative concepts into positive ones. For example, by applying Kelsen’s ‘normative positivism’ the concepts of the US and the UK on the MFN can be treated as both ‘is’ and ‘ought’ because they each have their own elements of reasoning.

84. Id. at 1-9.
85. Id. at 1-5.
86. Id. at 7-9.
When validating norms contest each other, as in the case of MFN, Kelseninan ‘normative positivism’ cannot offer any specific methodology to solve the problem of contestation. For example, ‘zeroing’ is a social fact. One group of countries, led by Japan, called the Friends of Anti-Dumping Negotiations (FANs), are arguing for prohibiting zeroing in the World Trade Organization (WTO); whereas the US is trying its best to legitimize zeroing in the Doha Round. The norms of the US and the FANs are quite diametric. These contesting norms reflect reasons that are socially assigned, (i.e., locally assigned). This local assignment of a norm creates more complexities for harmonization of a concept at the global level. Kelsenian ‘normative positivism’ is thus unable to provide a specific epistemology to harmonize the contesting concepts on ‘zeroing.’

The American version of ‘normative positivism,’ as espoused by Murphy, is more vulnerable than the Kelsenian form of ‘normative positivism’ to address the issue of methodological uncertainty. For Murphy, the ‘common good’ is a normative concept, which politically justifies having a force to provide authority of law. He claims the reason giving power of law flows from the ‘common good’ of the political community. Practical reason and rational desirability are the basis of common good, which propel the decisive reason for action. Murphy discredits any possibility of morally and politically neutral concepts, but he claims that politically and morally backed concepts are still positive ones. This duality of approach for Murphy is due to epistemic uncertainty. His main ideas can be summarized as follows:

- The methodology of politically neutral conceptual analysis is a counterproductive means for explicating the concept of law.
- The corresponding morally and politically neutral evaluative criteria for theory choice are impotent in the face of epistemic uncertainty.
- Therefore, there is no alternative but for legal theory to be practiced as a subset of political theory, which aims to produce the best moral consequences.

In short, Murphy insists on the concept of law as a practical aspect of political theory. Murphy’s methodology allows moral political considerations to supplant morally and politically neutral standards. This approach is thus even more of a challenge to legal

---

87. See WTO Negotiating Group on Rules, Communication from Japan on the Prohibition of Zeroing, TN/RL/GEN/126 (April 24, 2006); see also BHANDARI, MAKING RULES, supra note, Ch. 3.4.
89. See MARC C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 60-61 (Cambridge University Press 2006).
90. See Liam Murphy, The Political Question of the Concept of Law, in Jules Coleman ed., HART’S POSTSCRIPT, supra note, at 372.
91. Id. at 384.
positivism than solving any methodological or doctrinal uncertainty. In short, Murphy’s ‘normative positivism’ fails to offer any methodology to solve the problem of contested norms in making rules.

Hart’s contribution in this regard is particularly important. His book, *The Concept of Law*, is itself an essay in descriptive sociology. He claims that concepts depend on a social context. Like Kelsen, Hart also distinguishes social facts into positive and normative concepts. He discusses concepts with a multitude of ideas—close v. open, logic v. experience, beatitude v. fallacy, determined v. independent, and so on. If a ‘concept’ is closed, logical, beatific, and determined, then it is analytical or positive. If a ‘concept’ is open, experience based, and independent, then it is normative or utilitarian. Therefore, in Hart’s observation too, concepts have both normative and positive aspects.

‘Individuation’ is the methodology Hart employed in investigating normative and positive aspects of concepts. Hart specifically points out that when the real nature of a concept is not identified and properly analyzed it turns into excessive preoccupation in abstraction disjoined from the conditions under which it has to be applied in real life. The problem further consists of our blindness and obsession with the process of concept formation. Concepts are the product of social and individual interests, but we readily ignore the concepts of others and become obsessed with our own. This either obliterates the need for utilitarian investigation or hinders transmutation. More importantly, the problem consists of ignoring the ends and the purposes of concepts, refusing to ask the question: why is the concept thus and so?

A social context consists of a plurality of normative and positive concepts that design structural relationships. This is to say, they represent the interests of different groups and aim to set or structure their relationship. To put it simply in the context of trading relationships, concepts represent the interests of producers, consumers, and governments. The more imbalanced interests are carried by the concepts, the more protectionism becomes the structure. As discussed above, Hart’s analysis helps to individuate the positive and normative aspects of social concepts. Nevertheless, Hart fails to provide any specific tool to address the problem of the protectionist structural relationship caused by conceptual disarray or imbalances.

---

92. See RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* note, at 210. Raz remarks that, “H. L. A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which is realist and unromantic in outlook. It regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious. His analysis of the concept of law is part of the enterprise of demythologizing the law, of instilling rational critical attitudes to it.”

93. See HART, CONCEPT OF LAW, *supra* note, at v.

94. *Id.*, pp. 265-277.

95. *Id.* pp. 265-266.
Raz clearly argues that, “The existence of a rule is admittedly a fact. We can say ‘It is a fact that there is a rule’ . . . and if such a statement is true then it is a fact that there is such a rule. Yet even if every true or justified deontic statement states a fact it does not follow that every such statement is a statement of a rule. On the contrary, there is clearly not the case.” 96

Roscoe Pound proposes a methodology of ‘social engineering’ to solve the problem of conceptual disarray or imbalances by managing contesting interests. 97 Pound observes that a legal order always confronts adjusting free will and satisfying wants—free exercise of the will is but one. Wants generate interests and procure claims—individually, publicly, or socially. But when these interests conflict with each other the real problem arises about how to engineer these interests. Roscoe Pound offers a very simplistic solution or methodology: individual interests should subsume under social interests. 98 However, the crux of the problem does not end here. The social interest needs to be designed by harmonizing the contesting individual interests. The contesting individual interests do not easily yield for the sake of common interests, as discussed above (for example in the ‘zeroing’ case). Thus, the ‘social engineering’ theory of Pound lacks a methodology to reciprocate individual interests into common interest.

Hohfeld 99 finds that there is a ‘boundary conflict’ between legal and non-legal concepts. He proposes a methodology of separation of legal concepts from non-legal concepts. This certainly demands reflection about whether or not the problem of making rules is associated with this ‘boundary conflict’ (i.e., separation of legal concepts from non-legal concepts). The problem is so apt because in both sets of relations—the legal and the non-legal—a stream of ideas is continuously associated. Hohfeld analyzes two types of facts that create a jural relation: an operative fact and an evidential fact. On the one hand, the operative fact consists of constitutive, casual, and dispositive factors.

It shows the existing relation, and indicates a trend of change in creating a new relation. On the other hand, the evidential fact is one that offers some logical basis (not conclusive) for inferring some other facts that might be constitutive facts or intermediate

---

96. See RAZ, THE AUTHORITY OF LAW, supra note, at 147.


98. See Roscoe Pound, A Survey of Social Interests, 57 HARVARD LAW REVIEW 3, 1-39 (1943). Pound says that when we are considering what claims or demands to recognize and within what limits, and when we are seeking to adjust conflicting and overlapping claims and demands in some new aspect or new situation, it is important to subsume the individual interests under social interests and to weigh them as such.

evidential facts, which help to reach a conclusion. This Hohfeldian idea of ‘construct’ formation is certainly instructive to law-makers in understanding and applying positive methodology. In the Hohfeldian model, the method that distinguishes legal and non-legal concepts is the idea of jural relation. When jural relation is assigned to a ‘concept,’ irrespective of its normative nature, the concept becomes a legal concept. The Hohfeldian methodology of jural relation is undoubtedly a significant methodology in explaining the nature of rules, but not expedient in harmonizing and transforming normative concepts into positive ones.

Against this backdrop a question arises: when jurists have failed to offer a convincing methodology, have philosophers offered a better and more convincing methodology to ensure epistemic or methodological certainty of positivism? The brief answer is ‘no.’ Among others, again two philosophers are specifically mentionable here—Wittgenstein and Ayer. Bertrand Russell projected his student, Wittgenstein, as the philosopher who could offer a solution to the problem of methodology in explaining the nature of a ‘concept.’ Ayer proclaimed himself to offer a solution to this fundamental philosophical problem. In short, as discussed above, both failed.

The methodology of Ayer’s verification principle is neither sense-experimental nor observational, because for him both of these methods are fallible. Fundamentally, his method is one of purely logical consideration. Verification by sense-experience is confuted and therefore not logically valid. If a validity proposition is subject to the test of actual experience, then that could never be logically certain. All propositions (concepts) are either empirical or a priori. Logically, all concepts are not certain but probable, and these symbols are basically assigned and derived from our belief system. Therefore, all propositions, whether empirical or a priori, are verified in the same way. Ayer’s logical method is not about validity or invalidity, but about eliciting the consequences of our uses of the concepts. The uses themselves may vary and become incompatible, though it is not because the uses of the concepts are by their very nature incompatible, but rather because of an error in logic.

100. See Bertrand Russell, Introduction, to WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (Routledge, 2001/1922).
101. See AYER, LANGUAGE, TRUTH AND LOGIC, supra note, at 20-23.
102. Id. at 64.
103. Id.
104. Id. at 84.
105. Id. at 65.
106. Id. at 85.
107. Id. at 88.
108. Id. at 144.
The way Ayer provides his philosophical, methodological analysis is undoubtedly interesting in the context of making rules. It also certainly helps to explain the occurrence of conceptual divergences, which for Ayer is due to logical error. Consider the example of ‘zeroing.’ There are at least two divergent concepts about zeroing in the Doha Round negotiations: the American and the FANS concepts. The weakness of Ayer’s methodology is that it does not help us to know which of these two concepts is logically erroneous. In fact, Ayer does not provide a convincing methodology by which the error in logic could be identified and solved so that the conceptual divergences could be harmonized. Rather, to a certain extent, Ayer’s methodology in itself seems complex, unclear and also self-contradictory. One example is his claim that the positivist methodology of verification is false because empirically or by observation no such thing exists, which could be conclusively verified. Further he claims that positivists do not apply their criteria consistently. On the contrary, he justifies a rationalist process of deduction, in particular the \textit{a priori} tool coupled with tautology.

Post-Wittgenstein developments are certainly interesting. One of them is the development of Wittgenstein’s concept of ‘formulated boundary’ in \textit{Concepts: Core Readings}. The arguments claim that, given their importance to cognition, concepts raise so many controversies ranging from the local to the global level. This is a very important statement, which is especially relevant in the context of making rules both at domestic and international levels. It encourages us to ask a question: what makes the concept so apt or powerful, raising controversy from the local to the global level? The answer offered by Laurence and Margolis is that it is because of ‘boundary conflict’— when the behavioral abilities and scope of the issues at stake radically differ on what ought to be achieved—concepts become controversial. The idea of ‘boundary conflict’ is useful in comprehending why social facts are loaded with controversial normative concepts. Yet, Laurence and Margolis do not suggest any concrete methodology to mitigate the ‘boundary conflict.’

In short, Wittgenstein’s positivistic concept and Platonic positivistic concept produce quite distinct ideas. Like Aristotle, for Wittgenstein, concept exists independent of the existence of a thing or an object. In contrast, for Plato, concept exists independent of the external factors but dependent on the internal properties of a thing or an object. These theoretical perspectives offer insight into making rules. If concepts are formed under Wittgenstein’s model (i.e., independent of their existence), the transmutation of normative standards into positive standards becomes tougher. If concepts are formed under the Platonic model, expounding the properties of the issue independent of the

\footnotesize 109. \textit{Id.} at 147.
110. \textit{Id.} at 149.
external factors and eschewing normative standards, then that would help to adopt positivism in the form of ‘welfare-grundnorm,’ which is explained below. But before coming to the methodology of welfare-grundnorm, let us look at the integrated approach to law.

SECTION II: AN INTEGRATED APPROACH TO LAW

2.1 AN INTEGRATED APPROACH TO LAW

To address the gaps persisted by the mainstream positivism in the explanation of the nature of law, this part explains an integrated approach to law. The IAL proposed by this paper explicates the nature of law as built upon the inseparable association of three fundamental conceptual features of law: legitimacy, enforceability, and validity. The aim of this paper is not to tend any suggestion to discard positivism, but to further explore and strengthen legal positivism. Thus, this paper aims to defend positivism in the form of an IAL.

The IAL upholds the fact that all three segments—making, application, and interpretation—are important to identify and explain the nature of law. In other words, any explanation of the nature of law simply from the perspective of one of these segments is unequivocally inadequate. The mainstream positivistic explanation of the nature of law mainly from the vantage point of existence is, thus, visibly inadequate. A comprehensive explanation of the nature of law should consist in each of these segments being coherently associated with the fundamental features of law (LEV). Any act of denunciation or dismissal of the LEVs or one of them in conjunction with the operationalization of each of these segments can offer only an incomplete account of law.

The IAL is distinct from the mainstream positivism in two fundamental themes. First, the IAL explains the nature of law not from a disintegrated perspective but from the integration of legitimacy, authority (enforceability), and validity in each of the segments of making, application, and interpretation of law. Second, the IAL comprehends the institutionalization of the positivity of law through the accomplishment of the methodology of welfare-grundnorm, which is the core instrument in distinguishing law from normative standards.
Generally, Comte offers three features of positivism:\textsuperscript{112} predictability, verifiability, and certainty (PVC). In fact, these PVC features of positivity can also be found in normative standards as well. For example, a moral standard of a community is as predictable, verifiable, and certain as any other standards that Comte considers positive. Thus the PVC features alone are not adequate to separate law from normative standards. Therefore, the issue of transmutation of normative standards into positive standard is important, which is discussed in part three of this paper. In this part, we primarily discuss an integrated approach to the explanation of the nature of law. For this reason, in the following sub-headings we consecutively discuss legitimacy, authority, and validity to elucidate the IAL.

\subsection*{2.2 Legitimacy}

The concept of legitimacy is one of the fundamental issues in political science, law, international relations, and broadly in other social sciences. Despite this fact, there is no uniform conceptual understanding of legitimacy. Moreover, legitimacy is widely (mis)understood as a normative standard of justification, or social acceptance of a standard, which in fact poses tremendous challenges to a legal system in developing a positive concept of legitimacy. Julia Black apparently argues that, “Where regulatory regimes are largely non-legal . . . infusing them with law is problematic, using only a legal concept of legitimacy will lead us to a dead-end: such regimes will necessarily lack legitimacy and any potential for legitimacy, in legal terms.”\textsuperscript{113} Stillman contends, “. . . government is legitimate when it protects and enhances the values and norms of its citizens, when it preserves and expands their culture, and when it behaves itself in foreign affairs.”\textsuperscript{114} Nagel writes that, “. . . the task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it.”\textsuperscript{115}

In fact, from Aristotle,\textsuperscript{116} Kant,\textsuperscript{117} Locke,\textsuperscript{118} Rawls,\textsuperscript{119} Rousseau,\textsuperscript{120} and Weber\textsuperscript{121} to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{113} See Julia Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, 2 REGULATION AND GOVERNANCE 137-164, 145 (2008).
\item \textsuperscript{114} See Peter G. Stillman, The Concept of Legitimacy, 7 POLITY 32-56, 48 (1974).
\item \textsuperscript{115} See THOMAS NAGEL, EQUALITY AND PARTIALITY 33 (Oxford University Press, 1991).
\item \textsuperscript{116} See Stillman, The Concept of Legitimacy, supra note, at 36. Stillman argues that for Aristotle, one requisite quality of legitimacy is the ruler’s submission to the rule of law.
\item \textsuperscript{117} See John Simmons, Justification and Legitimacy, 109 ETHICS 739-771, 755 (1999). John Simmons summarizes the Kantian view of legitimacy in two broad categories. First, a state should be responsible to safeguard liberty and rights, and secure justice. Second, at the same time, people living in the state are also obliged to obey the law of the state. In Simmons words, “For Kant the justification of the state—its necessity for the realization of freedom and rights and justice—entails an obligation to enter civil society (2013) J. JURIS. 148
\end{itemize}
\end{footnotesize}
Beetham,122 in its most generic sense, legitimacy is explained as a standard that instructs how the government should govern its people. In this regard, consent of the people is commonly attributed as the core factor of legitimacy. Nevertheless, the riddle is largely unsolved because legitimacy has constantly been explained as a normative standard. The mainstream positivism has also not been able to solve this riddle. The IAL, thus, offers legitimacy as a positive standard that conveys the relationship between a state and its people and international relations within the premise of the rule of law.

The IAL construes law coming into existence through a legitimate process of lawmaking, i.e., legitimacy. The legitimate process involves not a single action like command, or authority, or the rule of recognition, or the consent of people but a series of progressions and accept the duties society imposes. This justification is apparently intended by Kant to at the same time legitimate particular states by binding each of us to obedience to the laws of our own states.”

118. John Locke mentions that, “. . . no one can be put out of [the state of nature] and subjected to the political power of another without his own consent.” Cited in Simmons, Id, at 745.

119. For John Rawls legitimacy is a justification of actions both the actions of a state and individuals in a broader framework of social cooperation, where liberty essentially retains priority position from entering into an original position to concluding a constitutional convention, formulating laws, and implementing laws. In particular, a constitution to be in place and the formulation of laws in compliance with the constitution is the essence of legitimacy for Rawls. See JOHN RAWLS, POLITICAL LIBERALISM, supra note, at x1vi; see also RAWLS, THEORY OF JUSTICE, supra note, at 273. Rawls states that, “A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions.”

120. See JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 14-16 (Amazon Digital Service Inc., 2006). Rousseau, who championed the idea of ‘general will’, found the problem of defining a form of association in which human autonomy and liberty would be defended together with uniting individuals with the social whole. He found the civil state as the only form of association that could accomplish the profound task of rational human conduct. In this process, Rousseau considers a person loses unlimited claim over things that are guided by natural instinct, but in turn, gains civil liberties and proprietary rights. In a civic state, the idea of ‘general will’ becomes a considerably important role, as a tool for promoting public advantage. But, Rousseau observes that this is not always true. He remarks that people are often deceived and in such a condition the popular will turns to be harmful, especially when popular will is expressed by social factions or partial associations. These factions undermine the general will of the state for their vested interests. Therefore, Rousseau strongly denounces a partial and fragmented society within a state.

121. Weber explains legitimacy as a standard of domination. He uses the term domination to imply authority. He classifies three types of authorities: customary, charismatic, and rational or rules based. He finds the customary or traditional and charismatic authorities insufficient in managing social, economic, and political relationships. Thus, he endorses the rules based relationship as the legitimate relationship. See MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY Ch. III & X (University of California Press, 1978); see also Craig Matheson, Weber and the Classification of Forms of Legitimacy, 38 THE BRITISH JOURNAL OF SOCIOLOGY 199-215 (1987).

122. See generally DAVID BEETHAM, THE LEGITIMATION OF POWER (Palgrave, 2nd ed., 2013); see also Rosemary H. T. O’Kane, Against Legitimacy, XLI POLITICAL STUDIES 471-487 (1993). Beetham offers three criteria of legitimacy: conformity to rules, justifiability of rules in terms of shared beliefs, and expressed consent. Beetham’s criteria of legitimacy are much more satisfactory except the second criterion, which offers normative grounds for the justification of positive rules.
by maintaining the hierarchy of law and passing through the formally prescribed processes. The authority to make law is invariably subjected to these two conditions: the hierarchy of law and following the formally prescribed processes. Thus, under the rule of law system, authority alone cannot posit or manufacture law.

For the mainstream positivists, however, law exists because of the exercise of authority, which might be expressed either in the form of practical reason for Raz, internal point of view for Hart, or command for Austin. Unlike to the mainstream positivism, IAL argues that law exists not because of the exercise of authority alone but because of the operationalization of the two features of legitimacy not only in the making of law but also in the application and interpretation of law. Both the law applying and interpreting authorities (institutions) are required to follow the prescribed process and hierarchy of law in enforcing and interpreting law.

These two features of legitimacy are undoubtedly important but need to be complemented by democratic legitimacy. It is because these two features might be vaguely present even in a rule by law system. What is not present in a rule by law system and only extant in the rule of law system is democratic legitimacy. For example, both the law making and law-implementing institutions (namely, the parliament and the executive body) are composed of the elected representatives of the people. However, one fact that should not be overlooked is that there will be only a marginal difference between elected representatives of the people and dictators when the elected representatives undermine the hierarchy of law and the prescribed process in exercising their authority. Thus, the IAL presumes the need for democratic legitimacy to be constituted within the framework of the two features of legitimacy.

The mainstream positivism, however, almost ignores the independent existence of legitimacy. Like Kelsen, Hart also treated legitimacy as an ancillary component of validity, whereas Raz treats authority as a fact that encompasses both legitimacy and

---

123. Under the system of parliamentary supremacy, the legislative body is considered the supreme one and is free to posit any law it deems appropriate. However, under the system of constitutional supremacy, the legislative body is not free to ignore the hierarchy of law, especially the constitution. In fact, law making is not solely confined within the authority of parliament alone. Under the system of delegated legislation, the executive body can enact rules and regulations. Both legal and natural persons also formulate laws through entering into contract and other institutional rules and regulations. Further, under the modern system of international law, states are required to harmonize international law into their domestic legal systems and maintain the hierarchy of international law. Thus, even under the system of parliamentary supremacy like in the UK, lawmaking authority cannot simply ignore the hierarchy of law.

124. See Kelsen, General Theory of Law, supra note, at 117. Kelsen states that, “The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way, which the legal order itself determines. This is the principle of legitimacy.”
validity. Coleman states that Hart in fact pointed to features of law, which are independent of its legitimacy. Despite this fact, one important, though partial contribution of Hart in regard to legitimacy comes from his distinction between a command of a gunman and a command of law. Hart resorts to legitimacy to distinguish these two types of commands. The gunman’s command lacks legitimacy, whereas the command of law retains legitimacy.

But Hart’s features of legitimacy: ‘persistency and continuity’ are inadequate to offer a systematic concept of legitimacy. Only the existence of ‘persistency and continuity’ cannot establish legitimacy and are inadequate to distinguish between the command of a gunman and the command of law as well. As mentioned above, the two basic features of legitimacy: maintenance of the hierarchy of law and observation of the prescribed processes not only distinguish between the command of a gunman and the command of law but also offer a clear concept of legitimacy. The reason is robust, in absence of these two basic features; like the command of a gunman no acts of authorities could retain legality.

For the mainstream positivism, the features of legitimacy offered by the IAL might be the problematic propositions. It is because the mainstream positivism reduces the compliance to the hierarchy of law and to the observance of the prescribed processes either into the ‘internal point of view’ or to the exercise of authority, which is peremptory in status and thus a reason in itself, which resonates the Hobbesian assertion that “It is not wisdom, but authority that makes a law . . . [N]one can make a law but he that hath the legislative power.”

---

125. See Raz, Ethics in Public Domain, supra note, at 212.
127. Id. at 108-109. Coleman brilliantly comprehends the Hartian concept on the issue of gunman. He mentions that, “Hart begins with an observation: while there may be many important similarities between commands backed by threats and law, there appear to be certain important differences as well. If we take a gunman as an example of the former, one thing to note is that the force of the gunman’s command evaporates when the threat is withdrawn, whereas law can outlive those who create it; and the authority to create or adjudicate law is not conferred on a particular person, but on persons in virtue of their occupying an office. Hart refers to these features of law as its persistence and continuity. They distinguish law from commands and legal systems from gunman.”
128. See Hart, The Concept of Law, supra note, at 89.
129. See Raz, Ethics in Public Domain, supra note, at 212.
130. Id., at 217. Raz mentions that, “. . . law claims authority for itself shows that it is capable of having authority.” See also Himma, Law’s Claim of Legitimate Authority, in Hart’s Postscript, supra note, pp. 273-274. Himma cites Raz, which is as following, “The [authority’s] decision is . . . a reason for action. They ought to do as he says because he says so. … [But] it is not just another reason to be added to others, a reason to stand alongside the others when one reckons which way is better supported by reason. … The decision is also meant to replace the reasons on which it depends.”
comes into play, the mainstream positivists often contest the supremacy of the constitution.

For example, Austin claims constitution as a ‘positive morality merely’ and contends that the elected representatives are bound only by ‘moral sanctions’ but not by the hierarchy of law and the prescribed processes. For Hart also constitutional issues simply involve moral arguments. While criticizing and reformulating Austin’s theory of law, Hart insists that there are no legal limits on the legislative power of a sovereign. Hart further claims that, “... a constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties but legal disabilities.” At this point one can easily discern conceptual disagreements between Hart, Kelsen, and Hohfeld.

All laws whether they are statutes, rules, regulations, or contracts obtain legitimacy only by complying with the hierarchy of law and the prescribed processes. It will be easier to secure legitimacy in the making of laws if a constitution exists, since all laws derive their legitimacy emanating from the constitution. But one may critically ask how a constitution itself derives its legitimacy. This question strikes the crux of the problem of legitimacy. Failure to address this issue has often steered jurists to depict a constitution as a positive morality.

In the most lucid form of explanation, like the legitimacy of international law emanating from the consent of states, the legitimacy of a constitution springs from the consent of its people, which is actualized through the wisdom of their representatives. If the consent of the people is undivided or uniform, the constitution making follows a smooth process. The possibility of undivided consent cannot be denied when political ideologies abide by the idea of the rule of law buttressed by constitutionalism. In the final analysis,

132. See Austin, The Province, supra note, at 242.
133. Id.
134. See Himma, Law’s Claim of Legitimate Authority, in Hart’s Postscript, supra note, at 272.
135. See Hart, Concept of Law, supra note, pp. 66-69. Hart claims that, “On the other hand the theory does not insist that there are no limits on the sovereign’s power but only that there are no legal limits on it. So the sovereign may in fact defer, in exercising legislative power, to popular opinion either fro fear of the consequences of flouting it, or because he thinks himself morally bound to respect it. . . . he may indeed think and speak of these factors as ‘limits’ on his power. But they are not legal limits.”
136. Id., at 69.
constitutionalism settles the structure of a constitution, which in turn prescribes the process of legislation.

In short, the legitimacy of a constitution emanates from the democratic process of representation that institutionally identifies, recognizes, and establishes public ownership to basic principles called constitutionalism, which in turn guide the whole constitution making process as the positive standards (basic rules of a legal system) of a constitution. Herein, a clear distinction seems between a rule by law legal system and the rule of law legal system. A rule by law legal system might also have a constitution but devoid of the check and balances of power reflected through legitimacy and positivity. The rule of law legal system obtains a constitution through a legitimate process by upholding constitutionalism not as moral principles amenable to political ideologies but as positive standards that formally regulate and ensure check and balances of state organs, political parties, and other stakeholders.

This proposition of legitimacy cannot remain ignorant of the criticisms by Jurgen Habermas, who argues that in the name of legitimacy, the master class legitimizes power through the contents of law and builds legitimate claims of obedience from the ruled. This form of privileged appropriation produces inequity, though legitimately. Consequently, this so-called legitimacy produces an asymmetrical distribution of legitimate chances. Habermas further argues that factually legitimacy does not rest solely on the consent of the affected but on fear, submission, indirect sanctions, powerlessness, miscommunication, and the lack of alternatives open to the affected persons. Loyalty may also be simulated hypocritically.

The question is: can our proposition of legitimacy remedy these problems as pointed out by Habermas? The answer is 'yes'. First, legitimacy creates a limited government. A limited government (all organs of state) cannot undermine the constitutionalism (both domestic and global constitutionalism) and the supremacy of constitution in manufacturing laws. Second, as a result of a limited government, the state is always required to comply with the hierarchy of law and the prescribed processes. If the government undermines the compliance requirements, a counter-hegemonic role produced within the state apparatus in the form of judicial review will test the validity of government acts (both legislative and administrative). Third, most importantly while transmuting normative standards into positive standards or positing rules (discussed in part 3 below), the state is invariably conditioned by constitutionalism. These three apparatuses ensure a condition of the rule of law, which is not free of imperfections but incomparably superb compared to a rule by law condition.

The premise on which we have discussed legitimacy suggests the idea that when the production of law and the exercising of authority follow the prescribed process in compliance with the hierarchy of law, the outcome turns out to be legitimate. In common parlance, the concept of legitimacy is not confined only to law but should also retained in a specific sense to provide a positive justification of an act, power, authority, command, decision, government, international society, international regime, and so on (collectively named as authority or the authority to act). Essentially, the idea of ‘justification’ stays at the core of the legitimacy discourse, which can be normative or positive. One of the distinctive marks of positive standard is that it fulfills the two features of legitimacy: the hierarchy of law and the prescribed process. The consequence of the positive justification is that rules and the exercise of authority are not dictated by the normative choices. To put it simply, law legitimizes authority and legitimacy grants the legality of authority.

The issue of legitimacy is not simply restricted to the state and government alone. It is equally vital for the justification of every act or decision of an individual, a group, or an institution. Normative acts and decisions also play an important role in society, but their legality survives only if the normative acts or decisions comply with law. Beyond the legal premise, no normative acts and decisions can derive legitimacy. In short, for all acts and decisions (authority), whether they are done at the individual level or the institutional level, legitimacy invariably emanates alone from the hierarchy of law and the prescribed processes. However, revolutions and the act of manufacturing law through revolution present some poignant questions to this conclusion.

A revolution may undermine and violate the existing laws or legitimacy of the existing system. The toughest question is how a revolution derives its legitimacy. Or, could a revolution be legitimized? If the revolution is peaceful and within the premise of domestic or international laws, the systemic changes brought about may furnish continuity to the existing legitimacy. When revolutions are not peaceful or hit with armed violence, two possible scenarios might occur. First, if unsuccessful or contained by the existing regime, the revolution happens to be designated as unlawful and perhaps the revolutionaries would be punished under the existing criminal law. Second, if it is successful, it may change the system of legitimacy, i.e., the legal order including other systemic aspects in the society. On its success, the revolution legitimizes its authority with the formulation of a new constitution and other laws. The point is that law is at the core of the foundation of legitimacy of every single authority, including a revolution.

A successful revolution can change the structure of legitimacy at the domestic level. But it cannot change the structure of legitimacy at the international level. It cannot ignore international laws and obligations arising from international legitimacy. For example, the violation of international human rights laws, humanitarian laws, international criminal laws, and other international obligations during the revolution cannot be simply ignored.
or fixed with impunity to violators. Both parties of conflict who violate international laws will be responsible under international law, whether the revolution is successful or not. This means, even a successful revolution cannot completely deny and ignore the existing system of legitimacy. In this context, we can conclude with the observation of Hans Kelsen that, “Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A greater part of the old legal order remains valid also within the frame.”\(^{139}\) The important proposition here is that having legality does not necessarily mean holding validity too, because it is a relationship between power, authority, and right, which is discussed below under the sub-heading of authority.

### 2.3 Authority (Enforceability)

As discussed above, legitimacy legalizes authority. The IAL explicates authority as legalized power. In other words, illegitimate authority is like a gunman’s power that lacks both legitimacy and validity. Legalized power constitutes authority and rights. Authority is an institutional form of legalized power, whereas rights are the legalized from of individual power. Any power beyond the form of authority and rights is illegitimate. This proposition assumes that legitimacy is the positive basis of authority.

However, Weber considers obedience to authority as the groundwork of legitimacy created by three modes of authorities: rational or legal authority, traditional authority, and charismatic authority.\(^{140}\) In other words, Weber assumes authority to be the basis of legitimacy, which is opposite to the proposition of the IAL. Joseph Raz further develops the Weberian concept of authority, which IAL considers a mismatch to the positivity of law because the Weberian and Razian concepts of authority undermine distinctions between the rule of law and a rule by law system. The Weberian and Razian explanations of legitimacy and authority suffer from three fundamental defects. First, they endure fallacy in distinguishing normative versus positive authority. Second, they create illusion by claiming authority as the source of legitimacy. Third, they ignore the conceptual distinctions and connections between power, authority, and rights. In the following paragraphs we examine these three defects and remove them with the IAL. First, we discuss the third defect followed by the second and finally the first one.

The mainstream positivism ignores the distinctions and connections between power, authority, and rights. The concept of power occupies a center stage in the analysis of authority. This is because power is connected with rights as well as authority. Rights in their basic forms are built on the foundation of legitimate but non-institutional power,

\(^{139}\) See Kelsen, General Theory, supra note, at 117.

which are exercised by both legal and natural persons. On the other hand, authority is built on the foundation of legitimate institutional power. Power without legitimacy is either normative authority (like the traditional or charismatic authority of Weber) or a gruesome force in the hands of a lawbreaker: a person, a group, or an institution. Individuals, groups, and institutions holding illegitimate power can either engage in normative activities not justified by law or illegal activities breaking the laws.

Therefore, when power is held in its barest form, one cannot legitimately issue and enforce commands, nor can obedience be demanded. Authority as the legitimate arrangement of power, in its institutional form (state and its organs), can only demand obedience to law, and enforce laws. A gunman, in Hart’s famous example can order and compel other people to obey his order supported by his power of gun and threat. But it is neither a legitimate command nor does an institutional authority support it. Thus, in no sense it is identical to the concept of command, obedience, and enforcement. A person with rights can impose duty, but in the event of the breach of duty, the person himself/herself cannot enforce their rights. The person should formally ask the state authority (court, executive agencies) to enforce their rights. A clear point herein is that, authority in its true from is a system of obedience to legitimacy in producing, enforcing, and interpreting laws. Authority alone cannot assume a position to demand obedience to it, but it is required to be faithful in maintaining legitimacy and ensuring obedience to law.

The following chart might be useful to offer a clear picture of the relationships between power, authority, and rights.

**Chart I: Power, Authority, and Rights**
To some extent, Austin distinguishes power from authority. He maintains that power can be imperative but lacks the feature of sovereignty. His idea of sovereignty constitutes the following institutional features: command, obedience, and enforcement. He emphasizes the fact that command and duty are correlative terms. The justification of Austin’s proposition derives from the feature that command alone can have the authority to enforce the duty.\(^{141}\) However, Austin’s explanation of authority as connected with the power of a political superior over political inferior overlooks the legitimacy aspect of the political superior.

Hart, however, is seen distinguishing authority from power. For Hart, authority is coercive power legitimized through the rule of recognition.\(^{142}\) Acceptance by ‘a sufficient number’ in the form of ‘an internal point of view’ is the condition of the existence of authority as the coercive power of law and government.\(^{143}\) The ‘internal point of view’ of the people in power constitutes the acceptance. In other words, authority emanates from the acceptance of its own power by the people in position. This enormously defective

\(^{141}\) See Austin, Lectures on Jurisprudence, supra note, at 66. Austin writes, “The command so expressed or intimated is a law properly so called . . .”; see also Austin, Province of Jurisprudence, supra note, at vii. Austin writes, “Laws proper or properly so called are commands: laws which are not commands, are laws of improper or improperly so called.”

\(^{142}\) See Hart, The Concept of Law, supra note, pp. 201-203. Hart writes that, “. . . the notion of an accepted rule of recognition . . . a necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules . . . Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals.”

\(^{143}\) Id., at 201.
proposition of Hart reduces legitimacy to the act of acceptance from the people in power of their own power, and thus discounts the standard process of legitimization.

Therefore, the understanding of authority as the source of legitimacy needs to be refuted. In fact, a cogent explanation of authority emanates only from its dependency on legitimacy and validity. Authority devoid of legitimacy and validity is the expression of tyranny, and absolutism in the form of a rule by law system. One of the serious challenges to a positive theory of law springs from the fact that how could it control and end tyranny and absolutism. It is only possible by conditioning power into the framework of legitimacy and validity, for which the Razian theory of authority flagrantly contradicts to IAL because it views authority as the source of legitimacy and reason of law in itself.\textsuperscript{144} Contrary to Raz, Comte contends that assigning supremacy to reason is an illusion, which positive science should discard.\textsuperscript{145}

Joseph Raz’s explanation of authority is complex and also full of contradictions. He defends ‘practical authority’, i.e., ‘authority with power to require action.’\textsuperscript{146} But at the same time, he explains authority predominantly from a ‘normative or moral’ perspective, articulating ‘a normative theory of political authority.’\textsuperscript{147} On the one hand Raz considers authority as a normative concept to be understood with normative theses,\textsuperscript{148} while on the other hand he claims authority as ‘a right to command’.\textsuperscript{149} He does not distinguish normative and positive concepts of authority but mixes them both. Besides explaining authority in the sense of ‘a right to command’ he also considers this explanation too narrow, and expands the concept of authority to encompass ‘the right to grant a permission’\textsuperscript{150} as well. Raz also discusses the relationships between power, authority and

\textsuperscript{144} See Raz, Practical Reason, \textit{supra} note, pp. 46-59. On page 51, Raz claims that ‘rules are reasons for action.’ On page 59, Raz states that ‘reasons for having rules determine the nature of the rules.’ On page 46, Raz argues that in any conflict situation, ‘exclusionary reason always prevails.’ On page 194, Raz contends that, “The reason not to comply with another reason is an exclusionary reason. Since rules can only function as rules if one takes them as reasons for action and avoids trying to comply with the underlying reasons, all rules are exclusionary reasons.” On page 16 of The Authority of Law, Raz endorses that, ‘authority is ability to change reasons for action.’

\textsuperscript{145} See Comte, Positivism, \textit{supra} note, Kindle Location 381. Comte argues that, “In the treatment of social questions positive science will be found utterly to discard those proud illusions of the supremacy of reason, to which it had been liable during its preliminary stages.”

\textsuperscript{146} See Joseph Raz, Authority and Justification, in Authority 115 (Joseph Raz ed., Basil Blackwell, 1990).

\textsuperscript{147} Id., Joseph Raz, Introduction, at 1.

\textsuperscript{148} Id., at 115.

\textsuperscript{149} Id., at 2.

\textsuperscript{150} Id. Raz mentions, “Where does political authority belong? . . . It is a right to command. Perhaps ‘command’ is too narrow a term here. What we really have in mind is a right to make laws and regulations, to judge and to punish for failing to conform to certain standards, or to order some redress for the victims of such violations, as well as a right to command. If we generalize ‘a right to rule’ to include the right to
rights, but fallaciously claims that power alone determines legitimate authority.\textsuperscript{151} Despite these shortcomings, Raz appropriately mentions that, “The special problem with authority is not that it requires one to regard the will of another as one’s reason for action, but that it requires one to let authoritative directives preempt one’s own judgment.”\textsuperscript{152} Nevertheless, Raz unequivocally justifies authority in terms of the faulty approach of exercised power.\textsuperscript{153}

Consequently, Raz considers authority itself as a ‘reason for action’.\textsuperscript{154} For Raz, a legitimate authority is not an independent reason but a dependent reason because “... it depends on the fact that compliance is the best way of acting in accordance with those reasons which are reflected in the authoritative directives.”\textsuperscript{155} Further, Raz finds that it is inconvenient to articulate legitimate authority with the concept of a limited government.\textsuperscript{156} Equally shocking is his view that consent really does not matter for producing command and resorting to coercion.\textsuperscript{157} In other words, for Raz, legitimacy does not constrain authority. Moreover, Raz acknowledges ‘an obligation to obey,’ only on the part of subjects and not on the part of those who exercise authority.\textsuperscript{158}

Whether Raz concedes it or not, his claim that, “... authority is typically exercised by giving instructions of one kind or another,”\textsuperscript{159} opens a floodgate to all normative or positive, and legal or illegal instructions. This grey area left by Raz defeats the fundamental concept of authority to be reflected in obedience to legitimacy and validity, and the act of enforcing and interpreting laws for securing obedience of its subjects. Besides failing to distinguishing positive and normative aspects of authority, Raz also

make laws, regulations, etc., the expansion is broadened to include our second sense above—having a right to give permissions—as a special case, for the right to make laws and regulations includes the right to grant permissions.”

\textsuperscript{151} Id., at 3. Raz contends that, “... only those who have real power can, in normal circumstances, have legitimate political authority. The reasons for this are not always obvious. ... An examination of these conditions shows that they cannot be fulfilled unless the authority possesses de facto power.” Further on page 14 Raz claims that, “As mentioned above, one major source of legitimacy lies in the ability of authorities to achieve desirable social coordination, which people should pursue, but are unable to achieve at all, or are less likely to achieve as efficiently, unaided by authority.”

\textsuperscript{152} Id., at 5 & 121. For Raz, a preemptive reason is that reason, which displaces all other reasons.

\textsuperscript{153} Id. Raz endorses the idea that ‘authorities are justified in terms of a task they have to fulfill’.

\textsuperscript{154} Id., at 5. For contrary view see COMTE, POSITIVISM, supra note, Kindle Location 381.

\textsuperscript{155} Id., at 6 & 121.

\textsuperscript{156} Id., at 12-13. Raz mentions, “My idea is based on the thought that whereas normally there is a case for an authority where compliance with its directives would lead its subjects better to comply with reason than if they were not to be guided in their action by that authority ... The basis of legitimacy is relative success in getting people to conform to right reason.”

\textsuperscript{157} Id., at 16.

\textsuperscript{158} Id., at 115.

\textsuperscript{159} Id., at 116.
mystifies the conceptual distinction between rights and authority. Rather, he considers authority as a ‘right to rule’.¹⁶⁰

The argument of the ‘right to rule’ is not only a bizarre concept, but also a defective idea because of the fact that all human beings are equal and no one has any right to rule over others, except supported by the conditions of legitimacy. In fact, to rule is to exercise a legitimate authority, and nothing beyond. Conversely, Raz’s ambiguous and self-defeating proposition appears when he claims a legitimate authority exists if there are sufficient reasons to accept it.¹⁶¹ Who should accept it? How should it be accepted? How could the acceptance be measured? Raz does not answer many such questions. Nevertheless, Raz clearly acknowledges that the reason is shaped in the form of ‘dependence thesis,’ which is ‘a moral thesis about the way authorities should use their powers’.¹⁶²

The term ‘reason’ itself has deep normative overtones. It is because multiple factors including moral, ethical, religious, cultural, and similar other perspectives form a practical reason. Moreover, every individual might have different reasons. Consequently, the concept of authority being tested by multiple reasons will be reduced to an uncertain and unfixed territory. At this point then, the question may arise that how can the problem of normative authority be solved? We will discuss this question in part three of this paper. However, before that, one important perspective of Razian authority should not be omitted.

Raz distinguishes between legitimate and de facto authority. For Raz the de facto authority is recognized by many of its subjects (consent of the subjects) but does not necessarily possess legitimacy. The authority that possess legitimacy is either practical or theoretical or both.¹⁶³ The practical authority is a reason for action, whereas the theoretical authority is a reason for belief.¹⁶⁴ Thus, Raz plausibly associates the belief system to be a part of authority or peremptory reason, which infects a positive concept of authority with a normative concept. Further, Raz also excludes legislative reasons from being reflective

¹⁶⁰ Id., at 117.
¹⁶¹ Id., at 120. Raz states that, “For an authority is legitimate only if there are sufficient reasons to accept it, that is, sufficient reasons to follow its directives regardless of the balance of reasons on the merits of such action.” Further on page 137, Raz considers theses about authority are normative and sustain interdependence between conceptual and normative argument. He argues, “The philosophical explanation of authority is not an attempt to state the meaning of a word. It is a discussion of a concept, which is deeply embedded in the philosophical and political traditions of our culture. The concept serves as an integral part of a whole mesh of ideas and beliefs, leading from one part of the net to another.”
¹⁶² Id., at 119.
¹⁶³ See Raz, Ethics in the Public Domain, supra note, at 211.
¹⁶⁴ Id., at 212.
and applicable to their subjects.\textsuperscript{165} Regrettably, Raz rejects the explanation of authority as a system of rules. He considers the claim that all authority is conferred by rules, is debatable.\textsuperscript{166} Raz rejects the concept of authority legitimized by law because for him it is a ‘relativized notion of authority’.\textsuperscript{167} He explains authority in non-relativized terms as a ‘practical concept’, which in itself is the source of reason, autonomy, and morality.\textsuperscript{168} In short, the Razian concept of authority seems deeply fraught with contradictions and fallacies.

2.4 Validity

Conceptually, there seems to be three deep misperceptions associated with the idea of validity not only among mainstream positivists, but also among jurists in general. First, they don’t recognize distinctions between legitimacy and validity.\textsuperscript{169} Second, mostly for mainstream positivists, authority is the source of validity.\textsuperscript{170} In other words, validity is only an auxiliary component of authority that posits law or brings law into existence.\textsuperscript{171} Third, validity is overwhelmingly understood as a normative statement, in particular a moral justification\textsuperscript{172} or a truth condition.\textsuperscript{173}

The IAL explicates the concept of validity not as a normative but as a positive framework that tests the legality of legislation and authority. In terms of the legality of

\textsuperscript{165} Id., at 213. Raz claims that, “A legislative authority, on the other hand, is one whose job is to create new reasons for its subjects, i.e. reasons which are new not merely in the sense of replacing other reasons on which they depend but in not purporting to replace any reasons at all. If we understand ‘legislative’ and ‘adjudicative’ broadly, so the objection continues, all practical authorities belong to at least one of these kinds. It will be conceded, of course, that legislative authorities act for reasons. But theirs are reasons which apply to them and which do not depend on, i.e. are not meant to reflect, reasons which apply to their subjects.”

\textsuperscript{166} See RAZ, THE AUTHORITY OF LAW, supra note, at 9.

\textsuperscript{167} Id. at 10.

\textsuperscript{168} Id., at 1 & 27.

\textsuperscript{169} See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 28 (Oxford University Press, rep. 2010).

\textsuperscript{170} See RAZ, THE AUTHORITY OF LAW, supra note, at 149.

\textsuperscript{171} Id., at 148. Raz claims that, “Rules, therefore, are not statements nor prescriptions, not even justified or true prescriptions or statements. They are things the content of which is described by some normative statements and such statements are true if the rules exist, i. e. are valid, and not true if the rules do not exist, i. e. are not valid.” Further at 149 he argues, “The best route to understanding of ‘legally valid’ is by attending to the fact that it is used interchangeably with ‘legally binding’. A valid rule is one, which has normative effects. A legally valid rule is one, which has legal effects.”

\textsuperscript{172} See ALEXY, A THEORY, supra note, pp. 27-29. Alexy divides theories of validity into three different categories: sociological theory of validity, juridical theory of validity, and ethical theory of validity. However, all these theories and statements of validity, he considers as ‘statement of normative validity’.

\textsuperscript{173} See RAZ, THE AUTHORITY OF LAW, supra note, at 147. Raz argues that all truth statement as social fact do not constitute the property of a rule. But at 149 he claims that, “A valid rule is one, which has the normative effects.”
legislation, it tests the processes related to the production, execution, and interpretation of law, and the contents of law as well. Especially, validity is the testing mechanism of legality on the basis of two criteria: the constitutionalization of law or maintaining the hierarchy of law, and following the prescribed processes. For analytical convenience, this paper calls this concept of validity as an integrated concept of validity. In the following paragraphs, we mainly analyze the inadequacies of the mainstream positivism in terms of its idea on validity. To be precise, the problem of the mainstream positivism is that it denies the integrated concept of validity.

For the mainstream positivism it is unpretentious that the existence of law itself adduces its validity. For example, a command is the sufficient condition of validity for Austin. The rule of recognition is the sufficient condition of validity for Hart. By the fact of being posited by authority, law retains its validity for Raz. Therefore, validity survives as an appendage to authority, which is considered as the sufficient condition for securing the positivity of law for the mainstream positivism. Consequently, mainstream positivism either ignores or denies the need for the test of the authority. In other words, the mainstream positivism theorizes law mainly from the practices of the United Kingdom and Israel where a single body of written constitution does not exist and the classical idea of parliamentary supremacy is still in vogue. Though its resistance to validity has already been weakened by many factors including the development of the concept of positivity in international law, especially under the international trade law

Raz also recognizes validity as a concept of tests. But his test is confined to appreciate the validity of every law conditional on the existence of the law creating facts. To put it simply, authority alone is sufficient to incorporate validity as well. Further, he readily resorts to the Hartian concept of the ‘rules of recognition’ as the ground test, which ignores the role of validity in synergizing legitimacy and authority. Moreover, Raz reduces the concept of validity to normative consequences. He claims that, “A rule of law is valid if and only if it has the normative consequences it purports to have.”

---

174. Id., at 152. Raz claims, “Since the validity of law depends on its source, and since the source is an action or a series of actions, doubts and discussions about the validity of laws revolve on factual questions, on issues susceptible of objective determination to which one’s moral or political views are essentially irrelevant.” Further at 153 he argues that law is valid because it is ‘issued by a legitimate authority.’


176. See RAZ, THE AUTHORITY OF LAW, supra note, pp. 150-151.

177. Id. at 151.

178. Id.; see also HART, CONCEPT OF LAW, supra note, at 103. Hart claims that, “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.”

179. Id. at 153.
essence, the explanations of the nature of law by the mainstream positivism are incomplete and misconceived because they erroneously assigned validity as a relic of morality and thus do not adequately encapsulate the concept of validity. On the contrary, the IAL presupposes a proposition that only by being posited, recognized, or commanded, law cannot uphold its positivity. Along with legitimacy and authority, law needs to be featured with the concept of validity to warrant its positivity. To calibrate this proposition, the IAL offers the criteria of validity as shown in the chart below.

Chart II: An Integrated Concept of Validity

No doubt, the ceaseless engagement of many positivist jurists on the explanation of the nature of law has made the treasures of law commendably rich. At the same time, it should not be ignored that their enunciations have failed to unravel the dynamics of normativism and positivism, in particular on the issue of validity. Their understanding of validity as an ancillary proposition of authority has rather stymied the institutionalization of the science of law. For example Raz claims that, “I have argued, for example, that it is essential to the law that it claims to have legitimate, moral, authority, and that it is source-based, and that it claims to have peremptory force, etc.”\(^{180}\) Erroneously, Raz ignores validity, and includes morality and other normative concepts as the essential features of law.

\(^{180}\) See Raz, Between Authority and Interpretation, supra note, at 97.

(2013) J. JURIS. 163
Hart claims that, “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.”\textsuperscript{181} It is clear from the observation of Hart that for him the rule of recognition is the sole criteria of validity. In fact, it is also the foundation of legitimacy and authority for Hart. Hart emphasizes that, “Some of the puzzles connected with the idea of legal validity are said to concern the relation between the validity and the efficacy of law. If by efficacy is meant that the fact that a rule of law which requires certain behavior is obeyed more often than not, it is plain that there is no necessary connection between the validity of any particular rule and its efficacy, unless the rule of recognition of the system includes among its criteria . . .”\textsuperscript{182}

Let us take a case from the feminist contention of law. Feminists argue that laws are made following a standard process with a legitimate authority, but the contents are fully loaded with patriarchal values. The criteria from where the contents are derived are also biased. Women are deprived of participating in the legitimization process and exercising authority due to the incoherent social practices and biased social structures. In short, they contend that women suffer widespread discrimination from individual to institutional levels in the name of the authority of law.\textsuperscript{183} This feminist contention mirrors a holistic picture of the discriminatory existence of law, which continues unless a system of validity stands in the way.

Generally, law either legitimizes rights, imposes duties, or authorizes institutions to secure command, obedience, and enforce rights. Conceivably, with the process of legitimization and the apparatus of authority the powerful (powerful in terms of ideology, resources, wealth, culture, practices, influence, domination, etc.) may protect their own interests through the instrumentality of law, unless the validity criteria is recognized and effectively applied. Therefore, without the test of validity in place under a legal system, law merely becomes reduced to the instrument of a service to a class or group. To remedy the manipulation of law, through an open and publicly communicated epistemic channel, there should exist a robust constitutional system of check and balance in particular the judiciary should be able to declare any such acts as invalid within the premise of the criteria of validity.

Thus, the postulated criteria of validity play a catalytic role in streamlining authority (including the majority in parliaments) by demanding compliance with the constitutionalization of law, and exhausting the prescribed processes, which are non-derogable \textit{a priori} standards recognized either through the process of incorporation or

\textsuperscript{181} See HART, CONCEPT OF LAW, supra note, at 103.

\textsuperscript{182} Id.

interpretation in the rule of law legal system. Therefore, in the transmutation of normative standards into positive standards, the two criteria of validity are invaluable to institutionalize the science of legislation. It is always important for any democratic society to institutionalize the non-derogable a priori standards into its legal system to rule out the possibility of manipulating the law. In short, the two criteria of validity are the backbone of the science of law in identifying and institutionalizing the positivity of law.

In essence, a solution to the problems of normativity and manipulation of law should be sought at four different but connected levels. First, at the legislative level, legislators should draw the contents of law on the basis of the two criteria of validity. Second, within the limit of law or delegated legislation, the executive organ of the state should be bound to deploy all its choices or decisions based on the criteria of validity. Third, both the legislative and executive acts should be open to be tested by the judiciary on the basis of the validity criteria. Fourth, if the judiciary commits judicially irremediable errors, the legislative body should remedy the defects of judicial decisions by manufacturing a new law or amending the existing law. On the whole, this process of the science of law engineers legitimacy and authority as to be solely rested upon the criteria of validity.

SECTION III: WELFARE-GRUNDNORM AND THE TRANSMUTATION OF NORMATIVE STANDARDS INTO POSITIVE STANDARDS

3.1 THE WELFARE-GRUNDNORM (WG)

In this section, we examine the third proposition, which is about welfare-grundnorm; i.e., ‘normative standards transformed methodologically into positive standards constitute positive laws.’ However, before explaining the WG, it would be worthwhile to mention briefly about its derivation. The WG acquires its vision from Bentham’s theory of utilitarianism and Kelsen’s theory of grundnorm. Perhaps, the WG can be better stated as a further extension of Bentham’s science of legislation; although, it is distinct from Bentham’s utilitarianism and Kelsen’s grundnorm in terms of its nature and explication. Conspicuously, the vindication of the idea of utility departs from the classical idea of the ‘greatest happiness of the greatest numbers’, which is somehow misunderstood and was incomplete until Pareto remodeled it with his brilliant explanation. Thus, to some extent, the WG in its explanatory framework is closer to the ideas of economist Vilfredo Pareto.

The WG offers a positive methodology, but having said that, it is not similar to the mainstream positivism. Unlike the mainstream positivism, for the WG, the discrete existence of a sovereign entity or a parliament is not sufficient for the institutionalization of the positivity of law. The WG disagrees to the notion that laws are positive by the mere fact of being posited. Rather, in its precise form, the WG offers tools for
transmuting normative standards into positive standards, which will help to systematically explain the discourse between law and morality (normativity). In other words, the WG argues that the positivity of law is systematically ensured only with the application of the three methodological components: a positive order, a limited government (a constitutional government), and justice according to law as shown in the following chart.

**Chart III: Welfare-Grundnorm (WG)**

The WG expounds two specific properties of a positive order for securing the positivity of law. For the WG, rules (laws) are positive only when the nature and content of the rules satisfy: first, the three levels of utility (optimality, efficiency, and equilibrium), which justify the rules to be transmuted from normative standards to a positive standard (the first property), and second, the fulfillment of the requirements of legitimacy, authority, and validity or the IAL (the second property). Thus, the WG elucidates how positivity could be ensured and applied in making, existence, application, and the interpretation of law. But this positive order can be spoiled at least by two political detriments: an unlimited government, and a normative concept of justice. To remedy these detriments, the WG subscribes the tools of a limited government and justice according to law. Thus, these three components—a positive order, a limited government, and justice according to law—provide a comprehensive framework for creating and maintaining the positivity of law.

Why should normative standards (concepts, principles, and social facts) be transmuted into rules? A convincing answer does not rest simply on the proposition of the self-sufficiency of authority, as the mainstream positivism urges. Rather a logical
answer suggests the constitutional (legal)\textsuperscript{184} optimality, efficiency, and equilibrium (OEE) as a quest for a well-ordered society. Normative standards, by their very nature are divisive and fragmented; thus, cannot achieve a well-ordered society. They are also inefficient in creating OEE. They are often contingent in protecting the fragmented interests of a certain community or groups alone. To support this argument, allow me to give two examples. One of them is a shocking example and the other could be disputed. First, in January 2014, in one of the villages of India, called Chowhatta (West Bengal), a kangaroo court ordered the punishment of a girl by raping her publicly in front of the entire community. Further, the entire community obstructed the police from entering into the community and arresting the accused.\textsuperscript{185} This example of defective morality or normative justice is undoubtedly horrible.

Second, in Nepal, a Communist Party called the Maoist started an armed insurgency against the democratic government from 1996. During the conflict from 1996 to 2005, many innocent people were killed from both insurgents and the government in violation of domestic and international laws, in particular the Geneva Conventions, 1949. After the initiation of the peace process, both the former insurgents and the government have been contending that their activities were political and therefore not to be brought within the remit of the criminal law. The OHCHR has collected some 30,000 documents and cases of violations of domestic and international laws,\textsuperscript{186} but the political actors are impugned on the ground of political normativity. This sort of impunity is not only peculiar to Nepal, but may also be common in many other conflict-ridden countries.

The Nepalese example presents how complex and dangerous normative political justifications in unleashing an unlimited government are. For the mainstream positivism, if the state enacts a law even providing a blanket immunity to all illegal activities taken place during the insurgency, the law is source based or posited by authority and thus legitimate and valid for the mainstream positivism. The blanket impunity law may create political advantages to certain political actors but could be detrimental to achieving a well-ordered constitutional democracy. Thus for the IAL, the blanket immunity law lacks both legitimacy and validity, since it undermines the supremacy of the rule of law.

\textsuperscript{184} The constitutional optimality, constitutional efficiency, and constitutional equilibrium are further molded into a specific shape through specific laws: statutes, precedent, rules, regulations, and contract. Therefore, in specific terms the idea of constitutional optimality, efficiency, and equilibrium can be stated as legal optimality, efficiency, and equilibrium.


The argument of invalidity springs not from morality but from the supremacy of the constitutional order and the rule of law. Accordingly, the methodology of WG with the tools of OEE suggests testing the legitimacy of any standard from within the scheme of validity. Only with the completion of this process, a standard becomes a positive rule. In short, with these methodological tools, normative standards get transformed into principles and principles (concepts) are metamorphosed into law by assessing their three levels of utility in conjunction with the IAL requirements.

In a constitutional democracy, where constitutionalism is uncontestably institutionalized, the transmutation of normative order into positive order is more smooth and stable. In conflict-ridden societies, like Nepal, where constitutionalism itself is contested and not institutionalized, the methodology of WG could be usefully applied also to formulate constitutionalism. In its broader scope, the WG can be applied in institutionalizing constitutionalism, promulgating a constitution, legislating a statute, and interpreting laws in consonance with the IAL.

All rules, including constitutional rules, in their primary stage—that is to say, before undergoing a legislative process—may entail social facts in the form of concepts or principles broken down into different disciplinary domains, such as economic facts, cultural facts, political facts, sociological facts, ethical facts, moral facts, religious facts, and so on. In all of these forms, the common and invariable features of these social facts rest on their normative character until they pass the test of the IAL criteria.

Only with the completion of the WG methods, the primary rules in Hartian terms and concepts in our terms may turn into law or secondary rules in Hartian terms. It is clear that the internal point of view of officials (suffered from the uncertain and unidentified numbers and views of officials) cannot simply turn normative facts into positive standards. Ultimately, the WG not only clearly elucidates the shortcomings in the Hartian and Razian theories of law but also evidently establishes the connections and distinctions between normative and positive standards. The following chart elucidates the distinctions between the mainstream positivism and the WG.

<table>
<thead>
<tr>
<th>Chart IV: Mainstream Positivism v. Welfare-Grundnorm</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mainstream Positivism</strong></td>
</tr>
<tr>
<td><strong>Sovereign (Parliament)</strong></td>
</tr>
</tbody>
</table>

(2013) J. JURIS. 168
The differences are specifically potent in explaining a command or the authoritative determination of rules. The mainstream positivism treats a command as a neutral concept and by virtue of such command, posited rules are thus claimed to be positive. The WG, instead, comprehends a command neither as a neutral nor as a biased state of condition, but amenable to both. A command can be normative if the sovereign is unlimited and acts beyond the premise of the process of the three levels of utility (OEE), which metamorphose the principles or concepts into a legitimization domain. The legitimization process with authoritative determination supported by the IAL transmutes normative concepts into a construct or rules, which turn out to be positive standards because they satisfy both properties of positivity as mentioned above. In essence, a command (authority) can be positive only if the WG framework supports it. Otherwise, there will be no substantial difference between a command of a sovereign and an order of a gunman.

Austin’s sovereign, Hart’s rule of recognition, and Raz’s authority are amenable to none of the frameworks of the two properties of positivity, since they are unyielding or self-sufficient. As a result, these theories are essentially inadequate to explicate the conditions of positivity; rather in a circuitous way they fall into a normative quagmire. Therefore, for any rules deemed to be positive, the WG offers four schemes of tests: conceptual discourse, transmutation of concepts (principles) into constructs by the application of a legitimization process, an authoritative production and existence of rules, and their compatibility with the validity test.

In its most simple and lucid form, the WG adopts three utility assessments in the phase of conceptual discourse and the legitimization process. These assessment methodologies are catalytic in transforming concepts (principles) into the legitimacy domain. They are as follows:

- First, by finding a condition (a rule) where the interests of all stakeholders will be expanded without any curtailment or detriment to their interests, which is a state of constitutional and legal optimality.

- Second, if the interests of the stakeholders cannot be expanded or are not amenable to the constitutional and legal optimality, then it seeks a condition (a rule)
where these interests are harmonized to be efficient, which is a state of constitutional and legal efficiency.

- Third, if both of the possibilities mentioned above are practically inconceivable due to a conflict of interests, then it endorses the cost-benefit analysis to address both inter-stakeholder and intra-stakeholder interests, which is a state of constitutional and legal equilibrium.

There also exists an inefficient condition. In legal constitutional discourse, the inefficient condition may exist when rules are produced differently from the above-mentioned three states. Rules produced under the inefficient condition produce and promote the interests of a certain section of society in a fragmented way beyond the permission of positive discrimination resulting in an imbalance state of authority, and rights. Consequently, the imbalanced legal-constitutional framework often rears autocracy, undermines democracy, breeds conflict, sustains inefficiency, and endures injustice. The WG as a methodology of the science of legislation aims to rule out the inefficient condition.

With the application of these three utility assessment methodologies, constitution makers can successfully produce a constitution that in turn should also fit with the IAL in the making, existence, and application of law. These three methodologies are the cornerstone to explicate positivism because they offer a framework to undertake normative standards into positive standards.

However, the third methodology might result in majority and minority practices, which are often called democratic decision making processes. In fact, they remind us of the limited version of the democratic decision making process. In our positivistic sense, the first two methods are the true cornerstones of any democratic decision making process, and they are also the preconditions of the third methodology. It is because in any social situation there often exist possibilities for the application of the first and second conditions. In certain circumstances, they might be put into penumbra, but only temporarily.

For example, constitutionalism might be contested in a political process. With the success of a revolution, the earlier constitution might be replaced with a new one. However, in modern liberal democracies, hardly ever would a situation arise where constitutionalism did not exist. If it seems prima facie non-existent, because of political contestation, it might exist in constitutional conventions and in precedent. The central idea is that the majority should not be justified to be free to take any decision as they please by renouncing constitutionalism. Constitutionalism thus should be an unavoidable limitation to the majority. Only a majoritarian decision compatible with constitutionalism can establish the equilibrium of law endorsed by the rule of law, which gives the reason
that the minority should not obstruct the majority from the implementation of such decisions. Rather, the minority is expected to offer possible cooperation to the majority.

If the legislative body ignores these coherent methodologies of utility assessment, due to its members being primarily motivated by populist and short-term goals or influenced by some other vested political interests or ideologies, it unfortunately aggravates serious democratic deficits. Raz correctly postulates that, “. . . no cogent political theory has ever found much merit in majoritarianism.”

Certainly, democracy is not a sacred cow. Once, South African President Jacob Zuma poignantly said, “You cannot eat democracy.” Professor Giovanni powerfully remarks that the “wrong ideas about democracy make a democracy go wrong.” In fact, democracy is a condition where people should feel that the law enforcing institutions and the law enforcing personnel are their friends and protectors, not foes posing a threat to them. They should be friends because in all situations they are required to implement law faithfully. Law as the highest standard of civic condition can be the protector of the people only through its agencies. In a society where these links are missing, democracy fails and institutions crumble. A strong and independent judiciary is thus important to espouse a counter-hegemonic role as the savior for preventing lawlessness.

In short, it can be stated that when a legislature finds the WG as a useful methodological tool, perhaps it will be able to address the normative problems. The search for a positive condition where interests of all stakeholders are expanded without any threat or curtailment invites a non-normative quest, like the judicial review, and adult franchising, which enlarge the welfare of all stakeholders. It is not necessary that in all conditions the welfare or interests of all stakeholders could be enlarged equally. Nevertheless, it is a condition where everybody feels better off than before. Therefore, the rule of law is an inherent component of positivity.

3.2 THE WG AND A POSITIVE ORDER

A positive order is a precondition to institute the positivity of law. As mentioned above and also shown in the chart below a positive order consists of two properties: first, the three levels of utility test (the first property), and second, the fulfillment of the requirements of the IAL (the second property). A positive order subscribes the rule of law at its core to transmute the normative standards into a valid, legitimate, and

---

187. See RAZ, ETHICS IN PUBLIC DOMAIN, supra note, at 376.
enforceable domain, i.e., positive standards. Arguably, a normative standard may receive legitimacy through the accomplishment of a legislative process and may also command authority through the involvement of the state’s apparatus in the implementation of the legitimized standard. However, the legitimate and authoritative standards may lack validity, which reminds us of the importance of the rule of law. On the contrary, a rule by law is a condition where validity, legitimacy, and enforceability do not exist in a unified whole or in harmony. The following chart will be useful to explain the idea of a positive order.

**Chart V: A Framework of a Positive Order**

In the early nineteenth century, the analysis of August Comte about the weaknesses of theological and metaphysical systems and their remedy through a positive system pioneered the idea of a positive order. 190 The logical and scientific link by which all our

---

190. See AUGUST COMTE, THE POSITIVE PHILOSOPHY 27 (Harriet Martineau trans., Batoche Books, Vol. 1, 2000/1896). Comte examines that, “In order to understand the true value and character of the positive philosophy, we must take a brief view of the progressive course of the human mind . . . From the study of the development of human intelligence, in all directions, and through all times, the discovery arises of a great fundamental law, to which it is necessarily subject, find which has a solid foundation of proof, both in the acts of our organization and in our historical experience. The law is that each of our leading conceptions—each branch of our knowledge—passes successively through three different theoretical conditions: the Theological or fictitious; the Metaphysical or abstract; and the Scientific or positive. In other words, the human mind, by its nature, employs in its progress three methods of philosophizing, the
varied observations could be brought into one consistent whole is the name of the positive order or the science of society given by Comte.\textsuperscript{191} For Comte, observation or empiricism applied to normative order alone could not produce a positive order. Realizing this point, Comte emphasized the role of an \textit{a priori} element in the formulation of a positive order.\textsuperscript{192}

The \textit{a priori} element was the foundational basis of the positive analysis in Socratic and Platonic philosophy, which Immanuel Kant tried to harmonize with Aristotelian empiricism. Comte’s reference on an \textit{a priori} element in devising a positive system marks an important direction towards the epistemological foundation of validity. An \textit{a posteriori} order could not offer a valid criteria, since in Comte’s terms, the observations could also be applied to normative order, and may vary subject to human perceptions meaning they would lack a unified, consistent whole as a validity criteria. Kelsen named the unified validating system as the highest normative order (\textit{grundnorm}). However, Kelsen subscribed a constitution as the reference of a \textit{grundnorm}, which is a positive order. Along with this contradiction in the Kelsenian explanation of a grundnorm, it is also vulnerable by being unable to solve the riddle that a constitution in a rule by law country too, in the Kelsenian terms, is the highest validating order. In short, Kelsen failed to unravel the puzzle between the rule of law and a rule by law.

In the popular fashion, it may be stated that validity arises from the maintenance of a hierarchical legal order in which a constitution stands at the top as a \textit{grundnorm}.\textsuperscript{193} This statement poses at least three problems. First, it ignores the distinction between authoritarian constitutions and democratic constitutions, permitting any constitution to be the source of validity. With this obliteration of the distinctions, a question may arise: do authoritarian constitutions retain a source of validity? Second, Kelsen’s \textit{grundnorm} fails to explain the validity standards for countries where they do not have a written constitution and also practice parliamentary supremacy. In particular, a question may arise: does the United Kingdom lack the standard of validity?

Third, Kelsen’s \textit{grundnorm} may also create some contradictions in appreciating the relationships between a constitution and international law. In fact, Kelsen is one of the

\begin{quote}
character of which is essentially different and even radically opposed . . .” See also AUGUST COMTE, \textit{SYSTEM OF POSITIVE POLITY} (London, Longman Greens & Co., 1875/1852); AUGUST COMTE, \textit{A GENERAL VIEW OF POSITIVISM} (J. H. Bridges trans., London, George Routledge & Sons Ltd., 1908).
\end{quote}

\textsuperscript{191} See AUGUST COMTE, \textit{A GENERAL VIEW OF POSITIVISM} 1-2 (J. H. Bridges trans., London, George Routledge & Sons Ltd., 1908).


\textsuperscript{193} See KELSEN, \textit{GENERAL THEORY}, supra note, at 115. Kelsen writes that, “. . . The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends . . .”

(2013) J. JURIS. 173
proponents of cosmopolitan legal order in which sovereignty will lose its dominating position along with its natural demise in allowing international laws to override any domestic grundnorm.\(^{194}\) The relationships might be expressed in a number of ways. For example, a domestic law compatible with the constitution might be inconsistent with an international law. Or a constitution, the highest norm (grundnorm) itself might contradict with some international rule. A question may thus arise: how could the grundnorm of constitutional supremacy solve this inconsistency?

These questions could be addressed only when the epistemological basis of validity is discovered in the idea of the constitutionalization of a positive order, which might be entrenched either in a written or an unwritten form of a constitution. Constitutionalism as an \textit{a priori} order expressed through individual autonomy, freedom of choice, personal liberty, and the legitimization of power builds the foundation of social relationships culminated in the exchange of goods, services, ideas, information, and culture for a politically sustainable society. Thus, constitutionalism as a positive order expands interests of all stakeholders without any undercut, which can be called social or constitutional optimality. In any dynamic society, all social interests might not be amenable to social optimality. However, they tend to enter into harmony for social efficiency, which can be termed as constitutional efficiency. Further, if social optimality and efficiency is contested due to inter and intra stakeholder conflict of interests, the utilitarian approach might come to the forefront to release the society from plunging into inefficiency, which can be termed as constitutional equilibrium. Any constitution beyond the framework of optimality, efficiency, and equilibrium falls into a condition of inefficiency roiled with immense socio-economic and political problems that tear apart the rule of law.

Constitutionalism, in the form of constitutional optimality, efficiency, and equilibrium, is best explained with the methodology of the WG. Conceptually, a limited government, a separation, check and balance of powers, and judicial review are the bedrocks of the constitutional optimality. Equality before the law, due process of law, human rights, and fundamental rights propagate constitutional efficiency. Justice according to law is an example of constitutional (legal) equilibrium with the likelihood of efficiency and optimality.

Now the above-mentioned three questions can be addressed logically. On the first question, it can be comfortably stated that at their best the authoritarian constitutions maintain constitutional equilibrium and beyond that level they ignore constitutional efficiency and optimality. On the second question, it can be said that, with the realization of a full-fledged system of separation, check, and balance with judicial review (review of

both legislative and administrative acts), countries like the United Kingdom practicing parliamentary supremacy may also bid the possibility for catching up almost all three features of constitutionalism. On the third issue of harmony between domestic and international laws, constitutional supremacy both under authoritarian and non-authoritarian constitutions might give effect to the international rules into their domestic legal systems. If they adopt the monist approach, they could better achieve a higher level of harmony between domestic and international rules.

In short, a positive order springs from a constitution with the constitutionalization of regulatory mechanism entrenched in constitutionalism. An institutionalized positive order is a necessary precondition for a limited government and justice. Hereinafter, we discuss the supremacy of law, and a limited government in brief.

3.2.1 The IAL & the Supremacy of Law

Aristotle’s exposition on the rule of law offers a clear account that supremacy of law over all authorities and institutions in governance and managing human relations is the key to the rule of law, which should be intrinsically guaranteed by rules. Hayek observes that in the political history of mankind, when the conception that legislation should serve to protect the freedom of individuals was lost, the Aristotelian concept ‘the empire of laws, not of men,’ which is based on the idea of individual autonomy and freedom was weakened for thousand years. It was especially true, when the art of legislation was found in the code of Justinian, with its conception of a prince who stood above the law that served as the model. By the rise of absolutism, the idea of supremacy of law was destroyed everywhere, but somehow it was retained to initiate the modern growth of liberty. With the growing importance and practice of positive law, the rule of law is gaining strength in the modern age, which seems to be bringing back the tradition that ‘in a democracy the laws should be masters.’

Hayek elucidates how arbitrary rules and discriminations were challenged with the demand for integrating basic organizing and governance principles like equality before the law into the body of law. This process celebrated the rule of law in creating rights against the arbitrary form of government. The famous British judge, Lord Coke had already written in 1624, that it is not the discretion of the government or the King, but the laws, which should measure every activity. Also with the abolition of the Star

196. Id. Kindle Location 6043.
197. Id. Kindle Location 5950.
198. Id. Kindle Location 5992.
199. Referred in id. Kindle Location 6016.
Chamber, the British democracy had settled the question of policy versus law, giving priority to law over policy, which politicians and bureaucrats often dislike. However, shattering the legacy of democracy and the rule of law, some European countries disgracefully colonized a number of countries across the globe for the sheer greed of supplying resources to their domestic industries and in turn monopolized the market in the colonized countries.

In the eighteenth century, a British jurist, A. V. Dicey explained the ‘supremacy of law’ as one of the three components of the idea of the rule of law. Though, his concept of the supremacy of law is limited to the idea of legal equilibrium as discussed above. In addition to the concept of Dicey, the realm of the rule of law exemplifies the constitutional optimality and efficiency, which exist only when all powers including the legislative power and political ideologies are brought within the framework of constitutionalism. No power and ideology thus should assume their supremacy over constitutionalism and its products, which engenders a movement from the supremacy of ideology to the supremacy of the rule of law.

The significance of the rule of law has been caused to flow from the historical fact of the changing nature of the organizing standards from tribalism to religion, from religion to political ideology, and from political ideology to the rule of law. Beholding crisis and opportunity, confusion and certainty, skepticism and faith, intolerance and harmony, localism and globalism, our time has indispensably witnessed the sine qua non of positivity reflected in the rule of law for guiding and governing us.

In human history, religions have indeed played important roles in organizing and regulating human relationships. Christianity in the Christian world, Islam in the Islamic world, Dharma in the Hindu society, Buddhism in some of the Asian countries, are some major examples in regard to the role of religions in organizing human relationships. Since the Enlightenment movement in Europe, and the growing role for reason as the definer of human relationships across the globe, the role of religion as

---

200 Id.
202. See A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, Kindle Location 5292 (Evergreen Review Inc., 2007). He mentions that, “That rule of law, the, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. . . . It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”
203. Buddhism is widely considered as a religion; nonetheless, its origin clearly shows that it is an atheist philosophy.
doctrine of social organization and governance was gradually weakened and substituted by political ideologies.

In the Islamic world, the Qur'an and Sunna of the Prophet Mohammed still play an important role in social organization and governance both as religion and political ideology. The world has largely seen the development of political ideologies in different hues and forms. In all these developments, a constantly visible trend was found that the tenets of religion and political doctrines were being translated into law as governing tools. Being aware of the implications of political and ideological divisions for society, the tradition of liberal democracy focused its vision on the concept of the rule of law, bolstered by the idea of constitutionalism in defining and organizing human relationships including institutional relationships.

The movement from tribalism to religion, religion to political ideology and political ideology to the rule of law reinforced by constitutionalism, offers a captivating tradition connecting our social, economic, political, and cultural relationships. The antagonism, struggle, and also cooperation between political ideologies and liberal constitutionalism vividly present the astounding and enlightening lessons. At a time when political ideologies attempted to hold their supremacy over constitutionalism, autocracy, religious fundamentalism, and ethnic conflicts have unfortunately risen, dominating the socio-economic processes. Perhaps, the universally growing movement towards the supremacy of constitutionalism over political ideologies and other normative belief systems including religion and ethnic identity is one of the priceless achievements of the profound human endeavor for harmony, peace, respect, dignity, autonomy, freedom, liberty, rights, and duty-based relationships. In other words, the rule of law movement is a sobriquet of transforming a normative system into a positive order.

Political ideologies have played roles in promoting the concept of law. Nevertheless, time and time again they have also resisted the supremacy of the rule of law for the sheer greed of maintaining political preeminence or the influence of their commands. Amidst the struggle between political ideologies and the idea of the rule of law, the evolution and institutionalization of the concept of constitutionalism has emerged as the foundational stone of liberal democracy, which has indeed shaped the nature of democracy. The development and growth of the rule of law is thus closely connected with the movement from a normative to a positive order in which political ideologies are organized within the premise and supremacy of the rule of law.

Let us imagine three situations. First, there is a democratic system with a democratic government in place formed securing a majority in parliament or through a coalition. The government believes in the popular will of the people and thus demands that the existing laws (including the constitution) should not limit its actions for the cause of democracy. Further, in the name of promoting democracy, it decides to provide lifelong
honorarium, facilities, and financial support to dignitaries who hold high-level positions in the executive body, including the prime minister.

Second, there is a democratic system in place and the parliament is composed of representatives of the people. They consider that the popular will should be unchecked. Thus, they should not be restricted from amending existing laws or enacting any new laws, as the parliament may deem necessary. They like to amend the constitution and laws frequently to serve their political purposes at their convenience. Let us say, among others, they have amended the constitution and laws to prolong the terms of office of the parliament so that the members of the parliament could keep their offices without facing elections, which they consider necessary for democracy.

Third, there is a country; it has a constitution, laws, and a legal system of its kind. By liberal democratic standards, it is not a democratic country. But, it claims the status of a democratic country and its constitution mentions that it is a democratic country governed by the dictatorship of proletariat. It has achieved a number of socio-economic indicators that show their developmental index is improving. Nonetheless, people are demanding political freedom, where they want to see free competition between political parties for the office of the government. But the existing government denies people’s democratic aspirations. Should the people be allowed to break laws that suppress their democratic aspirations? How should the concept of the rule of law and positivity deal with these situations?

Before we answer these questions, let us review how legal political thinkers and philosophers have surveyed the issue of popular will and its relationship with the rule of law. Aristotle observed that when individuals rule, not the law, it is a manifestation of oligarchy in democracy.\textsuperscript{204} Aristotle further examines that when individuals arbitrarily exercise power and disregard their responsibilities for personal advantage, they are against the will of the people.\textsuperscript{205} Aristotle further considers, in a number of ways, democracy will be indistinguishable with tyranny when democracy is not subject to law and the best citizens are left out from holding the first place. There should be no demagogy in democracy, but laws alone should be the supreme masters. If demagogy prevails, people in power collectively become monarchs.\textsuperscript{206}

\textsuperscript{204} See ARISTOTLE, POLITICS Book IV, Ch. VI, Kindle Location  (Benjamin Jowett trans., Kindle Edition 2012).
\textsuperscript{205} Id. Ch. X, Kindle Location 4854.
\textsuperscript{206} Id. Ch. I. Aristotle writes, “. . . political insight will enable a man to know which laws are the best, and which are suited to different constitutions; for the laws are, and ought to be, relative to the constitution, and not the constitution to the laws. A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community. But law should not be
The demagogues make decrees in the name of people to override laws, by referring to the popular will. And, therefore they grow great because they hold in their hands the votes of the people, who are more than ready to listen to them. To keep people happy, they say, ‘let the people be judges’; so the authority of every office is undermined. Where the laws have no authority and supremacy, there is no democracy.\textsuperscript{207} The established constitution may lean towards democracy, but it might be administered in an undemocratic spirit. This sort of state, Aristotle says, often happens after revolution because the dominant parties become content with encroaching a little upon their opponents. On top of that, the authors of the revolution now have the power in their hands.\textsuperscript{208} Under the rule of law conditions, Aristotle examines the role of politics as an institution that enables people to know about the rule of law.\textsuperscript{209} With these observations from Aristotle, out of the three questions raised above, the first two might have been answered well.

In democracy, neither political parties, nor political leaders or their ideologies should be masters. When Tracey coined and used the term ‘ideology’ in 1817, he used it as a science to acquire positive ideas free from normative prejudices. He emphasized the universal human needs as the common originator of ideas. McLellan observes that in its origin the notion of ideology was positive, however, it quickly became pejorative. The oscillation between a positive and normative connotation characterizes the whole controversy associated with the concept of ideology.\textsuperscript{210}

Rousseau, who championed the idea of ‘general will’, found the problem of defining a form of association in which human autonomy and liberty would be defended together with uniting individuals with the social whole. He found the civil state as the only form of association that could accomplish the profound task of rational human conduct.\textsuperscript{211} In this process, Rousseau considers a person loses unlimited claim over things that are guided by natural instinct, but in turn, gains civil liberties and proprietary rights.\textsuperscript{212}

\begin{footnotesize}
\textsuperscript{207} Id. Ch. IV, Kindle Location 4839.
\textsuperscript{208} Id. Ch. V, Kindle Location 4841.
\textsuperscript{209} Id. Ch. IV, Kindle Location 4838. Aristotle observes, “At all events this sort of democracy, which is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot; the flatterer is held in honor; this sort of democracy being relatively to other democracies what tyranny is to other form of monarchy. The spirit of both is the same, and they alike exercise a despotic rule over the better citizens. The decrees of the demos correspond to the edicts of the tyrant; and the demagogue is to the one what the flatterer is to the other. Both have great power; the flatterer with the tyrant, the demagogue with democracies of the kind which we are describing.”
\textsuperscript{210} See DAVID MCLELLAN, IDEOLOGY 5 (Buckingham, Open University Press, 2nd ed. 1995).
\textsuperscript{211} See JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 14 (Amazon Digital Service Inc., 2006).
\textsuperscript{212} Id.
\end{footnotesize}
In a civic state, the idea of ‘general will’ assumes a considerably important role, as a tool for promoting public advantage. But Rousseau observes that this is not always true. He remarks that people are often deceived and in such a condition the popular will turns to be harmful, especially when popular will is expressed by social factions or partial associations. These factions undermine the general will of the state for their vested interests. Therefore, Rousseau strongly denounces a partial and fragmented society within a state. A question may arise: how could political parties be legitimized within a democratic framework, which are often mired in the form of a partial society? Practically, the most reasonable answer springs from the idea of the rule of law. All political parties, their ideologies, and activities should be compatible with constitutionalism directed towards respecting and promoting the cause of the rule of law, which is the basic precondition for the victory of democracy that can definitively contribute to the positivity of law.

If the popular will is unchecked, it breeds arbitrariness. Hayek argues that power, whoever exercises it, can become arbitrary if not checked. An arbitrary use of power is a condition where the power holders exercise it in an uncertain, irregular or ad hoc way. The only remedy for such malaise is the subordination of power by the rule of law. It is not only the executive branch of the government, which is often criticized for its tendency for arbitrary power, but also the legislative body that should function under the established dictate of the rules.

With these discussions, out of the three questions posed above, the first two have been answered clearly. The third situation is a situation of a rule by law because constitutionalism, the constitution, and the whole body of laws are not promulgated with the application of the WG, but are promulgated at the denial of the IAL. What is more, judicial review is also denied. Thus, the supremacy of ideology expressed through the rule by law setting denies the very a priori conditions and rules out the significance of the WG. To remedy the defects of the rule by law situation, liberal democratic processes are instrumental, which are the harbingers of a positive order buttressed through the supremacy of law.

---

213. Id. 23. Rousseau writes, “if, when the people, being furnished with adequate information, held its deliberations, the citizens had no communication one with another, the grand total of the small differences would always give the general will, and the decision would always be good. But when factions arise, and partial associations are formed at the expense of the great associations, the will of each of these associations becomes general in relation to its members, while it remains particular in relation to the State: if may then be said that there are no longer as many votes as there are men, but only as many as there are associations. The differences become less numerous and give a less general result. Lastly, when one of these associations is so great as to prevail over all the rest, the result is no longer a sum of small differences, but a single difference; in this case there is no longer a general will, and the opinion which prevails is purely particular.”

214. See Hayek, Constitution of Liberty, supra note, Ch. 11 Kindle location 6115.
3.2.2 Utility Test: From Principles to Rules

With the rule of law at the core of a political system, the relationships between principles and law, especially the question where the principles come from and what role should they play in a legal system can be categorically addressed. However, there are serious normative challenges down the road. These challenges are erroneously expressed in the form of divisive concepts of the rule of law such as: the Western concept of the rule of law, the Asian concept of the rule of law, the African concept of the rule of law, the Islamic concept of the rule of law, the socialist concept of the rule of law, and so on. At the core, these divisive or fragmented concepts attempt to explain the rule of law on the bandwagon of normativity, which is misleading.

The positivity of law being embedded in the rule of law occupies a central role in the conceptual discourse for transforming concepts into positive constructs. If the normative concepts fit into the methodological standards of the WG, especially in the legitimization process, they are posited as rules. In other words, concepts, principles, or social facts are transformed into posited rules with the application of the utility standards. Otherwise, the idea of a limited government or government by law, not by men, turns out to be futile. It is thus understandable that there is a key role for the science of legislation to determine the relationships between principles and rules.

Some jurists and legal philosophers view the idea of the rule of law as an elusive and value-laden concept. This statement reflects one of the hardest realities that many positivists and normative jurists often explain the idea of the rule of law not as an intrinsic part of the law, but as a descriptive principle of law. Joseph Raz elucidates the rule of law merely as a principle of law, but not as an intrinsic part of law. Similarly, Ronald Dworkin, who is considered a critic of both the positivist and naturalist schools, expounds the idea of the rule of law as an interpretative principle. In hard cases, Dworkin, assigns principles the especial role for defining and determining law. Further,

215. See Hilaire Barnett, Constitutional and Administrative Law 51 (London, Routledge, eighth ed., 2011, Kindle Edition). Barnett observes, “The rule of law is a concept, which is capable of different interpretations by different people, and it is this feature which makes an understanding of the doctrine elusive. Of all constitutional concepts, the rule of law is also the most subjective and value-laden.” See also Andrei Marmor, The Ideal of the Rule of Law, in A Companion to Philosophy of Law and Legal Theory 666 (Dennis Patterson ed., Wiley-Blackwell, 2nd ed., 2010). Marmor argues that, “The fact that we tend to refer to the rule of law as an ideal suggests that the rule of law is a general normative principle, and one that can be attained, in practice, to various degrees; legal systems can meet the normative requirement of this ideal to a greater or lesser extent.”

216. See Ronald Dworkin, A Matter of Principle 1-2 (Harvard University Press, 1985). Dworkin argues that, “...law is a matter of interpretation rather than invention... cases must be decided at retail, in their full social complexity; but the decision must be defended as flowing from a coherent and uncompromised vision of fairness and justice, because that, in the last analysis, is what the rule of law really means.”
one of the leading jurists of the natural law school, John Finnis, also explicates the rule of law merely as the virtue or quality of institutions and processes.  

In Ronald Dworkin’s terms, principles are descriptive and laws are prescriptive (positive). However, Dworkin maintains that what is law on the issue is discoverable in principle. In Dworkin’s view, a principle states a reason, which argues in one direction, but does not necessitate a particular decision. Dworkin contends that each judge in deciding a case applies principles. Thus, the decisions of the court are political decisions in the sense that the rulebook conception of the rule of law condemns it.

Dworkin’s explanation of the relationship between law and principles is defective by at least two counts. First, it recognizes principles outside the remit of law. This immediately poses a question: who is bound to apply any standards that are not internalized by the law? Or, why should such standards be considered binding in discovering law itself? Dworkin’s argument is also refutable not only with the evidence from domestic legal systems, but also from the perspective of international law. Second, it allows a normative system to take a role in defining the prescriptive content of law, which is analytically illogical.

For example, a legal principle—*actus non reum facit, nisi mens sit rea*—no one will be punished for a crime without a guilty mind or intention; let us say, Country Z or Legal System Z has a statute, which prescribes that under the crime of drugs transaction, human trafficking, or terrorism, the overt act (*actus reus*) is sufficient for establishing a case. Can the Z legal system, or more specifically its judges, apply the principle of *actus non reum facit, nisi mens sit rea* in this situation? The most reasonable answer is no, they cannot. This means, unless a legal principle is internalized in the prescriptive content of

---


220. See DWORKIN, A MATTER OF PRINCIPLE, supra note, at 17.

221. See Canada v. USA (the Gulf of Maine case), ICJ Rep 1984, 246. The ICJ mentioned that the rights and duties between states couldn’t be determined on the basis of principles but on the basis of law alone. In para. 81 of the decision, the ICJ mentions that, “... in this respect the Chamber has logically to refer primarily to customary international law—can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot also be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective—which remain simply criteria and methods even where they are also, in a different sense, called principles. Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates...”
law, the principle turns out merely to be a normative standard (concept) that cannot be applied in the interpretation and application of law. From this proposition, we can claim that unless principles are internalized either in the form of constitutionalism or in the contents of the existing laws, they cannot be applied to describe or discover the law in question.

But Dworkin’s contention specifically focuses on a situation where law is silent or in a penumbra. Hart also endorses the ‘minimum content of morality’ to resolve the penumbral situation. However, the judges should search the ‘minimum content of morality’ from within the legal system for Hart. Dworkin considers Hart’s proposition incongruent, since there is a gap in law that, for Dworkin, can only be fulfilled by principles. In this sense, principles are extraneous to the prescriptive aspects of law, but they supply to fill the inadequacy in the prescriptive aspects of the law. The fallacies of this conception can be exposed with two simple examples each from civil and criminal law, as follows.

Let us imagine there is no law that regulates and penalizes electronic crime. A person called Mr. R, through electronic use of the credit card of Ms. Y, takes X amount of money from Ms. Y’s credit card account. In the absence of law, a principle alone cannot penalize Mr. R on the charge of electronic crime. However, Mr. R can be prosecuted on traditional crimes like theft, fraud, or other charges as prescribed by law, and Mr. R might be additionally liable for a tort action. In short, principles alone neither can create crime nor can penalize.

Let us take another example from civil law. Mr. R and Ms. Y have entered into a business agreement. The agreement prescribes in details about their rights and duties. It mentions that on selling 2000 items of goods by Ms. Y, Mr. R will get additional 2 percent benefit from Ms. Y. Happily, Ms. Y had sold 2000 items, however, unfortunately two items were returned by one of the customers. Mr. R demands to get the 2 percent benefit, but Ms. Y denies on the ground that the last two items were returned lessening the sold amount to 1998 items. Let us say, Mr. R’s lawyer claims on the ground of the principle of equity to get the 2 percent benefit. The question is, can a court honor the claim of Mr. R on the ground of the principle of equity? Or, in other words, can rights and duties be created on the ground of principles? The simple and clear answer is no,

222. See Hart, CONCEPT OF LAW, supra note, pp. 193-200, 248, 250, & 254. Hart admits that his theory is not a plain-fact theory of positivism since amongst the criteria of law it admits values, not only plain facts (at 248). Hart also says that his theory of rule of recognition conforms to moral principles or substantive values as criteria of legal validity (at 250). In a penumbral situation, the judge’s duty will be to make the best moral judgment he can on any moral issues he may have to decide (254); see also Hart, ESSAYS IN JURISPRUDENCE, supra note, at 64. In the Essays, Hart explicates his idea of necessary intersection between law and morals. S. B. Drury, H. L. A. Hart’s Minimum Content Theory of Natural Law, 9 Political Theory 533-546 (1981).
unless the principle of equity has already been recognized by law as a tool to supply missing requirements in a dispute.

The point here is that, rights, duties, authority, and liability cannot be created, modified, or supplied by any external agency, including principles not recognized by the legal system, otherwise law gets mired in normative altercations and its whole purpose of certainty and predictability gets defeated. Plainly, courts do not entertain jurisdiction on the basis of principles unless there is a specific law authorizing them to hear the case. However, a legal system can recognize ‘principles’ by internalizing them in the prescriptive content of law. Yet, the recognition may also allow the possibilities for competitive principles. In this situation, how do we know which principle should be given priority or chosen over another? This is not an imaginative argument.

For example, Article 84 of the Constitution of the Kingdom of Nepal, 1990, had internalized a contesting situation between principles. It reads, “Powers relating to justice in the Kingdom of Nepal shall be exercised by courts and other judicial institutions in accordance with the provisions of this Constitution, the laws, and the recognized principles of justice.” Further, the Interim Constitution of Nepal, 2007, retained the same provision in Article 100(1); and, also added one more provision under Article 100(2), which provides, “Following the concept, norms and values of the independent judiciary, and bearing in mind the aspirations of the people’s movement and democracy, the judiciary of Nepal shall be committed to this Constitution.” Perhaps, with such a wide range of judicial authority on the internalization of principles into the legal framework, the Nepalese judiciary could move on a proactive path. However, the limit comes from the phrase ‘recognized principles.’

With the above discussion, for any principle to be recognized by a legal system, it needs to undergo the legitimization process, including fulfilling the criteria of enforceability, and validity. Thus the principle should be able to create rights and duties having specific content of law. In short, only with the completion of the IAL features, a principle can become a part of a legal system. A principle, devoid of the IAL criteria is simply a normative standard, not a legal standard. The following chart illustrates the relationship between law and principles.

**Chart VI: Law and Principles**
Again, coming back to Joseph Raz, who regards the rule of law as a non-universal concept, and simply a doctrine that is conditioned by political cultural context including its justification and meaning. Raz also claims that it is the function of the rule of law to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system. Marmor also supports Raz claiming that the rule of law as ‘a general normative principle’ could be attained in varying degrees of practices.

The function of the rule of law, in the Razian explanation, is misplaced because a totalitarian system inspired by political ideology also produces laws compatible with its political doctrines that fit with the Razian concept of the rule of law. The Razian concept, thus, fails to appreciate the true nature and function of the rule of law and also discounts the role of the legislature in choosing the most appropriate principles in the given context to instill them with legal content.

223. See Raz, Ethics in Public Domain, supra note, at 370. Raz writes, “I do not regard the rule of law as a universal moral imperative. Rather it is a doctrine which is valid or good for certain types of society provided they meet the cultural and institutional presuppositions for the rule of law, i.e., those on which the rule of law depends for its success.”

224. Id. Raz writes, “Like many other political doctrines (such as that of democratic government) the rule of law, precisely because it varies in details and thrives in a variety of political and cultural environments, can have different meanings and moral justifications in different countries.”

225. Id., at 375.

226. See Andrei Marmor, The Ideal of the Rule of Law, in A Companion to Philosophy of Law and Legal Theory 666 (Dennis Patterson ed., Wiley-Blackwell, 2nd ed., 2010). Marmor argues that, “. . . legal systems can meet the normative requirement of this ideal to a greater or lesser extent. Presumably, the better the law meets these standards, the better law is, at least in some respect. However, as soon as we begin to think about the rule of law as an overall normative ideal, some dangers lurk in the background. One obvious danger is to confuse the ideal of the rule of law with an ideal of the rule of good law. Many commentators associate the rule of law with the kind of legal regime that respects, for example, personal freedom and human dignity. Others go even farther and maintain that a legal regime that violates human and civil rights is one that fails to comply with the rule of law. Undoubtedly, these are noble ideals but their connection to the rule of law is questionable.”

(2013) J. Juris. 185
Raz further incubates serious theoretical and practical contradictions by claiming that the authority of the court is to harness legislation to legal doctrines. Unlike to Razian claim, often the legal realm reflects the opposite. However, the Razian proposition might be partly true, if the doctrines are part of the existing rules. Nonetheless, Raz’s idea of the rule of law gives an account in the form of principles that are not part of the existing rules. This brings Raz closer to Dworkin in assigning a role to principles in conveying legislation compatible with doctrines. Thus, the Razian proposition undermines not only positivism itself, but also the citadel of the rule of law.

It should not be mistaken that both the legislative body and judiciary, by the nature of their legitimization authority may engage in the discourse of legitimizing principles. However, an important distinction persists between the legislative legitimization and judicial legitimization. Legislative legitimization can be both an a priori act as well as an a posteriori act, but the judicial recognition is fundamentally an a posteriori act. As an a priori act, the legislative body (e.g., a constituent assembly) having authority to develop constitutionalism, may propound and institutionalize a set of principles into the body of law.

Following the institutionalization of constitutionalism, both the legislative body and the judiciary can exercise their authority constrained by constitutionalism itself. However, when constitutionalism offers more than one possibility of interpretation, it is not the parliament but the judiciary, which recognizes the principles in the form of rules to give effect to the constitution, with the best possible effort of operationalizing equilibrium, efficiency, and optimality. Indeed, with the application of the WG, not only the legislative body, but also the judiciary can immensely contribute to the awareness of the rule of law.

Irrespective of the place of its origination, the idea of the rule of law has achieved universal recognition. For example, among the three ideas of the rule of law explained by Dicey in the eighteenth century, his first idea about the ‘supremacy of law,’ and the second about the ‘equality before the law,’ have been universally recognized as an intrinsic part of the rule of law. Whereas, his third idea associated with explaining a

227. *Id.*

228. *See Dicey, Law of Constitution, supra note*, Kindle Location 5292. He mentions that, “That rule of law, the, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. . . . It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.”

229. *Id.* Kindle Location 5301. Dicey mentions that, “It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals . . .”
constitution as the result of ordinary law, is peculiar to the local conditions of the United Kingdom. Nevertheless, the idea of enforceability of the rights of individuals associated with the concept of ordinary law is universally applicable.\textsuperscript{230}

Though, the idea of the universality of the rule of law is both academically misunderstood and politically contested. The political contestation springs from the ideological intolerance of the supremacy of the rule of law. The academic misunderstanding arises from the disillusionment spread with the notion of a rule by law. The political contestation can be addressed with the limited government in place and the academic disillusionment can be removed with the wider discourse on the IAL.

3.3 THE WG, POSITIVE ORDER, AND LIMITED GOVERNMENT

The separation of powers (authority), check and balances of authority, and judicial review in place are the minimum conditions for a limited government. John Locke, in his \textit{Second Treatises on Civil Government}, was concerned to find out an effective solution to the practical problem of arbitrariness. He posed a question: how power, whoever exercises it, could be prevented from being arbitrary? He found the answer in the erection of liberty by legislative power.\textsuperscript{231} In short, Locke’s conception of the rule of law affirms the idea of a limited government.

The United Nations also recognizes the concept of the rule of law as intrinsic to the idea of a limited government. The Universal Declaration of Human Rights, 1948, resolves that ‘human rights should be protected by the rule of law’, meaning human rights should be protected not through the unenforceable principles but by the positive law itself, which creates a duty to the government.\textsuperscript{232} Considering the rule of law at the very heart of its mission, the UN subscribes the principles of accountable government entrenched in laws.\textsuperscript{233} In other words, the principles of governance have their source in laws;

\textsuperscript{230} \textit{Id.} Kindle Location 5308. Dicey mentions that, “The rule of law, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.”

\textsuperscript{231} Referred in \textit{HAYEK, THE CONSTITUTION OF LIBERTY}, \textit{supra} note, Ch. 11 Kindle Location 6016.

\textsuperscript{232} See UN, \textit{Universal Declaration of Human Rights 1948 (UDHR)}. The Preamble of the UDHR provides that, “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

\textsuperscript{233} See UN, \textit{The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616 (23 Aug. 2004)}. Paragraph 6 of the Report reads, “The rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that
therefore, such principles should be promulgated, enforced, and adjudicated by an independent judiciary. Along with the separation, check and balance of powers, the effective mechanism of judicial review is the inalienable precondition of a limited government. The UN endorses the following principles as to be the part of law. They are:

- Supremacy of law
- Equality before the law
- Accountability to the law
- Fairness in the application of the law
- Separation of powers
- Participation in decision-making
- Legal certainty
- Avoidance of arbitrariness
- Procedural and legal transparency

The list provided by the UN is not an exhaustive list. However, among others, it lacks judicial review. Discernibly, its main focus supports that principles should be legitimate, valid, and enforceable; otherwise, they cannot create any rights or duties. If principles are not translated into laws, consequently they will produce political demagogy. In Rousseau’s terms, political demagogy is a situation where a government may exist, but ‘continually exerts itself against the sovereignty.’ With political demagogy in place, a rule by law state surfaces in determining the nature of constitutionalism and law, placing the idea of a limited government within the purview of political ideology. Under such a framework, laws are changed to meet political interests and conveniences. If there exists only a single ideology, like in an absolute monarchy or in a communist state, perhaps to a certain level, they may command stability, but at the cost of autonomy, freedom, and liberty among others.

Also, in plural but illiberal societies, ideologies often victimize the rule of law. Either they contest both constitutionalism and the constitution or fail to agree to institutionalize the constitutionalism. The failure of the Constituent Assembly of Nepal to formulate constitutionalism and promulgate a constitution during the 2008–2012 period can be taken as one of the examples of a plural but illiberal society where political ideologies are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

234. See ROUSSEAU, supra note, at 75.
dominate the rule of law. At the same time divisions among political ideologies disallow the possibility of positivity of law to be in place. The case of Nepal unmistakably suggests that unless political actors are ready to shed ideologies and stand unwaveringly steadfast in the search for constitutionalism on the positive grounds inspired by the idea of the rule of law, constitutionalism succumbs to the claws of political demagogy. Determination of law by putting political ideology at the center is still true, especially in many illiberal democracies and totalitarian societies. These inherent defects in a rule by law system can only be cured by the positivity of law.

For instance, China can be taken as one of the best examples in this regard. China has a constitution. It has legitimate and enforceable statutes. They are compatible with the Chinese Constitution. Many Chinese laws have contents similar to the contents of their counterpart laws in many democratic societies. Some of the criminal, commercial or business laws can be taken as examples, among others. It also allows private law making through contractual relationships. Like in other countries it has the judiciary to decide legal disputes. It is a hub of foreign investment. Many of its laws are market-friendly as well. The stable political environment is congenial to the growth of the market and promoting foreign investment. China has secured the honor of the second largest economy in the world. It has brought down poverty to the level of around ten percent, which is admirable. Nevertheless, can one appreciate China as an example of a country with the rule of law?

Article 5 of the Chinese Constitution, 1982, provides that, “The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the constitution and the law. All acts in violation of the constitution and the law must be investigated. No organizations or individuals may enjoy the privilege of being above the constitution and the law.”

Reading Article 5 of the Chinese Constitution, one can strikingly notice that China upholds a socialist legal system. The idea of the socialist legal system comes into the spotlight when it is read with Article 1 of the Chinese Constitution, which provides that, “The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.” Article 3 of the Constitution further stipulates that, “... All administrative, judicial and pro-curatorial

organs of the state are created by the people’s congresses to which they are responsible and under whose supervision they operate . . .” The Preamble of the Constitution makes it clear that China is governed under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory with a proletariat dictatorship.

Reading these constitutional provisions, it is clear that the constitution of China is designed not with the autonomy and wisdom of the freethinking people, but from the political ideology of the Communist Party of China. In short, the Chinese Constitution is an ideologically deterministic constitution. The Communist Party (practically, the only political party) holds all power including political leadership in all state apparatus. All laws should be compatible with the socialistic conception. Laws can be made or amended to serve the political ideology.

Regretfully, the judiciary in China is not independent. The judiciary does not have the power of judicial review. Against this background, one can comfortably conclude that China lacks the rule of law and instead holds a hybrid legal system with the predominance of a rule by law legal system. However, the Chinese legal system and laws are gradually adopting universally accepted legal concepts and many of their commercial laws, for example, have adopted legal concepts similar to the legal concepts of commercial laws comparable to any liberal democratic society. In this regard, it can be concluded that the aspirations for the rule of law are hard to be ignored and are growing in China too.

Now a relevant question may arise: is the idea of the rule of law different from law? If the rule of law and law are the same concepts, then should we acknowledge North Korea as having the rule of law, since it does have a constitution and laws and is also governed by those laws? A careful answer leads us to say that there persists a dynamic relationship between law and the rule of law, but they are not the same concept.

The basic proposition is that governance or human relationships should not be merely based on the existence of law, but also the process of making of law, the contents of law, the application of law, and the interpretation of law should be derived from the positive system of the rule of law. In other words, the principles of governance and human relationships should be a part of the rule of law not only of law. If these very dynamics are denied from explaining and theorizing the nature of law, it will unleash an unlimited government, which shatters the positive order and the positivity of law, as well. In quintessence, the principles of the rule of law should be translated into the intrinsic part of the constitutionalism, which gets further internalized in the contents of constitution and other laws including statutes and precedents. In short, we can conclude that a limited government is an essential precondition for ensuring a positive order.
3.4 Positivity, Justice, and the Rule of Law

Justice is positive not normative. Normative concepts not recognized by law or broadly by the legal system, cannot assume a role in deciding the question of rights, duty, authority and liability as discussed above under heading 3.2.2.

Law is all about regulating and facilitating human and institutional relationships. These relationships invite the question of how should they be conducted? Should they be conducted on the basis of normative standards: moral, ethical, religious, ethnic or cultural identity, political ideology, or some other beliefs? Or, should they be conducted on the basis of a positive standard (law)? Could normative standards be ignored altogether while manufacturing law? Is it possible to disregard normative standards from human relationships? Or, in a broader perspective, could law deny normative standards altogether? In technical legal jargon, could law be pure? These questions about the nature of law are inseparable from the realm of the understanding of justice. However, most of these questions have already been discussed and answered above.

It is obvious that the outcomes of justice are cardinal in the enjoyment of rights as guaranteed by law, with specific remedies in place in the case of violation of such rights. However, a question perennially surfaces that on what ground should justice be imparted: on normative or positive grounds? The idea of justice brings the essential fact into light that it is a condition derived from a positive order built on the citadel of the rule of law. Thus, if justice is disconnected from the rule of law, it dissolves with normative standards, which analytically lack legitimacy, authority, and validity.

---

236. The idea of basic human relationships occupies a broad range of descriptions: the relationships between each other at individual level, family relationships, social relationships, organizational relationships, occupational relationships, proprietary relationships, political relationships, religious relationships, cultural relationships, and so on. The relationships between a state and its people also cover a wide area of interactions between: an individual and the government, a local community including an ethnic community and the government, the state organs and socio-politico, cultural, and religious organizations, and a state and the market among others. The idea of maintaining international relationships is also an all-encompassing concept. It covers bilateral, regional, and multilateral relationships among states, people, and between states and international organizations.


238. For a detail discussion, see generally KELSEN, PURE THEORY, supra note. Kelsen explains that pure theory of law describes the law and attempts to eliminate from the object of this description everything that is not strictly law. The aim of pure theory is to free the science of law from alien elements, which is the methodological basis of the theory. In short, the pure theory of law is a theory of positive law.
The ‘Socratic idea of justice’\(^{239}\) can be taken as a model, which signifies that the established rules or laws should define and govern relationships among people, between the state and its people, and shape the modality of international cooperation among states and people. For this purpose, upholding an integrated approach to law is one of the fundamental aims of justice. By ensuring the IAL, which is positively entrenched in the making, existence, and application of law, justice can be administered on the basis of positive standards in order to institutionalize positive relationships. In short, justice should be understood in terms of what the law is.

A question may arise, if the law is unjust or bad? The simple logical proposition is that laws either should be made or amended with the OEE in consonance with the IAL, which is the only remedy to the unjust or bad laws. Ignoring law or bending law for the convenience of normative concept is indubitably the root cause of the unjust or bad laws, to which the only remedy comes from positive standards. Therefore, in short, justice should be done and understood in accordance with the law and not beyond.

**SECTION IV: CONCLUDING OBSERVATIONS**

This paper set off its inquiry about the nature of law with three specific propositions. The first proposition that ‘law is a legitimate, enforceable, and valid standard’ has been analyzed in all three sections of this paper; mainly its basic contours have been explored in sections 1 and 2 above. The second proposition ‘the need for an integrated approach to law’ has been warranted and analyzed in detail in section 2 above. And, section 3 of this paper has vindicated the third proposition ‘all posited laws are not positive; thus to be positive, laws should undergo the test of the IAL’ by offering a methodology of the welfare-grundnorm.

Explaining the three propositions, and analyzing the weaknesses of the mainstream positivism with a view to offering solutions for strengthening positivism in the form of the IAL, this paper has systematically derived three conclusions, as follows:

---

\(^{239}\) Socrates spent his whole life inquiring into the meaning of justice. Throughout his inquiry into the nature of justice Socrates was genuinely seeking to resolve a problem that he considered far too important for academic trifling. For Socrates, justice was the fact of the supremacy of law and the act of abiding by the law. One day before the execution of Socrates, his friends offered him help to escape from prison. There were people willing and ready to help get Socrates out of prison, at no great risks or cost. But Socrates refused to escape from prison, instead choosing death. He refused to abandon the principle he lived for. He valued law and abiding by law higher than unprincipled survival, which signifies the Platonic idea of justice. Socrates was sure that the decision that imposed the death penalty on him was not a correct one; nevertheless, it was a legal decision and he firmly believed that his duty was not to defy the legal decision. Otherwise, social relationships could not be organized by the idea of the rule of law.
First, the nature of law can be explained and theorized only with the adoption of an integrated approach to law, which explicates law as a legitimate, enforceable, and valid standard. This conclusion has been instilled with the discussion and analysis carried out in section 2 of this paper.

Second, the mainstream positivism has failed to offer a systematic explanation of the nature of law. This conclusion has been attained from the discussion carried out in section 1 of this paper. In essence, any explanation or theory of law, which aims to explicate the positivity of law parting with the IAL, can only draw a sloppy description about the nature of law. By treating the nature of law partially from the vantage point of the existence of law alone, the mainstream positivism has undercut the need for positivity in the making, application, and interpretation of law. Hence, the mainstream positivist theories about the nature of law are inadequate.

Third, a theory of law should be able to offer a methodology that would identify clear connections and distinctions between normative and positive standards and offer tools in transmuting normative standards into positive standards. In this regard, this paper has offered the welfare-grundnorm as the methodology, which clearly identifies the connections and distinctions between normative and positive standards and offers tools to transmute normative standards into positive standards. This conclusion has been surveyed from the exploration carried out in section 3 of this paper.

A brief examination of the three essential components of the WG: a positive order, a limited government, and justice according to law would help to remove any ambiguity in regard to chalking out distinctions between normative standards and positive standards that are essential to explicate the nature of law. Only the existence and application of law are not adequate conditions in presenting a persuasive theory about the nature of law and meeting the conditions of the rule of law. The concept of the rule of law demands a coherent existence of validity, legitimacy, and enforceability for ensuring the positive standards in all stages of the life of law: making, existence, application, and interpretation. In other words, through the process of an integrated approach to law, the discrepancies between a rule by law and the rule of law can be addressed. Consequently,

240 In this regard, the statement of Joseph Raz itself exposes the weaknesses of the mainstream positivism. Raz claims that, “… Legal positivism is held to present a static view of the law. Legal positivists, such as Kelsen and Hart, regard the law as a system of rules, or norms. The rules may be changed from time to time. But they are changed by external political intervention ‘from outside’ the law. So far as one is concerned with legal reasoning as such, its point and purpose can only be the interpretation of existing law. Any change or development in the law requires an extralegal injection. It requires input from outside the legal system.” See RAZ, ETHICS IN PUBLIC DOMAIN, supra note, at 238.

241 Some argue that most of the principal figures in the philosophy of law in the twentieth century paid little attention to the issue of the rule of law because for them that issue was approached by first determining what the law is that rules, after which there is little left to say about the rule of law. E.g. see David Dyzenhaus, The Rule of Law as the Rule of Liberal Principle, in RONALD DWORKIN 57 (Arthur Ripstein ed., Cambridge University Press, 2007).
this will also build a union of the law and the legal system, which remains absent in the state of a rule by law. In fact, this union is the foundational basis for ensuring the positivity of law.

With this union in place, the rule of law sets limits to all powers. It tolerates no power superior to it, both at the domestic and international level. In other words, the rule of law brings all politics, ideologies, parties, power centers, institutions, and entities under the framework of law. It declines to maintain exclusive order of a domestic legal system insusceptible to an international legal order. It maintains hierarchy and coordination between different segments of law including domestic and international laws. The rule of law maintains that it is not the sovereign who is supreme; but it is the law, which is supreme, as the highest level of human achievement and the finest creation of human civilization. It is not the command of the Austinian sovereign, which in many occasions has suppressed the democratic aspirations of people and dismantled the condition for the rule of law, but it is the rule of law that is the source of command. Moreover, command in itself cannot be an exclusionary reason as claimed by Joseph Raz. In fact, no command can retain validity if it goes astray beyond the framework of the rule of law. Here, one can comfortably distinguish two varieties of command: under the rule of law and under a rule by law. Command under a rule by law state might be enforceable, but cannot meet the standards of legitimacy and validity.

In conclusion, this paper explicates the nature of law as a positive standard and anticipates that the IAL would provide a common agenda to legal positivism in explaining and theorizing the nature of law along with opening perspectives for discourse and future research.