Chapter 2
Legal Positivism and Real Entities

Abstract In chapter 2 it is suggested that classical legal positivists (i.e. Jeremy Bentham and John Austin) fail to identify the 'real entities' that, supposedly, constitute law. It is suggested that this failure entails a demand for arguments supporting the description of the law given by them. Without such arguments the description is unconvincing. It is also suggested that utilitarian moral theory (and consequentialist moral theory in general) faces similar difficulties.

2.1 Introduction

The first theories to be examined here are the ones presented by Jeremy Bentham and John Austin. They are famous proponents of the legal positivism that evolved in the eighteenth and nineteenth centuries. Of these two theorists, Bentham was the first to express the ideas central to legal positivism. To estimate their relative importance for legal positivism, however, is beyond the scope of this study. The investigation will instead focus on some conceptions they had in common.

It is worth noting that Bentham's theory evolved as he formulated a criticism of William Blackstone's *Commentaries on the Laws of England*. One of Bentham's objections was that Blackstone limited himself to description and thereby counteracted constructive creation (Bentham 1931, p. 101). After a closer look at the description of and approach to law of Bentham and Austin, this objection will be commented on in the conclusion of this chapter.

As we turn to Bentham and Austin the aim will not be to make a comprehensive comparison of their opinions. Instead some conceptions of the law will be pointed to in preparation for more general observations regarding the theories presented by Bentham and Austin.

R. Edvinsson, *The Quest for the Description of the Law*,

2.2 The Expositor and the Censor

Legal positivism in different shapes is connected with conceptions of the law and its dictates as relatively defined objects. It is assumed that these objects can be adequately described and that there is something to be gained from such descriptions.

The works of Bentham and Austin show clear signs of such conceptions. It appears, for instance, in the distinction between "the Expositor" and "the Censor". Bentham calls attention to the importance of distinguishing between description and assessment of the law. According to Bentham, whenever we have something to say on the subject of the law, it is as one of two possible characters. It is either as an expositor or as a censor. The different tasks of these two characters are outlined by Bentham in *A Fragment on Government*: "To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in enquiring after the facts: the latter, in discussing reasons." (Bentham 1931, pp. 98, emphasis and note omitted). He continues: "To the Expositor it belongs to show what the Legislator and his under workman the Judge have done already: to the Censor it belongs to suggest what the Legislator ought to do in the future." (Bentham 1931, p. 99, emphasis omitted). It should be noted that these two tasks, (or functions as Bentham puts it), are taken to be completely distinguishable (Bentham 1931, p. 99).

2.3 Facts Underlying Prescription

Though the distinction between the two different functions might have some merits, it is misleading to suggest that description can refrain from dealing with anything but facts. In a note to his presentation of the above mentioned distinction Bentham claims the following:

> In practice, the question of Law has commonly been spoken of as opposed to that of fact: but this distinction is an accidental one. That a Law commanding or prohibiting such a sort of action, has been established, is as much a fact, as that an individual action of that sort has been committed (Bentham 1931, p. 98 note 1, emphasis omitted).

This needs to be examined in detail. That a certain statute has been passed and that a certain act has been performed might be agreed upon to such an extent that we talk of them as facts. This does not, however, entail that what such a statute prescribes in relation to such acts is clear or certain. Whether or not the act is regulated by the statute remains to be settled. (It is not even clear that it is a fact that an act is or is not of the sort regulated by the statute.) Whether an act should or should not be classified in a way placing it under the concept used in a statute; whether or not the act

should be described in that way, is not a linguistic question.[1] Nor is it self-evident. Bentham seems to have assumed that once it is established what statute is passed, it is also conclusively determined what acts are regulated. Statutes are thus assumed to leave no doubts in this matter.

2.4 Law Treated as a Real Entity

2.4.1 Introduction

In the above-examined part of *A Fragment*, "the law" discussed by Bentham refers to the prescriptions and possibly their form.[2] In this work, he focuses on what can be called discerning the content of the law and how it is formulated. The thorough description of the law given in *Of Laws in General,* on the other hand, deals with law more generally. It concerns what some call the nature of the law. In the following section, it will be investigated what kind of description Bentham makes. It should be noted that the description is alleged to be factual.

2.4.2 Bentham

Bentham's original plan was to clarify what is meant by "laws" in a section at the end of *An Introduction to the Principles of Morals and Legislation* (Bentham 1970:1, p. 207 note i and p. 294 note v). As the project evolved, it grew to become a book of its own: *Of Laws in General,* published after his death. In his introduction to *Of Laws in General,* H.L.A. Hart shows that it is reasonable to assume that the two completed parts of Chap. XVII in the *Introduction* were intended to serve as the first two chapters in what eventually became *Of Laws in General* (Bentham 1970:2, pp. xxxv).

In the second of these parts, Bentham begins an exposé regarding jurisprudence. He claims the following: "Jurisprudence is a fictitious entity: nor can any meaning be found for the word, but by placing it in company with some word that shall be significative of a real entity." (Bentham 1970:1, p. 293).

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[1] Whether or not something is to be considered to be X in the sense of a specific legal rule is not only a linguistic question. It is also determined by the consequences that would result from treating that something in that way. For examples in Swedish law see the treatment of 'eller liknande' ('or similar') in NJA 1996 p. 696, 'innehav' ('possession') NJA 1998 p. 604, or 'träningsmatch' ('practise match') in NJA 1985 p. 788.
The content of a law is thus not settled by any literal meaning of rules.

[2] Cf. the previous quotes regarding the 'expositor' and the 'censor' and types of jurisprudence, and Bentham's discussion regarding substance and form (Bentham 1970:1, p. 295) or his claims concerning expository matter (ibid. pp. 304, 306).

He continues:

> To be susceptible of an universal application, all that a book of the expository kind can have to treat of, is the import of words: to be, strictly speaking, universal, it must confine itself to terminology. Accordingly the definitions which there has been occasion here and there to intersperse in the course of the present work, and particularly the definition hereafter given of the word law, may be considered as matter belonging to the head of universal jurisprudence (Bentham 1970:1, p. 295, emphasis omitted).

Based on this we can conclude that Bentham considered establishing and describing the nature of the law to be parts of "universal jurisprudence". It is also apparent that Bentham found this undertaking to be terminological.

As interesting as this might be in itself, we now turn to the law's relation to "real entities". We can assume that Bentham's claim that we need to place "jurisprudence" in relation to "real entities", can be extended to involve the terminological project of defining the law. "Real entities" are then as central to the "law" as they are to "jurisprudence". Unless the law is a "real entity", it needs to be defined in relation to such in order to have meaning.[3]

It is reasonable to request an explanation of how law is a "real entity" or how it is considered to relate to "real entities". Section 2.5 will convey part of the descriptions of the law given by Bentham and Austin. Based on these descriptions it can be determined if they meet this request.

2.4.3 Austin

In *The Province of Jurisprudence Determined* Austin sets out to discuss something he separates into four parts. Divine laws, positive laws, positive morality and metaphorical or figurative laws are discerned (Austin 1954, p. 1). The central role assigned to positive laws is evident from the beginning. Austin explains: "The principal purpose or scope of the six ensuing lectures, is to distinguish positive laws (the appropriate matter of jurisprudence) from the objects now enumerated" (Austin 1954, p. 2).

In his first lecture, Austin goes on to say: "I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts" (Austin 1954, p. 10)

He found it important to keep the different things called laws separate: "It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science

[3] Cf. "Jurisprudence is a fictitious entity: nor can any meaning be found for the word, but by placing it in company with some word that shall be significative of a real entity." (Bentham 1970:1, p. 293)

of jurisprudence by their being confounded or not clearly distinguished." (Austin 1954, p. 10).

This ambition to distinguish the object examined in such jurisprudence involves a need to clarify what law is. In his introductory "Analysis of Lectures" Austin explains what he intends to do: "In the first of the six lectures which immediately follow, I state the essentials of a law or rule… In other words, I determine the essence or nature which is common to all laws that are laws properly so called" (Austin 1954, p. 3). It is thus obvious that also Austin attempted to provide a general description of the law.

2.4.4 Summary

Both Bentham and Austin strove to give general descriptions of the law in order to set it apart from things like morality and evaluations of the law. They attempted to delineate and clarify what law is by description in terms of unassailable concepts. In Bentham's words, he describes, law in terms of "real entities". In their works, they both seem to assume that there is no fundamental disagreement regarding what law is.

2.5 Description of the Real Entity

Having made some observations about their approach to the description of the law, it is now time to turn to the descriptions made by Bentham and Austin. Bentham condenses his description in a definition:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question (Bentham 1970:2, p. 1, emphasis omitted).

In this definition, the three elements deemed to be the core of his description are found. Law is taken to be a declaration of will. It is, furthermore, the will of a sovereign that is declared. This declaration of will is (as a last element) backed by sanctions to ensure compliance.

Austin's description has a lot in common with Bentham's. The striking difference is that Austin talks about commands instead of declarations of will. In Austin's view, a law is a kind of command: "Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or, rather, laws or rules, properly so called, are a species of commands" (Austin 1954, p. 13, emphasis omitted). Commands are in turn considered to be one kind of declaration of will: "A command, then, is a signification of desire. But a command is distinguished from other significations of

desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire" (Austin 1954, p. 14).

Like Bentham, Austin, points out a connection with sanctions: "The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a sanction, or an enforcement of obedience." (Austin 1954, p. 15, emphasis omitted). Another similarity between the two theories is the role attributed to power and the sovereign. Austin claims: "Laws and other commands are said to proceed from superiors, and to bind or oblige inferiors" (Austin 1954, p. 24, emphasis omitted). He further explains:

> [T]he essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be put in the following manner: - Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author (Austin 1954, pp. 253).

2.6 Problems

After these observattions regarding the general descriptions of the law given by Bentham and Austin, it is time to return to their ambition to define the law by pointing out relations to concrete, undisputed matters. The sections above show how it is reasonable to conclude that Bentham and Austin, through their descriptions, intended to separate the law that they experienced as concrete from more diffuse things like morality. Such an ambition gives rise to some demands on the description. The sovereign, the declaration of will and the command invoked in the description need to be of a certain kind. If the law is supposed to become concrete by the description, or if the description is supposed to show how the law is concrete, the matters referred to in the description need to be concrete. There have to be "real entities" behind them.

At first glance this might not seem problematic. We might claim to have a clear notion of what is meant by the terms "command" and "declaration of will". On closer inspection, however, we notice their vagueness. It is not clear if "will" always needs to be declared in a certain way. Are only written documents of a certain type accepted as declarations of will? Even if it is contended that this vagueness can be eliminated, it can not reasonably be argued that the terms and the so-called "real entities" were discovered without any influence from the notion that using the terms and picturing the entities in that way leads to a reasonable conception of the law.

To make things worse, the problem with vagueness is further intensified since more than one of the terms used in each description is vague. The vagueness of "declaration of will" or "command" is accompanied by the vagueness of "sovereign". Under these circumstances it is tempting to identify the sovereign with a specific

person or group. (This appears to be the position of Bentham and Austin.[4]) This not only reduces the vagueness of "sovereign"; it can also to some extent help clarify "declaration of will" and "command". It can, for instance, be suggested that the declarations that count are the written documents signed by the sovereign. This, however, does not seem to give us a concrete law. Firstly, it is difficult to point out the sovereign. Secondly, regardless of how we define the "sovereign", it declares law only in some of its declarations. It seems to be necessary to specify under what circumstances the declarations are to be considered law. If anything is considered to be law, without being such a declaration, it is also necessary to explain how it can be considered to be law. (Any such explanation seems to make law less concrete.)

If the vagueness is accepted and the sovereign is suggested to be something less specific, such as, the general will of the people (cf. Rousseau 1997) the description seems to fit better with our notion of the law. This, however, makes it very difficult to explain how this will is turned into law by being declared in some way. It is even difficult to ever agree upon what exactly this general will dictates on any topic.

It might be tempting to sidestep these problems of vagueness by assuming that it is common knowledge what the law dictates. With such an assumption, the process of lawmaking derived from the description of the law can be turned around to help us identify the sovereign and the commands or declarations of will. Discerning what the law dictates is, however, not significantly easier than establishing undisputed definitions of the above-mentioned terms. It seems that the reason for describing the law as a system in the first place, to a large extent, was to help us discern just what the law dictates. For this reason, a description excluding part of the law from the description (by depicting that part as exceptional "hard cases"), grants little satisfaction: It is exactly in the difficult cases that are excluded that we have any need of help discerning what the law dictates.

Overall, it must be concluded that Bentham and Austin fail to point out the "real entities" that constitute law. For this reason, they also fail to reach their goal: They cannot give an undisputable description of law as a concrete system.

2.7 Utilitarianism[5]

Closely related to these classical versions of legal positivism is the utilitarian moral theory. This theory is often associated with Bentham. However, he is not its originator. As F.C. Montague points out in his introduction to Bentham's *A Fragment on Government*, Bentham does not even argue for utilitarianism. He rather takes it for granted (Bentham 1931, p. 35).

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[4] See e.g. Bentham (1970:2), p. 5 and Austin (1954), p. 253.
By seeing the sovereign as a specific person or group of persons, the sovereign becomes more 'real'.

[5] I do not claim to be original or profound in my comment on utilitarianism. For a more thorough criticism, see e.g. the contributions by Charles Taylor and Frederic Schick in (Sen and Williams 1982).

Bentham himself makes no claim to be the originator of the principle of maximizing happiness. He explains:

> It was from Beccaria's little treatise on crimes and punishments that I drew, as I well remember, the first hint of this principle, by which the precision and clearness and incontestableness of mathematical calculation are introduced for the first time into the field of morals - a field to which in its own nature they are applicable with a propriety no less incontestable, and when once brought to view, manifest, than that of physics, including its most elevated quarter, the field of mathematics (Bentham 1962, pp. 286).

The ideas of utilitarianism are decidedly older than Cesare Marchese di Beccaria. They can even be said to be part of (empathic) human nature. In the shape of theories prescribing maximization of pleasure they can be traced at least as far back as Plato's *Protagoras*.[6] According to the classical version of utilitarianism, it is the resulting happiness that determines the moral value of an action. One obvious problem, of course, is the difficulties encountered when we attempt to measure relevant happiness. It is hard to determine all the consequences of actions, and it is impossible to measure the resulting happiness, especially, when it comes to other, maybe even future, persons.

In response to the difficulties involved in determining the amount of relevant happiness, it might be suggested that likeliness should be taken into account. In the comparison of alternative actions it is then a happiness, calculated in a probability equation, that determines how actions are to be ranked. The amount of happiness attributed to a predictable outcome of an action is modified by the likelihood of that outcome. The modified amounts of "happiness" of the various predictable outcomes are then brought together in some manner to be compared to the modified "happiness" of the various outcomes of alternative actions. To calculate happiness in this way is not much easier than to measure it.

In addition to this, it is difficult to determine to what extent the distribution of happiness affects the sum of happiness. It can be contended that the amount of happiness, unlike the number of marbles, changes depending on how it is distributed. But calculating the net happiness gained from different levels of satisfaction of some notion of justice or equality seems hopeless.

Notions of justice might even be given a more prominent role in the equation. In agreement with John Rawl's "maximin" rule (Rawls 1973, pp. 152)[7] it might be argued that the situation of those who are worst off takes overriding priority. From the point of view of a utilitarian calculation, this would mean that the resulting happiness for those who are better off could be omitted, as long as consideration for the happiness of those who are worst off (however that is determined) in the various alternatives yields singular results. It is, however, far from

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[6] (Plato 2001 *Protagoras,* p. 354) The use of the phrase 'the greatest happiness for the greatest number' can also be found in works preceding Bentham. Cf. e.g. Hutcheson (1971), p. 164.

[7] "The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others."

obvious that the above-mentioned priority should be granted. Such an overriding priority seems inappropriate when it comes to the allocation of happiness. It might make more sense in the distribution of some other good (as in the case of Rawls' theory of justice).

On the whole, utilitarian theories seem to run into problems they cannot solve. Since all notions of justice, including Rawls', seem riddled with controversy, things are not made any better if it is justice or some other good that is to be maximized in addition to, or instead of, happiness. (A theory suggesting this would, by the way, not be utilitarian.) It is hard to see how any such theory can ever give us any assistance when we find it hard to choose. It seems that morality cannot be turned into a utilitarian calculus because we never find the variables to be plugged into the equation. This leaves us with the question: what is utilitarianism good for?

2.8 Conclusion

Now that the theories of law of Bentham and Austin have been outlined, it is time to make some observations about how they theorise. They both appear to have seen law as a concrete system.[8] They both also showed an ambition to separate law from more diffuse things like morality and the evaluation of the law. They tried to describe law in terms of "real entities" because such a description would render a proper picture of the law.

It can be assumed that they imagined that the dictates of the law would become more evident once the nature of the law was discerned. Seeing the concrete system would help us recognise the well-defined dictates of the law. As it appears "the sovereign", "the declarations of will" and "the commands" are not concepts corresponding to real entities in the way they were assumed to be. It thereby becomes hard to argue that law constitutes a concrete system. To be sure, descriptions using these concepts can no longer serve as conclusive arguments.

Although possible, it is not desirable to make the above-mentioned concepts more concrete by assuming that the dictates of the law are unambiguously evident. This contention is controversial and needs to be proven rather that assumed. With no other arguments for the concrete nature of the system of law than the arguments that assume its dictates to be unambiguously evident; and with no other arguments for the unambiguously evident dictates than the concrete nature of the system; the two beliefs stand in need of support.

Bentham and Austin fail to identify any "real entities" that can be said to constitute law. For this reason their theories provide little help in the identification of the dictates of the law. Since they do not say what other use there would be for their theories, we are left wondering.

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[8] The utilitarianism discussed in the previous section, in a similar way, treats the good as something concrete.

As mentioned above, Bentham objected to Blackstone by claiming that it is not reasonable to limit oneself to a description of the law. One also needs to censure. In connection with this, Bentham stresses the importance of separating these activities. As we turn to the description of the law given by Bentham we see how this description, on the one hand, attempts the impossible (to point out real entities) and, on the other, ends up theorizing without giving any obvious purpose. As fate would have it, even Bentham can be accused of focusing too much on description. It can be argued that his mistake is the assumption that law can be described as such a concrete system that the activities of description and censure can be clearly distinguished.

The central question is left unanswered. We are never told why law should be treated as a concrete system.

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