Is It Better to be Good than Lawful? A Critical Analysis of Austinian *Legal Positivism* in the Philippine Legal and Jurisprudential Systems

ALDEN REUBEN B. LUNA
Department of Legal Management
San Beda University, Manila
aluna@sanbeda.edu.ph

The degree of dissonance in public opinion as regards the efficiency, or lack thereof, of the present administration has been growing by the day. From the most magnanimous of issues, like pandemic response, to the minutest, such as how the President has constantly picked up petty quarrels with the opposition by cursing them on nationally televised appearances, the general public has been at the brink of utter discord on how to accept the actions (even inactions) of the sitting administration.

This divide in public opinion has only been heightened with the decision of Congress on 10 July 2020, after months of exhaustive and comprehensive hearings, to deny the grant of franchise to the multi-media and broadcast giant, ABS-CBN, at a time when the surge of the pandemic is climbing at its summit. On the one hand, there are those who believe that this is simply an assertion of the supremacy of Philippine legal system in application and interpretation, given the perceived violations of ABS-CBN of some domestic laws and even the restrictions of their previous franchise; on the other hand, some construed this is nothing more than a stubborn flexing of the administration's institutional muscles to bring down its opponents and suppress views that are adversarial to the government.

And while ideally, the harmonization of both law and morality (or justice) ought to be the goal of every State, the differences in the interpretation of the concept of morality, as well as diversity in culture and tradition. This dilemma between law and justice, legality and morality, has been the subject of a long line of philosophical and sociological debates, as well as an amusing source of confusion in the varying (sometimes even conflicting) decisions of the Philippine courts in the interpretation and application of laws. Ultimately, the question boils down into the legitimacy of laws.

For this purpose, the researcher will focus on legal positivism from the perspective of John Austin to address the aforementioned dilemma.

Keywords: John Austin; Legal Positivism; Civil Law; Jurisprudence

How to cite this article:
Luna, Alden Reuben B., "*Is It Better to be Good than Lawful?* A Critical Analysis of Austinian Legal Positivism in the Philippine Legal and Jurisprudential Systems", *Scientia* Vol 10 no. 1. (2021), p. 11-29.

Dates:
Received: June 13, 2020
Accepted: February 26, 2021
Published(Online): March 31, 2020

Introduction: The Strongest of Them All?

When high-ranking public officials face the mirror every night before they go to bed or early in the morning before they do their routines, I wonder if they channel their inner *Evil Queen* personae, and ask nonchalantly "*Mirror, mirror on the wall, who is the strongest of them all?*" Of course, the recipients of these probes may be less of a mirror as they are underlings and obsequious followers, who would readily and unhesitatingly respond in a manner that would gratify the prober's pompous desires.

But indeed, who is the *strongest of them all*?

The structure of the current political system of the Philippines embodies the fundamental principle of separation of powers – *one government composed of three co-equal branches* – Legislative, Executive, and Judiciary. "The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution. Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere."[1] As such, ideally, none of the three branches is "stronger" than the other.

However, the institutional structure of the Philippine government seems to lend credence to the perception that the President is the most powerful public official in the country. Under the 1987 Philippine Constitution, he commands the Armed Forces of the Philippines, as its Commander-in-Chief (*Article VII, Section 18*), and represents the country in international negotiations with other sovereign States (*Article VII, Section 21*). With the stroke of his pen, bills are enacted into laws (*Article VI, Section 27*), which he too implements and executes (*Article VII, Section 1*).

The powers of the President are not limited to those provided in the Constitution. "The President, upon whom executive power is vested, has ***unstated residual powers*** which are implied from the grant of executive power and which are necessary for her to comply with her duties under the Constitution."[2]

But what makes the President appear even stronger than his actual panoply is the manner through which he earns the seat – i.e. he needs to get the nationwide fiat to conquer the throne, (*or at least the nod of the greater plurality of the qualified populace*). And to get this nod, he needs to be presented as some sort of an emancipator who will deliver the country from its woes and miseries. Whether he actually embodies the principles he is portraying or not, such façade still creates an ideal guise that people get to either love or hate, support or dissent – and everything in between.

However, despite this perception of power and might, the President and his executive actions can still be the subject of the review and scrutiny of another branch of government – one whose decision can smack, thrash (*I'm exaggerating of course*) and overturn that of the President's. This branch of government is the Judiciary, and its power to review the acts of the President in his official capacity stems from the expanded definition of *judicial review* under Article VIII, Section 1 of the Constitution, which states that "The judicial power shall be vested in one Supreme Court and such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual

[1] Angara vs. The Electoral Commission, 63 Phil. 139, (1936).

[2] Marcos vs. Manglapus, G.R. No. 88211, (October 27, 1989).

controversies involving rights that are legally demandable and enforceable, and to ***determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government***." (*emphasis supplied*) "This development of the courts' judicial power arose from the use and abuse of the political question doctrine during the martial law era under former President Ferdinand Marcos."[3]

But the Supreme Court is quick to prick any bubble of conversation that may arise regarding judicial supremacy over the other departments of government. Justice Jose P. Laurel once stated that "when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not, in reality, nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them."[4] As such, when the courts adjudicate rights and obligations, or when they determine the legality of the acts of the other branch or instrumentality of government, it is simply an assertion of the supremacy of the Constitution, primarily, and other laws of the land.

In the landmark case of *Biraogo vs. The Philippine Truth Commission*[5], the Supreme Court explained that "the role of the Constitution cannot be overlooked. It is through the Constitution that the fundamental powers of government are established, limited, and defined, and by which these powers are distributed among the several departments. **The Constitution is the basic and paramount law to which all other laws must conform and to which all persons**, including the highest officials of the land, must defer. Constitutional doctrines must remain steadfast no matter what may be the tides of time. It cannot be simply made to sway and accommodate the call of situations and much more tailor itself to the whims and caprices of government and the people who run it." (*emphasis supplied*)

As such, as to the question *of who is the strongest of them all*, the ideal answer is none of the three branches of the government. Rather, it should be, *albeit ideally,* the Constitution. And as the primordial sentinel of the highest law of the land, the Supreme Court is mandated with ensuring that the Constitution, and consequently, all other existing laws and regulations in the Philippines, are upheld at all times. This mandate is further strengthened given the fact that under the Civil Code of the Philippines, "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines. (*Article 8*)" Judicial decisions rendered by the Supreme Court are informally called *jurisprudence*.

This judicial obligation is generally reflected in the courts' application of laws in the resolution of actual controversies involving demandable rights and obligations. When a person is proven guilty of committing the crime of theft, he should be punished strictly based on the provisions of the law being invoked and used – not upon any unwritten custom, nor based on the sole wisdom of the judge. When a regular employee is not paid his 13th month pay, the courts have the power to order the employer to make such payment based on the Labor Code of the Philippines – not upon any virtue or principle, no matter how profound the same is.

[3] Kilusang Mayo Uno, et al. vs. Hon. Benigno Aquino III, et al., G.R. No. 210500, (02 April 2019).
[4] Angara vs. The Electoral Commission
[5] G.R. No. 192935, (07 December 2010).

But in so applying the law, strictly and down to its last punctuation mark, it would seem that it leaves judges very little room for liberality. For example, a judge cannot punish an act, no matter how heinous and appalling it is, if there is no law defining the same as a crime or prescribing for its penalty. In 2008, Hayden Kho infamously set the internet ablaze with the videotaped sexual acts he had with Katrina Halili. While Kho was stripped off his professional license, he was spared from any criminal liability. The reason being that the criminal action filed against him was under Republic Act (R.A.) No. 9262, otherwise known as the Anti-Violence Against Women and Children, and the evidence presented was not enough to constitute the alleged offense. The same would have been the subject of a more appropriate prosecution under R.A. No. 9995[6], otherwise known as the Anti-Photo and Video Voyeurism Act of 2009. However, when the alleged videotaping was committed, R.A. No. 9995 has not yet been enacted.

Conversely, a judge cannot simply ignore the glaring provisions of law that speak of punishment, even if he has personally witnessed the social injustices and atrocities the accused has experienced which led him into committing the crime, and believes that he should not be punished so severely.

As the old adage goes, *dura lex sed lex* – roughly translated as *the law may be harsh, but it is the law.*

These were the very words used by Presidential Spokesperson Harry Roque in trying to justify Congress' decision to deny the grant of a franchise to the multi-media and broadcast giant, ABS-CBN. Roque, in one interview, said "*that is why if he (President Duterte) could, he probably would have done something for ABS-CBN franchise, but the President is a lawyer. But the law may be harsh, as we said earlier, dura lex sed lex*"[7] The National Telecommunication Commission (NTC), in a separate interview, similarly defended the issuance of the closure order, citing that it just upheld the law. "*Whether it was harsh or not, it is still the law*," said NTC Deputy Commissioner Edgardo Cabarios.[8]

However, Supreme Court Associate Justice Marvic Leonen himself argued that there is a blurry line between legality and justice: "*Dura lex sed lex is not an invocation to uncritically accept an unjust act. A lawful grant of power to a person/entity doesn't guarantee that it is always wisely used. At times, what is called legal may not be just. Our collective duty is to make sure the legal will also be just.*"[9]

This now poses a dilemma as regards the application of the law – should it be strictly applied, regardless of its effects, or should judges be given a liberal leeway to go beyond the law if such strict application would run counter against the fundamental principles of justice and morality?

This dilemma between law and justice, legality and morality, has been the subject of a long line of philosophical and sociological debates, as well as an amusing source of confusion in the varying (*sometimes even conflicting*) decisions of the Philippine courts in the interpretation and application of laws. And while the merger of legality and morality is ideal, it does not always come to fruition. This may be put to the test

[6] Under this Act, mere taking photo or video coverage of a person or group of persons performing sexual act or any similar activity or capturing an image of the private area of a person/s such as the naked or undergarment clad genitals, public area, buttocks, or female breast without the consent of the person/s involved and under circumstances in which the person/s has/have a reasonable expectation of privacy, is already punishable (*Section 4*).

[7] Catalina Ricci Madarang, ***Defining 'Dura Lex, Sed Lex' in the Context of ABS-CBN Shutdown***, Philstar.com, https://interaksyon.philstar.com/trends-spotlights/2020/05/07/167978/define-dura-lex-sed-lex-in-the-context-of-abs-cbns-shutdown/, (Accessed on 08 January 2021).

[8] Ibid.

[9] Ibid.

anew as the Supreme Court determines the constitutionality of R.A. No. 11479, otherwise known as the Anti-Terrorism Act of 2020.

To this dilemma, legal positivism seeks to offer a simple answer – laws should be interpreted and applied as *law,* and not as an offshoot of morality. "Along with natural law theory, legal positivism is one of the two great traditions in legal philosophy. Its adherents include important nineteenth-century figures like John Austin and Jeremy Bentham, as well as twentieth-century thinkers like Hans Kelsen, H. L. A. Hart, and Joseph Raz. All positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention (*the social thesis*); second, that there is no necessary connection between law and morality (*the separability thesis*)."[10]

The primary purpose of this study is to assess and evaluate the influence of legal positivism in the Philippine legal system, especially on Philippine jurisprudence. However, this research will mainly focus on the concept of legal positivism as espoused and expounded by John Austin.

The Great Expectations

In analyzing the impact of Austinian legal positivism in the Philippine legal and jurisprudential system, let us first look at the two general, yet profoundly great expectations existing in almost all of modern society – that of obedience and that of being taken care of. On the one hand, there is the imposition of rules that demands deference; on the other hand, there is the anticipation that such rules are meant to promote and protect the general welfare and common good. And while these two social expectations, in principle, should complement each other, they do not always dance along with the same tune and blend towards a harmonious melody. And given that expectations involve a great deal of perception, conflict sometimes arises in the interpretation and implementation of these two social sensibilities.

Perception is important in our appreciation of truth. As finite beings, we only perceive reality in piecemeal. It is not a matter of choice, but an innate restriction to our humanity. What we get to choose is where to look or in what angle we want to see something – or someone. We never experience reality in its totality. We can only see something from a particular vantage point, at a specific time, within the confines of a limited space.

Our behavior and social expectations are also generally regarded as matters of perception as they are largely influenced by environment and culture. Generally, we behave in accordance with what culture dictates as socially acceptable conducts, and we try to avoid doing those which will lead us into a ghetto of discrimination and isolation. Through simple observation, we can see that the grasp of cultural persuasion seems to be an inescapable thoroughfare, given that mechanisms for conformity are present in almost every facet of social living. Going against the social current may not only result in a simple reprimand but may even steer towards social indignation and cultural discrimination. The influence of culture runs deep into the most basic component of individual personality, such as the concept of *normality.*

> The concept of the normal is properly a variant of the concept of the good. It is that which society has approved. Normal action falls well within the limits of expected behavior for a particular society. Its variability among different peoples is essentially a function of

[10] Jules L. Coleman and Brian Leiter, ***Legal Positivism, A Companion to Philosophy of Law and Legal Theory, 2nd edition,*** (Oxford, UK: Blackwell Publishing Ltd., 2010), 228.

> the variability of the behavior patterns that different societies have created for themselves, and can never be wholly divorced from a consideration of culturally institutionalized types of behavior.[11]

While the rewards and punishments attached to compliance or non-compliance with social norms are by themselves strong motivators to toe the line, they can only do as much to compel conformity. Hence, these norms generally metamorphose into State regulations and are codified into laws to reinforce compliance and enhance social order - where non-conformity will not only result in social discrimination, but may also lead to socially approved chastisements such as the amputation of one's freedom, and worse, even one's death.

An established government is the face of the institutionalization of social norms. Through its legislative and rule-making power, the government has been endowed with the authority to shape expected social behavior. And indeed, our social existence is bombarded, if not completely dominated, with *do's* and *don'ts*, obligations and prohibitions, and duties and proscriptions. Rules as regards how we ought to behave and regulations as to what actions are forbidden, govern almost every facet of society. From the minutest of daily ordeals such as crossing the street, to the magnanimous ones like territorial disputes between nations, systems are in place to steer the wheel towards boosting the probability of social order. And while this might seem like a curtailment, to a certain extent, of our esteemed freedom, it is a price that societies are generally willing to pay in exchange for peace and harmonious social relations.

> Thus, so far as men try to get the better of those who have the power to harm them, fear of death leads to competition; but it can also incline men to surrender themselves up to one who guarantees to protect their lives. Again, love of "commodious living" inclines men to competition; but it can also incline them to take an easier course and resign themselves to having less than they would like, for the sake of holding on to what they already have.[12]

As such, laws and governmental rules demand obedience from those upon which they are imposed, by reason simply of their existence.

At the other end of this spectrum of expectations are the people, who in turn expect that such rules are going to promote their welfare and protect their rights. This is especially true in States where the recognized source of sovereignty is the people, like the Philippines. Section, Article II of the 1987 Philippine Constitution (*hereafter referred to as "Constitution" for brevity*) declares that "the Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them." As such, there exists a reasonable expectation from the people that whatever laws the government would enact are aimed at upholding the common good, protecting fundamental rights, and augmenting social existence.

The problem arises when there is a conflict between what the government expects from the people and what the people expect from the government. And in the face of such conflict, what should prevail? For John Austin, the answer is clear: as long as laws are derived from a legitimate source and are commands of established human sovereigns, then there is only one expectation – i.e., we ought to follow these laws regardless of how their merits are perceived.

[11] Vincent Ryan Ruggiero, ***Thinking Critically About Ethical Issues***, 8th edition, (New York, USA: The McGraw-Hill Companies, Inc., 2012), citing Ruth Benedict, ***Anthropology and the Abnormal***.

[12] W.T. Jones, ***A History of Western Philosophy: Hobbes to Hume, 2nd edition***, (San Diego, California: Harcourt Brace Jovanovich, Inc., 1969), 145.

John Austin in a Nutshell

John Austin[13] is regarded as one of the most influential pioneers of legal positivism – the view that the legitimacy and authority of law depend on social factors, such as the structure of governance or existing State policies, and not on its merits or its compliance to certain moral ideals and principles. In his own words, "the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."[14]

In general, the positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems exist. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient, or imprudent is never sufficient reason for doubting it. According to positivism, the law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.). Austin thought of the thesis as "simple and glaring".[15]

In other words, legal positivism does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to the law. Positivists do not judge laws by questions of justice or humanity, but merely by how the laws have been created.[16]

Through his works, Austin sought to arrive at a morally neutral analysis and description of laws – independent and separate from other philosophical undertakings that measure the validity and legitimacy of laws through the lens of ethics, epistemology, and even metaphysics. One example of these schools of thought that Austin wanted to depart from is the *natural law theory*.

Succinctly, Aquinas identified four different kinds of law: the eternal law, the natural law, the divine law, and human (positive) law. For present purposes, the important categories are natural law and positive law. According to Aquinas, (genuine or just) positive law is derived from natural law. This derivation has different aspects. Sometimes natural law dictates what the positive law should be: for example, natural law both requires that there be a prohibition of murder and settles what its content will be. At other times, natural law leaves room for human choice (based on local customs or policy choices).[17] Aquinas believes that positive law is derived from natural law

[13] Austin began to study law in 1812 after five years in the army and from 1818 to 1825 practiced unsuccessfully at the chancery bar. His powers of rigorous analysis and his uncompromising intellectual honesty deeply impressed his contemporaries, and in 1826, when University College, London, was founded, he was appointed its first professor of jurisprudence, a subject that had previously occupied an unimportant place in legal studies. He spent the next two years in Germany studying Roman law and the work of German experts on modern civil law whose ideas of classification and systematic analysis exerted an influence on him second only to that of Bentham. Both Austin and his wife, Sarah, were ardent Utilitarians, intimate friends of Bentham and James and John Stuart Mill, and much concerned with legal reform. Austin's first lectures, in 1828, were attended by many distinguished men, but he failed to attract students and resigned his chair in 1832. In 1834, after delivering a shorter but equally unsuccessful version of his lectures, he abandoned the teaching of jurisprudence. He was appointed to the Criminal Law Commission in 1833 but, finding little support for his opinions, resigned in frustration after signing its first two reports. In 1836 he was appointed a commissioner on the affairs of Malta. The Austins then lived abroad, chiefly in Paris, until 1848, when they settled in Surrey, where Austin died in 1859. (Britannica.com, https://www.britannica.com/biography/John-Austin, accessed 25 January 2021)

[14] Stanford Encyclopedia of Philosophy, ***John Austin***, *https://plato.stanford.edu/entries/austin-john/#AustView*, citing Lecture V, p. 157 (Accessed on 27 January 2021).

[15] Ibid.

[16] Internet Encyclopedia of Philosophy, ***Legal Positivism***, https://iep.utm.edu/legalpos/ (accessed on 26 January 2021)

[17] Brian Bix, ***Natural Law Theory, A Companion to Philosophy of Law and Legal Theory, 2nd edition***, (Oxford, UK: Blackwell Publishing Ltd., 2010), 213.

and that the legitimacy of positive law largely depends upon its compliance or consistency with the natural law. To this end, Aquinas believed that only just laws possess a binding effect upon the people and upon conscience itself, i.e. those human laws which are consistent with the natural law and are promulgated for the common good. His definition of positive law largely reflects his idea of what constitutes a just law, i.e. *an ordinance of reason for the common good of a community, promulgated by the person or body responsible for looking after that community*.

Furthermore, "natural law theory accepts that law can be considered and spoken of both as a sheer social fact of power and practice and as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them. This dual character of positive law is presupposed by the well-known slogan *unjust laws are not laws.*"[18] The phrase *lex iniusta non est lex* is often ascribed to Aquinas, and is sometimes given as a summation of his position and the (traditional) natural law position in general. While Aquinas never used the exact phrase above, one can find similar expressions: 'Every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law'; and '[Unjust laws] are acts of violence rather than laws; because … a law that is not just, seems to be no law at all"[19] In other words, natural law theorists are willing to go as far as declaring laws that do not comply with the fundamental principles of justice and respect for human dignity as *not laws*. Ultimately, therefore, natural law theorists believe that legality is necessarily connected and anchored upon morality.

Austin seeks to depart from the moral confines of natural law theory and liberate the study of law from being a mere adjunct of ethics or metaphysics – positive law from natural law and/or divine law. "Austin adopted the classification of laws initially developed by his great and venerated predecessor, John Locke. The 17th century philosopher used the phrase *laws properly so-called*. He also divided these laws into three types-- divine, civil, and moral. In the same fashion, Austin conceived of law properly so-called as the commands of God, certain rules or positive morality, and positive law. Only the last is the subject-matter of the science of general jurisprudence which he so painstakingly attempted to develop."[20] In his article *The Province of Jurisprudence Determined*, he was quick to differentiate the laws of the Divine and the laws of man, to clarify what in his perspective should be included in any consideration or study of laws and jurisprudence.

> "The whole or a portion of the laws set by God to men is frequently styled the law of nature or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the Divine law, or the law of God. Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously. Of the laws or rules set by men to men, some are established class by political superiors, sovereign, and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of the rules thus superiors, established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term law,

[18] Stanford Encyclopedia of Philosophy, ***Natural Law Theories***, https://plato.stanford.edu/entries/natural-law-theories/#LexIniNonEstLexDoSerUnjLawBinLeg (accessed on 27 January 2021).
[19] Bix, ***Natural Law Theory***, 213.
[20] Western Australian Law Review, ***John Austin, Judicial Legislation and Legal Positivism***, https://www.austlii.edu.au/ (Accessed on 25 January 2021).

> as used simply and strictly, is exclusively applied. But, as contradistinguished to natural law, or the law of nature (meaning, by those expressions, the law of God), the aggregate of the rules, established by political superiors, is frequently styled positive law, or law existing by position. As contradistinguished to the rules which I style positive morality, and on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of positive law. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, positive law. though rules, which are not established by political superiors, are also positive, or exist by position, if they are rules or laws, in the proper signification of the term."[21]

For Austin, there is no reasonable and necessary connection between morality and law, between the divine/natural law and human/positive laws; and judges shouldn't tire themselves in creating or manufacturing one in interpreting or applying the law. For instance, when judges resolve an issue or case, they should not go beyond the confines of the law and simply adopt and employ the same *as is* to the given situation – regardless of whether or not he believes that the law is just or fair or right (*in a moral sense*).

He characterized positive law as a command or order of a human sovereign backed by the threat of sanction in case of non-compliance thereto. He made no mention of the common good or any other intrinsic criterion to validate the existence of a rule as law. What Austin considers as the proper yardstick for determining the legitimacy of a law is its *source* – i.e., the established human sovereign as recognized by the general populace and to which the people render habitual deference and obedience. "For Austin, the sovereign is a particular person, namely that individual who, as a matter of fact, happens to have secured the habit of obedience, but who herself is not in the habit of obeying anyone."[22] In other words, by the sovereign, he refers to an established institution that exercises recognized superiority over others. "Superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[23] Austin sees the presence of *command* as an essential component of the law. "Every law or rule (taken with the largest signification which can Lam or rules be given to the term properly) is a command. Or, rather, laws or rules, properly so-called, are a species of commands."[24]

And whenever there is a command, there is a corresponding duty. "Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed. Concisely expressed, the meaning of the correlative expressions is this. He who will inflict evil in case his desire be disregarded utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregards the desire is bound or obliged by the command."[25] And for him, these commands must come from a human sovereign.

In other words, laws are commands of a sovereign. And to ensure compliance thereto, another integral part of the law is the corresponding sanction for those who fail or refuse to oblige. Austin defines sanction as "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."[26] To him, a command without the threat of sanction on the occasion of non-compliance is merely an expression of one's

[21] John Austin, ***The Province of Jurisprudence Determined*** (London, UK: John Edward Taylor, 1861), 19.

[22] Coleman and Brian Leiter, ***Legal Positivism***, 231.
[23] Austin, ***The Province of Jurisprudence Determined***, 29.
[24] Ibid., 21.
[25] Ibid., 22.
[26] Ibid.

desire or a simple request. It is the fear of being punished that compels compliance. As such, the greater the sanction, the stronger the deterrent becomes and the more likelihood for public obedience.

> "If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party, commanding to inflict an evil or pain in case the desire be disregarded… If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request."[27]

He then went on to explain that when a command is clothed with the threat of sanction, it creates a duty on the part of those who are ordered to comply. The fear of being castigated is transformed into a sense of obligation. "Without sanctions, commands would really be no more than requests. Agents act in compliance with the law's demands in order to avoid the imposition of sanctions. It is the threat of sanction that gives agents a (prudent) reason to act and thus the sanction accounts for law's normativity."[28]

> "Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command or to violate the duty which it imposes. Command and duty are, therefore, correlative terms… Wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed."[29]

Based on the aforementioned, it is clear that Austin regards the *source* of law as the ultimate determinant of its existence, not its substantive merits. It is one of social fact, not of intrinsic value. Therefore, so long as the *rule* or *norm* was duly enacted or codified into law by the proper legislative arm of the government based on its established procedures, and that its imposition is coupled with the threat of punishment or sanction, then the same is already regarded as law, in its strictest sense – even if said law may be viewed or criticized as being unfair to a particular sector of society and regardless if its implementation may have an adverse effect to some.

In other words, a law exists because the sovereign willed it into existence, not because it promotes some basic social good or upholds certain fundamental moral principles. In a nutshell, for Austin, the law is the order of a "sovereign" backed by a threat of sanction in the event of noncompliance. A norm is a law, then, only if it is the command of a sovereign. Legality, on this account, is determined by its source – that is, the will or command of a sovereign – not its substantive merits. The criteria of legality are matters of fact, not value.[30]

Concerning this, when Austin speaks of jurisprudence and the role of judges in applying the law, he believes that they (judges and justices) should not be afforded with much leeway in the interpretation and application of the law, to depart from what is expressly written. The law should be applied simply because it is the law, and not so much on its effects and/or repercussions to the public. For Austin, "the proper domain of jurisprudence was the descriptive analysis of the positive law, its basic concepts and relations. Normative analysis of law, he thought, was the proper domain of legislation, not jurisprudence, and the two should not be confused, just as law and morality should not be confused."[31]

[27] Ibid., 21.
[28] Coleman and Brian Leiter, ***Legal Positivism***, 231.
[29] Ibid., 22.
[30] Coleman and Brian Leiter, ***Legal Positivism***, 231.
[31] Patricia Smith, ***Feminist Jurisprudence, A Companion to Philosophy of Law and Legal Theory, 2nd edition***, (Oxford, UK: Blackwell Publishing Ltd., 2010), 291.

Austinian Legal Positivism and the Philippine Legal and Jurisprudential Systems

The aforementioned approach to the philosophical study of law resonates deeply into the basic tenets of legislation and law enforcement – i.e., *we have to obey the law, because it is the law and our duty-bound to comply*. People can argue against the reasonableness of certain laws, but they should still act as told and behave accordingly – even if they disagree with such laws or with those responsible for its codification. The same also seethes deep into the manner that the courts resolve issues presented before their chambers and in the manner they apply and interpret laws.

As mentioned above, this is reflected in the legal maxim *dura lex sed lex*, which is roughly translated as "*the law may be harsh, but it is the law*." This is especially true in countries that follow the framework of *civil law*[32], like the Philippines, rather than that of the *common law*.

> Briefly, *common law* is generally uncodified. This means that there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on precedent, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the appropriate sentence based on the jury's verdict. *Civil Law*, in contrast, is codified. Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution; procedural law establishes how to determine whether a particular action constitutes a criminal act; and penal law establishes the appropriate penalty. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code.[33]

[32] The civil law system traces its roots from the early legal system of the ancient Roman state. The early Roman legal system saw the permeation and adoption of Grecian philosophy. Initially, the primitive government of ancient Rome was composed of an elective king, a council of nobles, and a general assembly. War and religion were administered by the king, and he alone proposed the laws, which were debated in the Senate and ratified or rejected by a majority of the votes in the 30 parishes of the city. Civil law balanced the rights and fortunes of the seven classes of citizens and guarded the observance of contracts and the punishment of crimes. Eventually, the powers of the kings started to fade into oblivion. When the last Tarquin king started to resort to lawless despotism, the rule of the patricians started to emerge. The decay of royal power saw the rise of aristocratic dominion. "At this point, the law was both lex and jus, command and justice; it was a relation not only between man and man but between man and the gods. The crime was a disturbance of that relation, of the pax deorum or the peace of the gods; law and punishment were in theory designed to maintain or restore that relation and peace. Since priests were the autocracy at that time, they shaped the law to suit their religious ends.
However, where the law is based mainly on religious rituals, the law stagnates. The processes of thought are frozen by the countervailing fear of eternal damnation for those who think too much. In the case of Romans, early religion was not one of pure relation with an all-knowing god; it was one of a public observance aimed at promoting social cohesion and loyalty to the state. As such, the Romans gradually began to be weaned away from their gods with respect to the creation and formation of law.
While the civil law as commissioned during the ancient Roman state was lost to the West within decades of its creation, it was rediscovered and made the basis for legal instruction in eleventh-century Italy, and the sixteenth century came to be known as Corpus iuris civilis. Succeeding generations of legal scholars throughout Europe adapted the principles of ancient Roman law in the Corpus iuris civilis to contemporary need. Medieval scholars of Catholic church law, or canon law, were also influenced by Roman law scholarship as they compiled existing religious legal sources into their comprehensive system of law and governance for the Church, an institution central to medieval culture, politics, and higher learning.
By the late Middle Ages, these two laws, civil and canon, were taught at most universities and formed the basis of a shared body of legal thought common to most of Europe. The birth and evolution of the medieval civil law tradition based on Roman law was thus integral to European legal development. It offered a store of legal principles and rules invested with the authority of ancient Rome and centuries of distinguished jurists, and it held out the possibility of a comprehensive legal code providing substantive and procedural law for all situations. As civil law came into practice throughout Europe, the role of local custom as a source of law became increasingly important—particularly as growing European states sought to unify and organize their individual legal systems. Throughout the early modern period, this desire generated scholarly attempts to systematize scattered, disparate legal provisions and local customary laws and bring them into harmony with rational principles of civil law and natural law. (Citing Pacifico Agabin, ***Mestizo: The Story of the Philippine Legal System***, Diliman, Quezon City: University of the Philippines, 2011, and Berkeley Law, ***The Common Law, and Civil Law Traditions***, https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf.

[33] Ibid., ***The Common Law and Civil Law Traditions***.

Under the aforementioned *civil law* orientation of the Philippine legal system, if the provisions of the law are clear and unequivocal, both enforcers and adjudicators alike are simply called upon to apply the law without the need for any further interpretation or deeper inquiry as regards its validity, and the people are demanded to conform without question – even if its implementation might be prejudicial to some. As long, as a *rule,* is a law, and its letters are clear, then it should prevail over any attempt at interpreting the same in a different light.

In the case of *Obiasca vs. Basallote*[34], the Supreme Court stated that "when the law is clear, there is no other recourse but to apply it regardless of its perceived harshness." Furthermore, in the case of *Barcellona vs. Bañas*[35], it was ruled, as in a plethora of other Supreme Court decisions, that "where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application. Where the language of a statute is clear and unambiguous, the law is applied according to its express terms."

Similarly, in the case of *Bolos vs. Bolos*[36], the Court explained that "a cardinal rule in statutory construction is that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application. As the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation. This is what is known as the plain-meaning rule or *verba legis.* It is expressed in the maxim, *index animi sermo*, or 'speech is the index of intention.' Furthermore, there is the *maxim verba legis non est recedendum*, or 'from the words of a statute there should be no departure'. As expressed in the Latin maxim *absolute sentencia expositore non indigent,* when the language of the law is clear, no explanation of it is required.[37]

The *raison d' être* for the rule, insofar as the Constitution is concerned, is essentially two-fold: first, because it is assumed that the words in which constitutional provisions are couched express the objective sought to be attained; and second, because the Constitution is not primarily a lawyer's document but essentially that of the people, in whose consciousness it should ever be present as an important condition for the rule of law to prevail.[38]

Austin's seemingly rigid yet very simple approach to the study of the legitimacy of laws can also be seen in the provision of the Civil Code of the Philippines. Specifically, under Article 3, it is stated that "ignorance of the law excuses no one from compliance therewith." A person cannot hide behind the veil of ignorance or obliviousness to escape from the obligations imposed upon him by law or from the sanctions attached thereto should he/she fail to comply accordingly. Once a law has been duly enacted and properly published, a conclusive presumption is created that every person knows the law – even if in truth some people have no "actual" knowledge of the same. As ruled by the Supreme Court in the case of *Zulueta vs. Zulueta*[39], this principle is "founded not only on expediency and policy but on necessity," because to allow otherwise would result in social disarray and disorder where people can simply pretend not knowing certain laws to elude sanction for violating the same. This approach is positivist in character because it puts primacy upon the legitimacy and enforceability of law as willed into existence by the sovereign, through the established governmental processes for legislation.

[34] G.R. No. 176707 (February 17, 2010).
[35] G.R. No. 165287 (September 14, 2011).
[36] G.R. No. 186400 (October 20, 2010).
[37] Ibid., citing Rolando Suarez, ***Statutory Construction*** (2007), 171.
[38] G.R. No. 202242, (17 July 2012).
[39] G.R. No. 428 (April 30, 1902).

The strict adherence to the law is not only incumbent upon the people, but also on those required to apply them – such as the Judiciary. When a judicial issue is presented before them, they are required to resolve the same by strictly applying the law, especially when the law is clear as explained above, regardless of their personal opinions on the matter or even if they perceive the law as unjust. Judges cannot withhold judgment simply because they feel like the application of a particular law is unfair, given the circumstances. Under Article 5 of the Revised Penal Code of the Philippines:

> Whenever a court knows any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision and shall report to the Chief Executive, through the Department of Justice, the reasons which induce the court to believe that said act should be made the subject of penal legislation. In the same way, the court shall submit to the Chief Executive, through the Department of Justice, such statement as may be deemed proper, without suspending the execution of the sentence, when strict enforcement of the provisions of this Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice and the injury caused by the offense.

As provided herein, judges should render judgment based on existing laws, despite their differing personal opinions on such laws and in their applicability. At most, they can bring such *opinion* to the attention of the Executive Department, but without withholding judgment on an issue that is ripe for adjudication.

Another matter closely related to the nature of law as explained by Austin is the issue of judicial legislation. Austin discredits the opinion that "*judge-made laws*" are similar or equivalent to a law properly and actually enacted by the sovereign, to wit:

> To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish fictions with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths… When judges transmute a custom into a legal rule, the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from the authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence.[40]

Similarly, in the Philippines, the principle of separation of power generally prohibits judicial legislation. In the case of *Silverio vs. Republic of the Philippines*[41], which involves the issue of whether the court can grant *a change of gender* in complainant's public documents after undergoing sex reassignment surgery despite the absence of a law allowing the same, it was ruled that the "court has no authority to fashion a law on that matter, or anything else. The Court cannot enact a law where no law exists. It can only apply or interpret the written word of its co-equal branch of government, Congress."

The Court further explained in this case that "the statutes define who may file petitions for change of the first name and for correction or change of entries in the civil registry, where they may be filed, what grounds may be invoked, what proof must be presented, and what procedures shall be observed. If the legislature intends to confer on a person who has undergone sex reassignment the privilege to change his name and sex to conform with his reassigned sex, it has to enact legislation laying down the guidelines in turn governing the conferment of that privilege." And while the Judiciary is empowered to interpret laws, the same is still limited by the restrictive confines of the laws being interpreted and under the general direction of the legislative intent behind such laws.

---

[40] Austin, ***The Province of Jurisprudence Determined***, 35.
[41] G.R. No. 174689 (October 22, 2007).

In another case, where the counsel is urging the Supreme Court to adopt a liberal interpretation of a particular law because he believes that the same does not clearly convey and reflect the legislative intent, the Court ruled that "By liberal construction of statutes, courts from the language use, the subject matter, and the purposes of those framing them can find their true meaning. There is a sharp distinction, however, between the construction of this nature and the act of a court in engrafting upon a law something that has been omitted which someone believes ought to have been embraced. The former is liberal construction and is a legitimate exercise of judicial power. The latter is judicial legislation forbidden by the tripartite division of powers among the three departments of government, the executive, the legislative, and the judicial."[42]

Finally, Austin's *separability thesis,* where he claims that the legitimacy and existence of law are separate from its possible substantive moral value or implication, can also be observed in certain decisions of the Supreme Court where it struck down certain governmental measures for being violative of the Constitution despite nobility in intent and virtuousness of purpose. One such example is the Philippine Truth Commission (PTC) of then President Benigno Aquino III. Riding high on his 2010 election victory, and staying true to his slogan "*kung walang corrupt, walang mahirap*," President Aquino immediately issued Executive Order (E.O.) No. 1 upon assumption to office. E.O. No. 1 created PTC, which was tasked to specifically investigate reported cases of graft and corruption allegedly committed during the administration of former President Gloria Macapagal Arroyo. However, in the case of *Biraogo vs. Philippine Truth Commission of 2010*[43]*,* the Supreme Court struck down E.O. No. 1 for violating the constitutional provision on equal protection of laws[44], as it only singled out the administration of Arroyo, instead of including all other previous administrations. In this case, the Supreme Court ruled that:

> Equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed… E.O. No. 1 suffers from arbitrary classification. The PTC, to be true to its mandate of searching for the truth, must not exclude the other past administrations… While reasonable prioritization is permitted, it should not be arbitrary lest it be struck down for being unconstitutional… To reiterate, for a classification to meet the requirements of constitutionality, it must include or embrace all persons who naturally belong to the class.

In this case, it can be seen that not because an act or measure is motivated by ethical and noble intentions, doesn't mean it will prevail over the strict application of the law and the Constitution.

Finally, in a separate opinion penned by Justice Vitug in the case of *Estrada vs. Escritor*[45]*,* the Court explained that there lies a distinction between what is moral and what is legal, and that at the end of the day, as long as the *ethical* is not codified into law, then the latter should prevail.

> Law and morals, albeit closely connected, may proceed along different planes. Law is primarily directed at man's behavior while morals are directed at his animus or state of mind. While the law often makes reference to one's state of mind, it does not, however, punish the existence of immoral intent without more. It requires only that at the risk of punitive sanctions for disobedience, one must refrain from the temptation to act under such intent to the detriment of another. The ethical principle is generally cast, affirmatively or negatively, in the form of a direct command, whereas the legal rule speaks, generally, of the consequences

[42] Tañada vs. Yulo, et al. G.R. No. L-43575, (31 May 1935)
[43] G.R. No. 192935 (December 7, 2010).
[44] "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied of the equal protection of laws." (Article III, Section 1)
[45] A.M. No. P-02-1651, formerly OCA I.P.I. No. 00-1021-P, (04 August 2003).

> that attend the violation of a duty. As to purpose, law and morals further diverge. Morals strive for individual perfection, while law aims at harmony in the community.
>
> Not all societal mores are codified into laws. We have yet to see a law outlawing vanity, pride, gluttony, or sloth. Nor are all laws necessarily moral. Slavery is outlawed but not so in our distant past. Laws allowing racial segregation prejudicial to blacks or denying the right to suffrage to women may seem to be relics of a long-gone uncivilized society if one forgets that the abolition of these "immoral laws" is but less than a century ago.
>
> The observation brings to the fore some characteristics of morals, which make it unwise to insist that it be, at all times, co-extensive with the law — First, morals are not entirely error-free. To insist that laws should always embody the prevailing morality without questioning whether the morals sought to be upheld are in themselves right or wrong would be a dangerous proposition. Second, morals continuously change over time, often too slowly to be immediately discerned. To ensure that laws keep pace with the ever-changing moralities would be quite a perplexed, if not a futile, endeavor. Third, standards of morality vary. Modern society is essentially pluralist. People of different faiths owe common allegiance to the State. Different moral judgments flow from varying religious premises that, obviously, the law cannot all accommodate.

Given all the aforementioned similarities of the Philippine legal and jurisprudential systems with principles ushered in by Austinian legal positivism, does this mean that there is no room for liberality and flexibility for judges in the application of the law – that it is simply a matter of *dura lex sed lex* despite the possibility of injustice and depravity?

Bridging the Gap

While there seems to be an inclination towards legal positivism in the Philippine legal and jurisprudential systems, separating the moral ideals and social values from laws would be a difficult ordeal. As a matter of fact, the Constitution itself, through the Preamble, lays down some of the fundamental social and moral principles upon which its establishment is primarily based: "We, the sovereign Filipino people, imploring the aid of Almighty God, to **build a just and humane society** and establish **a Government that shall embody our ideals and aspirations, promote the common good**, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a **regime of truth, justice, freedom, love, equality, and peace**, do ordain and promulgate this Constitution." (*emphasis supplied*)

In addition, Sections 4 and 5, Article II of the Constitution provides that the general mandate of the government is integrally linked with fundamental socio-ethical principles that seem to provide for the justification of its existence, to wit: "The prime duty of the Government is to serve and protect the people," and that "the maintenance of peace and order, the protection of life, liberty, and property and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy," respectively.

The case of *Imbong, et al. vs. Ochoa, et al.*[46], which invalidated some of the provisions of the Republic Act (R.A.) No. 10354, otherwise known as the Responsible Parenthood and Reproductive Health Act of 2012 (RH Law), had moral and religious doctrines written all over it. On resolving the contention that the provisions of the RH Law violate Constitutional fiat of protecting the lives of both the mother and the unborn from conception (*Article II, Section 12*), as well as the express prohibition against abortion, the Court explained that:

[46] G.R. No. 204819, (08 April 2014).

> It is a universally accepted principle that every human being enjoys the right to life.
>
> Even if not formally established, the right to life, being grounded on natural law, is inherent and, therefore, not a creation of, or dependent upon a particular law, custom, or belief. It precedes and transcends any authority or the laws of men.
>
> In this jurisdiction, the right to life is given more than ample protection. Article III, *Section 1* of the Constitution provides -- *No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.* (*emphasis supplied*).

In the same case, the Court alluded to moral and religious principles to strike down the obligation imposed upon health practitioners by the RH Law "to immediately refer a person seeking health care and services under the law to another accessible healthcare provider despite their conscientious objections based on religious or ethical beliefs." The Court ruled that:

> The obligation to refer imposed by the RH Law violates the religious belief and conviction of a conscientious objector. Once the medical practitioner, against his will, refers a patient seeking information on modem reproductive health products, services, procedures, and methods, his conscience is immediately burdened as he has been compelled to perform an act against his beliefs. As Commissioner Joaquin A. Bernas (Commissioner Bernas) has written, "at the basis of the free exercise clause is the respect for the inviolability of the human conscience.
>
> Though it has been said that the act of referral is an opt-out clause, it is, however, a false compromise because it makes pro-life health providers complicit in the performance of an act that they find morally repugnant or offensive. They cannot, in conscience, do indirectly what they cannot do directly. One may not be the principal, but he is equally guilty if he abets the offensive act by indirect participation.
>
> Moreover, **the guarantee of religious freedom is necessarily intertwined with the right to free speech, it being an externalization of one's thought and conscience**. This, in turn, includes the right to be silent. The constitutional guarantee of religious freedom follows the protection that should be afforded to individuals in communicating their beliefs to others as well as the protection for simply being silent. The Bill of Rights guarantees the liberty of the individual to utter what is in his mind and the liberty not to utter what is not in his mind. While the RH Law seeks to provide freedom of choice through informed consent, freedom of choice guarantees the liberty of the religious conscience and prohibits any degree of compulsion or burden, whether direct or indirect, in the practice of one's religion.
>
> **In case of conflict between the religious beliefs and moral convictions of individuals, on one hand, and the interest of the State, on the other, to provide access and information on reproductive health products, services, procedures, and methods to enable the people to determine the timing, number, and spacing of the birth of their children, the Court is of the strong view that the religious freedom of health providers, whether public or private, should be accorded primacy**. Accordingly, a conscientious objector should be exempt from compliance with the mandates of the RH Law. If he would be compelled to act contrary to his religious belief and conviction, it would be violative of "the principle of non-coercion" enshrined in the constitutional right to free exercise of religion. (*emphasis supplied*)

In the case of *Chua-Qua vs. Clave*[47], the Court made reference to philosophical justifications in vindicating a teacher who was dismissed from the service after being romantically involved with a student, to wit: "If the two eventually fell in love, despite the disparity in their ages and academic levels, this only lends substance to the truism **that the heart has reasons of its own which reason does not know**. But, definitely, **yielding to this gentle and universal emotion is not to be so casually equated with immorality**. The deviation of the circumstances of their marriage from the usual societal pattern cannot be considered as a defiance of contemporary social mores." (*emphasis supplied*).[48]

[47] G.R. No. 49549, (30 August 1990).

[48] It must be noted, however, that this case was ruled in favor of the dismissed teacher for lack of substantial evidence showing that the petitioner took advantage of her position to court her student.

Similarly, while the standing rule in statutory construction, as adopted in Philippine jurisprudence, is that of strict adherence to the express provisions of law, there are instances when an interpretation thereof may be allowed. "Where the language of a statute is clear and unambiguous, the law is applied according to its express terms, **and interpretation should be resorted to only where a literal interpretation would be either impossible or absurd or would lead to an injustice.**"[49]

More importantly, any attempt at interpreting laws, when warranted, should always be in the direction of harmonization rather than discord; of giving effect to the legislative intent behind the provisions thereof rather than unduly blurring the same. In the case of *Chavez vs. JBC*[50]*, et al.*, the Court clarified that:

> Under the maxim *noscitur a sociis*, where a particular word or phrase is ambiguous in itself or is equally susceptible of various meanings, its correct construction may be made clear and specific by considering the company of words in which it is founded or with which it is associated. This is because a word or phrase in a statute is always used in association with other words or phrases, and its meaning may, thus, be modified or restricted by the latter. The particular words, clauses, and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts to produce a harmonious whole. **A statute must be so construed as to harmonize and give effect to all its provisions whenever possible. In short, every meaning to be given to each word or phrase must be ascertained from the context of the body of the statute since a word or phrase in a statute is always used in association with other words or phrases, and its meaning may be modified or restricted by the latter.** (*emphasis supplied*).
>
> xxxxx
>
> The Court may, in some instances, **consider the spirit and reason of a statute, where a literal meaning would lead to absurdity, contradiction, or injustice, or would defeat the clear purpose of the lawmakers**. Applying a *verba legis* or strictly literal interpretation of the constitution may render its provisions meaningless and lead to inconvenience, an absurd situation, or an injustice. Obviating this aberration and bearing in mind the principle that the intent or the spirit of the law is the law itself, resort should be made to the rule that the spirit of the law controls its letter.

And while *judicial legislation* is still not allowed in our jurisdiction, the Supreme Court has nonetheless been vested with the rule-making power under the Constitution. Article VIII, Section 5(5) provides that the Supreme Court shall have the power to "promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged." Pursuant to this power, rules of great magnitude and with profound socio-ethical implications have been established, such as Administrative Matter (A.M.) No. 09-6-8-SC (*Rules of Procedure for Environmental Cases*), A.M. No. 07-9-12-SC (*The Rule on the Writ of Amparo*), and the *2020 Special Rules on the Prosecution of Intellectual Property (IP)*.

As such, while heavily leaning towards *positivism*, Philippine legal and jurisprudential systems are not as uncompromising or inflexible as the Austinian legal positivism in terms of the application and interpretation of laws, and insofar as the relationship of morality and legality is concerned. Rather than being the delimiting form of legal and jurisprudential system that Austin envisioned, which exists in the Philippines, it allows enough flexibility to accommodate the consideration of socio-ethical principles in the application and interpretation of laws. This latter form of positivism was proposed by H. L. A. Hart:

[49] Barcellano vs. Bañas, G.R. No. 165287, (14 September 2011).
[50] G.R. No. 202242, (17 July 2012).

> Thus, not all laws are liberty limiting in the way in which Austin envisions; rather, some laws expand liberty. They are enabling, or what Hart calls power conferring – expanding rather than contracting the scope of individual freedom by giving legal effect or force to personal choices, for example, the distribution of one's holding through wills, the decision to bind oneself to future actions by contract or marriage, and so on. Some rules confer power on private individuals while those that create offices confer power and authorize public persons.[51]

For Hart, law consists of rules of two distinct types: primary rules that either limit or expand liberty; and secondary rules that provide avenues for the introduction of the necessary changes to the primary rules.

> Hart distinguishes among three different kinds of secondary rules: those that create a power to legislate; others that create a power to adjudicate; and finally a rule of recognition. The rule of recognition is not a power - conferring rule. Instead, it sets out the conditions that must be satisfied for a norm to count as part of the community's law. Hart maintains that wherever there is a law, there are primary rules that impose obligations and a rule of recognition that specifies the conditions that must be satisfied for a rule that imposes obligations to be a legal rule. These are the minimal conditions for the existence of a legal system.[52]

In comparison with the Philippine legal system, we have the Constitution and the codified laws and rules as *primary rules*, and the provisions found therein allow the government to make the necessary changes, amendments, and repeals on the same, as *secondary rules*. The fact that the Philippines have such amendatory mechanisms makes our legal and jurisprudential systems more flexible, fluid, and adaptive to the changing times. This does not mean, however, that judges are free to decide a case however they deem proper, without regard to the applicable laws. As a largely *civil law* State, we still give primacy to codified laws. But as a jurisdiction that also welcomes *common law* principles, interpretation and application of laws in a manner that would promote justice over inequality or discrimination may be allowed.

Nevertheless, it is worth noting that Austin does not completely disregard the existence of ethical principles as motivators for lawmakers to enact certain laws. His only point is that the philosophical study of law should be separate from the analysis of the principles that might have been used for their codification. For him, the law should be an independent object of empirical and scientific study. And should there be sentiments against the *propriety* or *fairness* of some laws, the same is best left to the sovereign legislature, on whether or not it would cause its amendment or repeal[53], and not for the judge to decide differently than what the law expressly provides. As long as *rules* are laws, in their strictest sense, then people should oblige, and the courts should limit themselves in simply applying them. Generally, as discussed above, the Philippines still adhere to this approach.

But unlike Austinian legal positivism, Philippine legal and jurisprudential systems allow for flexibility in recognizing the importance of customs, traditions, and even socio-ethical principles, and incorporating the same in the enactment of laws and the application and interpretation of the same. Therefore, while there is truth to the adage *dura lex sed lex,* if there is

[51] Coleman and Leiter, ***Legal Positivism,*** 232.
[52] Ibid.

[53] For instance, punishing a married woman who engages in an extra-marital affair is easier than penalizing one committed by a married man. Under Article 333, adultery is committed by any married woman who shall have sexual intercourse with a man, not her husband. On the other hand, under Article 334, any husband who shall keep a mistress in the conjugal dwelling, or *shall have sexual intercourse, under scandalous circumstances*, with a woman who is not his wife, or shall cohabit with her in any other place, shall be punished by prision correccional in its minimum and medium periods. Given this seemingly discriminatory treatment of an offense committed under the same circumstance, bills have been introduced in Congress time and again to either decriminalize both offenses or place concubinage and adultery under the same classification and penalized under the same category. In one interview, then Magdalo Party-list Rep. Francisco Ashley L. Acedillo, one of the co-authors of House Bill 6010, said that "despite laws promoting equality between men and women, Filipino women continue to suffer from various forms of inequalities and discrimination."

something that can be done within the confines of the Constitution and our legal system, so that these laws would not be as harsh in its application or unjust in its interpretation, why not to do it? *Why insist on the harshness of the law if there are available tools in our legal system that can make it temperate, humane, and just?* Because at the end of the day, the sovereign is neither the President nor the government – the Constitution declares that "The Philippines is a democratic and republican state. **Sovereignty resides in the people and all government authority emanates from them**." (*Article II, Section 1*).

Bibliography

Printed Materials:

Agabin, Pacifico. Mestizo: The Story of the Philippine Legal System. Diliman, Quezon City: University of the Philippines, 2011.

Austin, John. The Province of Jurisprudence Determined. London, UK: John Edward Taylor, 1861.

Bix, Brian. Natural Law Theory, A Companion to Philosophy of Law and Legal Theory, 2nd edition. Oxford, UK: Blackwell Publishing Ltd., 2010.

Coleman, Jules and Leiter, Brian. Legal Positivism, A Companion to Philosophy of Law and Legal Theory, 2nd edition. Oxford, UK: Blackwell Publishing Ltd., 2010.

Jones, W.T. A History of Western Philosophy: Hobbes to Hume, 2nd edition. San Diego, California: Harcourt Brace Jovanovich, Inc., 1969.

Ruggiero, Vincent Ryan. Thinking Critically About Ethical Issues, 8th edition. New York, USA: The McGraw-Hill Companies, Inc., 2012.

Internet Sources:

Chan Robles Virtual Law Library - www.chanrobles.com

Internet Encyclopedia of Philosophy - www.iep.utm.edu

Stanford Encyclopedia of Philosophy - www.plato.stanford.edu

Supreme Court E-Library – www.elibrary.judiciary.gov.ph

The Lawphil Project - www.lawphil.com

Western Australian Law Review - www.austlii.edu.au