

CHAPTER TWO

THE JUDICIAL FUNCTION IN CLASSICAL POSITIVISM: CONTINENTAL CIVIL-LAW AND COMMON-LAW ANALYTICAL TRADITION

I. PROBLEM STATEMENT AND DELIMITATION

The analysis of the judicial function in classical positivism requires an initial framework to define the chapter's purpose and establish its boundaries. The main objective is to show how the role of judges was shaped in a legal model characterized by the certainty and supremacy of law. The discussion begins with the political foundations of state sovereignty and proceeds to the responses offered by the continental and anglo analytical traditions to the problem of applying the law. Following the considerations outlined at the end of the previous chapter, which highlighted the contemporary crisis of legal certainty in the face of the proliferation of sources of law lacking formal recognition, this section returns to the classical model to examine how the judicial function was once conceived as a mechanism of security and predictability. This provides a structured view of legal modernity, where the judiciary appears as a power subordinate to the law, devoid of creative leeway and limited to the execution of legislative mandates.

The periodization of this model falls between the eighteenth and nineteenth centuries, a stage in which confidence in state power and written law as guarantors of predictability crystallized. The Napoleonic Code of 1804 and French exegesis became symbols of the continental tradition, while the German histori-

cal school tempered this rigidity by affirming the historicity of law. At the same time, in England, Bentham's utilitarianism and Austin's command theory outlined an analytical positivism that transferred certainty to a system of orders issued by the sovereign, relegating custom and case law to a secondary role. The analysis of both traditions reveals a shared horizon: the need to contain judicial discretion and ensure uniformity in the application of law.

This chapter, therefore, is organized around these two strands. The first part focuses on the continental tradition, highlighting both the cult of the text promoted by exegesis and Savigny's historical reaction to the risk of excessive formalism. The second part addresses the analytical tradition, where Bentham's critique of the common law and Austin's theory of statutory law demonstrate the radical nature of a model that subordinated all legal sources to the sovereign's command. This division does not suggest an isolated treatment of these currents, but rather a comparative effort to illustrate convergences and tensions surrounding the judicial function.

The relationship with the previous chapter is evident. The first chapter offered a broad overview of the legal positivist tradition, highlighting legal certainty as a guiding principle from the *Corpus Iuris Civilis* to Kelsen's *Pure Theory of Law*. On that basis, this second chapter narrows the focus to a specific dimension: the role of judges in the classical model. It moves from a general analysis of positivism to a specific study of the judicial role, thereby clarifying how legal certainty was sustained in a system of subordination of the courts to the legislator. In this way, the book's guiding thread maintains continuity and coherence by articulating the history of legal ideas around a specific problem.

Finally, this approach opens the bridge to Kelsen's thought. If the classical model restricted the judicial function to the mechanical application of the law, the Austrian jurist elaborated a more complex normative theory in which judgments are conceived as individualized norms within a hierarchical system. The

transition is not understood as an absolute rupture, but rather as a critical overcoming of an exhausted paradigm. Consequently, the conclusion of this chapter introduces the crisis of the classical model and the need to conceptually rethink the judicial function, preparing the ground for the following chapters, which will examine in greater depth the *Pure Theory of Law* and its understanding of the judicial function.

II. PREMISES OF THE CLASSICAL MODEL: SOURCES, LAW AND CERTAINTY

The classical model of legal positivism was built upon complete trust in the law as the central and exclusive source of law. The affirmation of state sovereignty implied that all valid rules must derive from a single power with the capacity to impose binding mandates backed by sanctions. This framework absorbed and subordinated all other possible sources consolidating legislative supremacy as the foundation of certainty in social life. From this perspective, a model emerged in which legal predictability rested on the normative force of written law and on the strict limitation of judges to the role of subordinate applicators.

The concretization of this paradigm was expressed through three decisive processes: first, the consolidation of source monism and legislative omnipotence as a consequence of the principle of indivisible sovereignty; second, the Napoleonic codification and the cult of the text as a technique of predictability that sought to standardize and stabilize the law in a closed normative body; and third, the articulation of the separation of powers and the judicial function in the reflections of Montesquieu and Beccaria, who offered institutional and penal parameters to restrict judicial discretion. These three axes clarify how legal modernity built a model in which certainty, security, and the limitation of power were interwoven into the law as the cornerstone of the legal order.

1. *Monism of State Sources and Legislative Omnipotence*

The classical model of legal positivism was grounded in the idea of a monism of state sources, in which the law stood as the supreme expression of political power. The notion of sovereignty, initially articulated in Hobbes's political philosophy, posited the need for an absolute authority capable of issuing unquestionable command. The strength of this approach lay in the conviction that civil peace could only be guaranteed by an indivisible body of power, charged with promulgating norms backed by sanctions. Thus, the Hobbesian Leviathan embodied the transition to a centralized legal order, in which a plurality of sources was incompatible with the desired security (2005, pp. 134-136). Legislative omnipotence thus emerged as an inevitable correlate of a sovereign conceived as the sole creator of law.

Hobbes articulates sovereignty as an indivisible power sustained by an irrevocable institutional act by which individuals transfer their rights to a common representative. Based on this original pact, all the sovereign's actions and judgments must be regarded those of the subjects, even those who dissented at the time of the agreement. Therefore, he states: "Each of them, whether they have voted for or against, must authorize all the actions and judgments of that man or assembly of men, just as if they were their own" (Hobbes, 2005, p. 142). This concept lies at the root of legal monism: obedience does not depend on individual will, but on collective authorization, which makes the existence of parallel normative sources impossible. Positive law, consequently, is identified with the will of the sovereign; therefore, judges and magistrates lack autonomous creative power, since their function is limited to executing the law under the sovereign's command (Hobbes, 2005, pp. 142-144 and 227-229).

From this conception derives legislative omnipotence as an essential attribute of political power. The sovereign possesses the capacity to legislate, judge, control doctrines, and dispose of pro-

erty, without dividing or delegating the essence of the State. The unity of legislative power becomes a guarantee of legal certainty: justice and equity only have normative force when recognized by the supreme authority. Therefore, even natural law, custom, or private concessions lack binding effect unless they are integrated into civil law by command of the sovereign (Hobbes, 2005, pp. 146-150). This logic reveals the scope of Hobbesian legislative omnipotence: positive law is legitimized not by its moral content, but by the political authority behind it, thus consolidating the centrality of a single focus of normative production.

This view would be taken up by the analytical tradition, in which John Austin consolidated the paradigm of law as command. Jurisprudence, understood by him as the science of positive law, dealt exclusively with norms imposed by political superiors on political inferiors, excluding both morality and religion (1832, p. 1). The radical nature of this position was manifested in its rejection of the ambiguous use of the notion of natural law, since for Austin, divine laws remained on a separate plane, while the object of legal science should be restricted to those rules backed by state sanction (1832, p. 2). The introduction of the concept of command as the structural axis of the discipline offered the necessary conceptual scaffolding to sustain legislative omnipotence: to the extent that every rule derived from a general command of the sovereign, state law absorbed the entire legal phenomenon.

The relationship between command, duty, and sanction constituted the explanatory core of the monist model. For Austin, a command is, in essence, a manifestation of desire whose noncompliance entails a probable evil, called a sanction (1832, pp. 7-8). With this triad, positive law was clearly distinguished from morality and religion, since only in the former was the obligation linked to external coercion. Likewise, the English jurist differentiated between particular commands and general commands; the latter possessed the character of law, imposing duties on classes of acts and not on specific individuals (Austin, 1832, p. 15). At this point, the ideal of predictability associated with state

law was consolidated: law was identified with abstract, general, and permanent rules, whose validity rested on the authority of the sovereign. The reduction of law to positive law did not admit conceptual exceptions; thus, any norm without sanction subsisted outside the legal sphere.

In the same vein, Austin criticized the designation “law” attributed to various categories of rules that did not meet the requirements of the imperative command. He rejected the so-called moral, figurative, declaratory, permissive, and imperfect laws for lacking the support of a higher political power to endorse them with sanction (Austin, 1832, pp. 21, 21 and 30). This conceptual refinement reinforced source monism by reserving the name “law” only for provisions emanating from state authority. In this logic, even common law and judicial production were reinterpreted: custom only acquired binding force through the sanction of the legislator, and judicial decisions were understood as acts of application of the sovereign will, not as an autonomous source of law. Thus, legislative omnipotence was based on the following premise: every valid rule referred without exception to the central authority of the State, without recognizing scope for the normative creativity of other bodies.

In modern thought, Norberto Bobbio took up this tradition to show the diversity of levels in which positivism developed. In this regard, he clarifies: “By legal positivism as a theory, I understand that particular conception of law that links the legal phenomenon to the formation of a sovereign power capable of exercising coercion: the State” (2007a, p. 49). From this perspective, positivism did not emerge solely as a set of conceptual theses, but as a historical reflection of the process by which legal systems absorbed other legal sources under legislative supremacy. Coercive force, imperative theory, and the subordination of custom and jurisprudence to the law appeared as characteristics of this stage, all derived from the centrality of state power in modernity (Bobbio, 2007a, pp. 49-52). The monism of state sources was presented, then, not as an option among several, but as a historical consequence of the consolidation of sovereignty.

In summary, the monism of state sources and legislative omnipotence constituted the core of classical positivism, first articulated in the sovereign figure of Hobbes, systematized by Austin in his command theory, and reinterpreted by Bobbio in a historical and critical light. The normative concentration on the State defined the model of certainty and predictability characteristic of positivism, by excluding all alternative sources and placing the law as the ultimate foundation of law. This construction, although enriched with theoretical and ideological nuances, responded to the need to affirm the unity of the legal system in the face of the dispersion of sources, and paved the way for subsequent discussions on codification, exegesis, and the judicial function that marked the development of positivism in the continental and analytical traditions.

2. *French Codification as a Predictability Technique*

The legislative omnipotence described in the previous section found its most complete institutional expression of the era in the French civil codification. The Napoleonic Code of 1804 laid down fundamental principles for the application of law, seeking to guarantee certainty and uniformity within a territory fragmented by the regulations of the Ancien Régime. The preliminary articles defined the territorial binding force of the law, its non-retroactivity, and the prohibition of agreements contrary to public order, while imposing on judges the obligation to decide even in cases of legal silence, without empowering them to issue general provisions (*Código Napoleón*, 1809, pp. A–A1). These provisions reveal the centrality of the codified text as a guarantee of predictability: a closed, accessible, and formally supreme body of legislation over all other sources.¹

¹ The Napoleonic codification movement did not emerge from nowhere; it was based on a previous doctrinal tradition. Among its most influential figures is

In his *Preliminary Discourse on the Draft Civil Code*, Portalis philosophically justified this undertaking. For him, good civil laws constituted society's most valuable patrimony, because they moderate power, protect property, and ensure peace (2014, p. 11). Codification should be based on historical experience and adaptation to customs, avoiding both the proliferation of useless norms and the illusion of foreseeing every case. In his words, "simplifying everything is an operation on which it is necessary to reach an agreement. Foreseeing everything is a goal impossible to achieve" (Portalis, 2014, p. 12). Predictability, therefore, lay not in exhaustive detail, but in establishing fruitful principles to guide judges and citizens.

The relationship between legislator and judge was thus redefined. Portalis emphasized that the law should establish general maxims, while leaving the task of concrete application to the judge as an enlightened mediator. In this way, the impossibility of codes to exhaust reality was implicitly recognized, without relinquishing the predominance of the legislator as the primary source (Portalis, 2014, pp. 23-33). Predictability was based on the existence of a stable text to limit judicial creativity, while at the same time acknowledging the need for interpretation in order to maintain the vitality of the law in unforeseen situations.

Codification, however, entailed a risk: the emergence of an excessive cult of the text. Faced with this risk, the French jurist warned that blind adherence to the articles could paralyze civil life and stifle confidence in legal transactions. Predictability had to be distinguished from absolute rigidity: the code offered cer-

Jean Domat, who in his work *Les Loix civiles dans leur order naturel* (1689) sought to systematically order french law under rational principles inspired by roman law, and Robert Joseph Pothier, whose treatises on obligations, contracts and successions offered a detailed systematization that was directly incorporated into the Code of 1804. Both represent the transition from dispersed common law to a rational and unitary conception of private law. See: Domat, J. (1861). *The Civil Laws in their Natural Order*, 3rd ed. (F. Vilarrubias and J. Sarda, Trans. & arrang.). Librería de Estéban Pujal; and Pothier, R. J. (2020). *Treatise on Obligations*. Olejnik Legal Editions.

tainty through clear and uniform rules, but it had to retain the flexibility necessary to allow the use of reason and good faith in the application of the norms (Portalis, 2014, pp. 43-53). As he forcefully stated: “The function of the law is to protect us against the fraud of others, not to exempt us from the use of our own reason. Otherwise, the life of men under the surveillance of the laws would be nothing but a long and shameful state of minority; and the surveillance itself would degenerate into an inquisition” (Portalis, 2014, p. 47).

Together, the 1804 Code and the Portalis Discourse demonstrate how the technique of codification sought to reconcile legislative omnipotence with the need for predictability in social life. The codified text became a symbol of certainty and unity, while recognizing the limits of normative foresight and the complementary role of the judge. This balance explains the lasting influence of the Napoleonic model, whose authority derived both from its rational and systematic nature and from the trust placed in the written word as the foundation of legal certainty.

Napoleon’s codification consolidated the supremacy of written law as the foundation of certainty and predictability, but at the same time more clearly established the place of judges in the new institutional framework. The limitation of their normative creativity and the obligation to resolve even in cases of legal silence forced reflection on the balance of powers and the true scope of the judicial function. This debate did not arise in a vacuum: it was based on the political ideas of the 18th century, which defined the role of the courts within the state. Montesquieu’s reflections on the separation of powers and Beccaria’s on criminal legality marked the intellectual horizon within which codification was inserted. From these conceptions, we can understand how the classical positivist model sought to harmonize the authority of the law with judicial prudence, establishing a framework of guarantees against power and delimiting the interpretive function of judges.

3. *Separation of Powers and Judicial Function in Montesquieu and Beccaria*

The transition from Napoleonic codification to a modern continental conception of law cannot be understood without the decisive influence of enlightenment reflections on the balance of powers and the meaning of the judicial function. Montesquieu and Beccaria contributed complementary perspectives that made it possible to clearly define the contours of judicial activity within the new political order. Both authors agreed on the need to guarantee citizen security through clear norms, controlled institutions, and judges subordinated to the law, albeit from different perspectives: the former from a perspective of political theory and the latter from a perspective of penal philosophy.

In *The Spirit of the Laws*, Montesquieu formulated one of the most influential premises of constitutionalism: the separation of powers. In his view, political freedom depends on the peace of mind that arises when no one fears the abuse of power. Therefore, he distinguished a legislative branch, an executive branch in matters of foreign relations, and a judicial branch responsible for resolving conflicts and punishing crimes. The concentration of functions in a single person or corporation leads to despotism, as exemplified by eastern monarchies and certain Italian republics (Montesquieu, 1906, pp. 227-228). Therefore, the separation of functions was established as a practical and indispensable condition to preserve freedom against arbitrariness.²

Within this architecture, judicial power was to be designed so that its exercise would be almost imperceptible. Montesquieu

² Norberto Bobbio emphasized that the theory of the separation of powers cannot be understood as an abstract dogma, but rather as a political-legal instrument, which historically arose with the intention of containing legislative omnipotence and absolutist tendencies. His analysis of legal positivism illuminates how Montesquieu's conception is part of an effort to rationalize power within previously established normative limits, showing the connection between formal guarantees and political freedom. See: Bobbio, N. (2007). *El problema del positivismo jurídico* (E. Garzón Valdés, Trans.; 9th reprint). Fontamara.

warned of the risk of attributing it to a permanent body, as this generated the possibility of an oppressive force similar to despotism. The proposed solution consisted of the periodic election of judges from among the people, forming temporary tribunals to avoid tyranny and ensure impartiality. Within this framework, the accused, in accordance with the law, could elect or challenge their judges in serious cases, thus guaranteeing impartiality and public confidence in the courts. In this way, the power to judge was transformed into a diffuse function, detached from political or class interests, visible only through the magistracy and not through the judges as individuals (Montesquieu, 1906, p. 229).

This conception reached its best-known expression when Montesquieu described the judge as the “mouth of the law” (1906, p. 237). The court should limit itself to pronouncing the legislator’s words without adding any opinions. The judgment, therefore, had to contain the literal text of the law, so that citizens would precisely know the obligations they had assumed. The predictability of the law rested on this literalness since any scope of discretion would open the door to judicial arbitrariness. Reducing the judge to an inanimate role guaranteed legal certainty, subordinated the judicial function to the legislator, and strengthened political freedom against excessive interpretation (Montesquieu, 1906, pp. 229-230).

The balance of powers also required an institutional design in which the legislative and executive branches mutually constrained each other. In this sense, the executive branch had to be vested in a single person to act swiftly, while the legislative branch was divided into two chambers with distinct interests to prevent hegemony. The key to freedom lay in mutual checks and balances: the executive branch could participate in legislation only with a negative power, through the veto, and the legislative branch retained the ability to review its implementation without judging the person executing it. This dynamic of checks and balances constituted the essence of a political order where no single branch achieved absolute supremacy, avoiding both legislative tyranny and executive despotism (Montesquieu, 1906, pp. 233-236).

For his part, as previously mentioned, Beccaria approached the judicial function from a penal perspective, placing greater emphasis on normative predictability. In the *On Crimes and Punishments*, he affirmed that judges should not interpret the laws, since their sole function was to apply them. Judicial interpretation opens the door to uncertainty and abuse, as each magistrate could subject the law to individual passions or interests. For Beccaria, justice is ensured when laws are clear, fixed, and applied literally; under this model, judicial decisions are reduced to perfect syllogisms without personal additions (Beccaria, 2015, p. 22).

In his view, normative clarity constituted an even more fundamental principle; the obscurity of the laws forced them to rely on those who mastered legal language, leaving the people defenseless. The printed dissemination of norms thus became a conquest of liberty, because it curbed the tricks of those who profited from popular ignorance (Beccaria, 2015, p. 24). In this regard, legislative transparency reinforced social predictability and restricted opportunities for arbitrariness.³

Beccaria also provided substantive criteria for the content of criminal law. He insisted on the proportionality between crimes and penalties, rejecting equal punishments for unequal offenses, as this encouraged the commission of more serious crimes without increasing the risk to offenders. He also criticized the subjective or religious criteria historically used to grade penalties, as they led to arbitrariness and tyranny. Only social harm should be considered as a measure of the seriousness of the crime; this criterion allowed for the organization of a rational penal system (Beccaria, 2015, pp. 25-27).

³ In a contemporary context, Paolo Grossi argues that legal modernity constructed a methodological model based on the centrality of the legal text as a symbol of certainty, to the point of displacing customary traditions and more open interpretive practices. This observation is pertinent to understanding Beccaria's insistence on clear and widespread laws since his proposal reflects that modern trust in written law as the sole source of security against power. See: Grossi, P. (2003). *Mitología jurídica de la modernidad* (M. Martínez Neira, Trans.). Trotta.

Finally, Beccaria emphasized that the purpose of punishment was not revenge or the pointless torment of the offender, but rather the prevention of future harm and deterrence of society. The effectiveness of the sanction lay in its ability to discourage repeat offenses and deter others, producing the greatest preventive effect with the least possible suffering. Thus, predictability was linked not only to the literal application of the law, but also to the rationality of a proportional penal system oriented toward the public good (Beccaria, 2015, pp. 33-34).

A joint reading of Montesquieu and Beccaria reveals a common thread in the configuration of the judicial function: the need to limit discretion and subordinate the power of judges to clear and stable normative principles. Montesquieu provided the institutional architecture of the balance of powers, while Beccaria perfected the logic of penal law by linking legal certainty with clarity, proportionality, and the preventive purpose of sanctions. Both outlined a model of justice where predictability, more than a rhetorical aspiration, became an effective guarantee of freedom from arbitrary power.

III. THE JUDICIAL FUNCTION IN THE CONTINENTAL TRADITION

The judicial function in the continental tradition is understood as an continuation of the Enlightenment idea formulated by Montesquieu and Beccaria: reducing the judge to an enforcer subordinate to the law within the framework of codification. However, during the 19th century, this conception acquired a more defined shape in Europe, where two opposing models confronted each other, decisively shaping the teaching and practice of law. On the one hand, the School of Exegesis turned the code into the exclusive source of certainty, building a legal culture based on literalism and predictability. On the other hand, the German Historical School asserted the historicity of law and the active role of the judge as interpreter of the living tradition. The tension between these poles,

predictability and rigidity versus historicity and flexibility, became the core of the judicial function on the continent, leaving a legacy that anticipated later debates in analytical positivism.

1. *School of Exegesis as a Cult of the Legal Text*

The birth of the School of Exegesis is closely linked to the Napoleonic codification of 1804, but it should not be confused with it. While the previous analysis highlighted the codification process as a technique of predictability based on the authority of written law, here we seek to understand how that codification was appropriated and transformed into a method of legal interpretation and teaching. Exegesis, in effect, represents the transition from the code to a true “legal culture of the text”, where the law became the sole legitimate source of decision-making and interpretation remained subordinate to the literal inquiry of the legislator’s will.

The first phase of this school developed between 1804 and 1830, in a transitional environment described by Julien Bonnecase as foundational, and marked by the influence of the centralizing spirit of the imperial government, interested in disciplining the teaching of law. The first commentators of the French Civil Code (Delvincourt, Proudhon, Toullier, Merlin, Maleville and Chabot de l’Allier) contributed manuals and treatises that, without yet constituting a complete doctrinal body, combined legislative innovations with categories inherited from the Ancien Régime. In this sense, the initial exegesis was not a systematic doctrine, but an incipient interpretative effort whose purpose was to channel the teaching of law within the new normative framework (Bonnecase, 2020, pp. 20-26).

The period between 1830 and 1880 represented the consolidation of the school, a stage identified by Bonnecase as its second phase. During this period, professors, magistrates, and lawyers brought precision to the exegetic method and turned the inter-

pretation of the Code into a collective endeavor. Notable among these are the works of Durantou, Aubry and Rau, Demolombe, Taulier, Marcadé, Troplong, and the Belgian Laurent, who produced monumental commentaries, philosophical treatises, and manuals that extended the method's influence to university teaching. The famous phrase attributed to Bugnet, "I don't know civil law, I teach the Code Napoleon", encapsulates the spirit of this movement, where written law became the absolute horizon of certainty and predictability (Bonnesse, 2020, pp. 26-33).

Exegesis was based on an unqualified faith in the legislative will, even going so far as to maintain that, faced with contradictory or insufficient laws, the most prudent course of action for the judge would be to abstain from ruling (García Máynez, 1980, p. 333). This attitude implied a displacement of justice and equity in favor of normative literalism, which was attributed, as García Máynez noted, "a monopoly on the formulation of law" (1980, p. 337). Consequently, the judicial function was reduced to an almost mechanical operation: the application of the law was conceived as a syllogism in which the judge merely subsumed the facts under the normative premises.

From this perspective, interpretive work left no room for creativity or weighing of interests, as legal grammar imposed itself as an insurmountable limit. The analogy with biblical exegesis is eloquent: just as the interpreter sought God's will in the sacred text, the exegetical jurist was limited to discovering the legislator's will in the articles of the code. Giovanni Tarello summarized this idea by pointing out that the School of Exegesis refers both to the French and Belgian civil law scholars who commented article by article on the Napoleonic Code, and to the method and ideas shared in their teaching (Tarello, 1995, pp. 64-65).

The influence of this school was decisive in the 19th century, despite subsequent criticisms of its rigidity and formalism. In contrast to the vitality that Portalis had defended in the preliminary discourse on codification, exegetes reduced the role of the judge to that of the "mouth of the law", trusting in the omnipo-

tence of the code to contain all the law necessary to regulate civil life. In doing so, they consolidated a model of legal predictability, but at the cost of sacrificing interpretive flexibility and subjecting equity to the absolute supremacy of the legal text. This tension between predictability and rigidity would henceforth mark the evolution of continental legal theory.

2. *The Historical School and Savigny's Criticism of Codification*

The formalism of exegesis, centered on the devotion to the letter of the law, found a decisive counterpoint in the thought of Friedrich Carl von Savigny. In contrast to the idea of law reduced to a codified and self-sufficient text, Savigny proposed a historical and organic conception in which law is not identified solely with the legislative will, but also with the spirit of the people who produce and transform it over time. His criticism was directed against the notion of a code conceived as a closed totality, since, in his opinion, hasty codification risked impoverishing the vitality of law and subjecting it to an inanimate rigidity (Savigny, 2015, p. 26).

In this context, written law constitutes only a partial manifestation of law, an expression at a given moment of collective legal conscience. For Savigny, law lives in history and does not emerge artificially through an act of state will. Therefore, the legislator does not create law from nothing, but rather organizes and formalizes it. The work of codification only achieves legitimacy when it is based on a historical maturity capable of guaranteeing continuity between tradition and positive norm. Otherwise, the code becomes an empty construction, a burden of rigid formulas that are distant from the real needs of the legal community.

Savigny's opposition to the immediate codification debated in Germany at the time did not imply an absolute rejection of legislative work. The problem lay in the following premise: a code capable of anticipating all future cases and shutting down the

natural evolution of law was impossible to achieve. This is illustrated by his reflection on specific legal institutions, such as marriage, in which social experience demonstrates the law's inability to encompass all possible situations: "Marriage belongs only half to law and half to custom, making any matrimonial law incomprehensible unless considered in connection with both aspects" (Savigny, 2015, p. 37). Therefore, an overly closed code inevitably leads to gaps in the law and unfair solutions (Savigny, 2015, pp. 36-37). This example demonstrates that codification should not be conceived as a closure mechanism, but as a stage in the historical development of institutions.

A particularly significant passage from the German jurist's work states: Furthermore, addressing a given positive law unilaterally presents the danger of being dominated by its mere letter, so any means of innovation must be welcomed. But a mediocre code tends to strengthen the predominance of a rigid and lifeless conception of law (Savigny, 2015, p. 26).

This statement reveals the author's central concern: the risk of replacing the living historicity of law with a formalism that reduces the judicial function to a repetitive mechanism disconnected from social reality. At this point, the critique connects with the reaction against exegesis, whose literal method ended up stifling fairness and interpretive creativity.

As an alternative, Savigny proposed a theory of interpretation based on four elements: grammatical, logical, historical, and systematic. These constitute tools through which the jurist can reconstruct the collective thought contained in the law, without being limited to its mere literality. In precise terms, interpretation is a procedure through which the historical origin of law is recovered, thus guaranteeing its application in the present while preserving coherence with its original tradition (Ministerio de Justicia de Colombia, 1988, pp. 182–183). The method is conceived, therefore, as an exercise in balancing fidelity to the legal text with

attention to the historicity of institutions and the internal structure of the legal system.

In this sense, the German Historical School, with Savigny as its central figure, laid the foundations for a dynamic conception of law as opposed to exegetical rigidity. The judicial function ceased to be understood as a mechanical operation of subsumption and began to be conceived as a task of historical and systematic reconstruction. In this transition, the critique of excessively closed codification and the recognition of the historicity of law opened a more flexible interpretative horizon, which would mark the evolution of continental legal theory during the 19th century.

In short, the judicial function in the continental tradition was marked by the tension between rigid predictability and flexible historicity. This duality not only defined the 19th century but also prompted a need to conceptually rethink the role of the judge. This rethinking no longer came from France or Germany, but from the English analytical tradition, where positivism sought to explain law with a more systematic language centered on the notion of command.

IV. THE JUDICIAL FUNCTION IN CLASSICAL ANALYTICAL POSITIVISM

The transition from the continental tradition to the analytical tradition reveals a shift in the way the judicial function was conceived. While in Europe the discussion revolved around the cult of the legal text characteristic of exegesis and the historicity defended by Savigny, in England, under the common law, the debate shifted toward a critique of the very foundations of the system and the authority of commentators. The judicial function was no longer conceived solely as literal interpretation or historical reconstruction, but was subjected to more radical scrutiny, examining its legitimacy under criteria of utility and systematic rationality. With this, English analytical positivism sought to construct a science of law that dealt with identifiable and verifiable norms, leaving aside

both appeals to tradition and justifications based on history. At this point, it's clear that the reflections of Bentham and Austin, previously outlined within the general framework of the previous chapter, prepare the ground for the detailed examination presented below.

This new perspective, initiated with the work of Jeremy Bentham, challenged the validity of the common law and proposed reorganizing law based on the principle of utility, reducing the judicial function to the application of socially beneficial rules. Later, John Austin took this transformation to a more systematic level by formulating a theory of enacted law which the only valid source resided in the sovereign command. In this way, the English analytical tradition distinguished itself by redefining the judicial function from strictly normative and descriptive parameters, paving the way for subsequent debates that would lead to Hart's critique and Kelsen's reformulation of the judicial function.

1. *The British Common Law under Utilitarian Criticism*

Jeremy Bentham's work represents one of the most systematic and profound critiques of the foundations of English common law. In a historical context marked by the influence of William Blackstone and his *Commentaries on the Laws of England*, Bentham denounced the lack of clarity, conceptual arbitrariness, and resistance to reform that characterized the English legal system. From his perspective, the legitimacy of law could not be based on traditions or the authority of established jurists, but on an objective criterion: utility, understood as the maximization of happiness and the reduction of collective suffering (Bentham, 2010, pp. 3–5; 2017, p. 6).

Bentham identified the almost dogmatic veneration of Blackstone as a major obstacle. The authority of his work, widely disseminated and considered a reference, prevented the law from being subjected to the rational criticism necessary to perfect

them. From this perspective, a legal system incapable of censure condemned society to stagnation. Civic obedience, he argued, should be combined with free and permanent dominance, since only through criticism was it possible to purify defective institutions and strengthen socially useful ones (Bentham, 2010, pp. 12-16). In doing so, he fundamentally challenged the notion that the law should be respected without question, insistently defending the idea of moral and political progress through its subjection to constant scrutiny.⁴

Criticism of the expositor of the laws was not limited to pointing out isolated errors. Bentham denounced the harmful influence of prestigious authors who, through the weight of their name, were able to impose weak or contradictory arguments as truth. This authority became even more dangerous when exercised in the field of teaching, as generations of students replicated their teachers' judgments without subjecting them to review. Thus, attacking Blackstone's work did not represent an act of personal hostility, but a civic duty intended to free law from the conceptual shackles that hindered the possibility of reform (Bentham, 2010, pp. 20-33).

The core of Bentham's proposal lies in the principle of utility. According to his formulation, every action and every rule must be judged by its tendency to increase or decrease happiness. In this way, the community ceases to be a rhetorical fiction and is defined as the sum of the individual interests that comprise it. Any allusion to the common good loses meaning if it does not translate into effective benefits for each member of society (Bentham, 2017, p. 7). With this conception, Bentham dismantled the arguments of the common law, which, lacking verifiable criteria

⁴ Centuries later, Hart would take up this concern again by emphasizing the inadequacy of a legal system based exclusively on custom, adding that only through secondary rules (of recognition, exchange, and adjudication) can certainty be guaranteed and institutional arbitrariness avoided. See: Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.

to evaluate their validity, were based on indeterminate concepts such as “spirit of the constitution” or “reason of the law”.

The contrast with the alternative principles is crucial to understanding the force of his critique. Bentham rejected both the ascetic principle, which exalted suffering as a virtue, and the principle of sympathy and antipathy, which rested on arbitrary approval or disapproval. The former, taken to its ultimate consequences, would turn society into a hell, since no political order can be sustained by the renunciation of pleasure and the deliberate production of pain (Bentham, 2017, p. 12). The latter, applied largely in the common law, led to the justification of institutions and norms based on sentiments or imaginary analogies, rather than objective reasons. In this regard, Bentham pointed to the English rule on succession as an example, which gave priority to uncles over fathers in inheritance. This provision was defended by Lord Coke with an absurd metaphor: hereditary rights had a “weight” that prevented their direct transmission in the ascending line (Bentham, 2017, p. 13).

These criticisms highlight the fragility of a system where judicial decisions were not based on a calculation of utility, but rather on precedents legitimized by tradition or the rhetoric of jurists.⁵ In response to this, Bentham proposed the construction of a “natural order” of law, organized according to social utility. This order made it possible to identify and reject harmful laws, defined as those that prohibited non-perverse behavior. In his logic, the only legitimate classification of legal institutions should be based on their tendency to produce pleasure or pain, categories understandable to anyone without the need for technical jargon (Bentham, 2010, pp. 37-42).

⁵ Hart identifies this problem by pointing out that without clear adjudication rules, judicial precedent generates uncertainty. In *The Concept of Law*, he argues that the lack of secondary rules prevents judicial decisions from being certain and stable. See: Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.

Ultimately, Bentham's critique of the common law was not an isolated academic exercise, but an attempt to subvert the authority of a system that, by clinging to custom and the exegesis of commentators, was incapable of guaranteeing justice and social happiness. His proposal, based on the principle of utility, offered a universal and rational alternative to the caprice, conceptual confusion, and obscurity of English law. In his words, "nature has placed humanity under the rule of two sovereigns: pain and pleasure" (Bentham, 2017, p. 6), and law, including the judicial function, can only be legitimized to the extent that it serves this inescapable.

Bentham's work clearly revealed the limits of a law based on custom and doctrinal dependence on commentators, demonstrating the need for a rational legislative system oriented toward collective utility. By exposing the conceptual fragility of the common law, his thinking paved the way for a transformation of analytical positivism, in which the judicial function could no longer be sustained by tradition or precedent. This transformation found continuity in Austin, who defined law as a legislated command, denied the creative force of jurisprudence, and reduced the judicial function to the execution of general rules, reaffirming the supremacy of the legislator as the sole source of validity of law.

2. Austin and the Judicial Function in a Statutory Law System

John Austin's work contributed to the development of the analytical shift in legal positivism by proposing a model of law founded on the notion of command and the centrality of legislation as the exclusive source of validity. Unlike the emphasis placed earlier on the general theory of command and its relationship to legislative omnipotence, here it is important to highlight how this conception transformed the judicial function within the English legal system. For Austin, jurisprudence had to be configu-

red as a descriptive science of positive law, detached from moral assessments and dedicated to identifying the norms issued by a political sovereign with coercive force over its subjects (1869, pp. 6-9).

At the core of his theory, Austin articulated the conceptual triad of command, duty, and sanction, which distinguishes law from other normative systems such as morality or religion. A command is, in his terms, "a manifestation of desire" whose binding force is secured by the threat of harm in the event of noncompliance (Austin, 1869, p. 7). This analysis offers a first key to the judicial function: judges are not creators of law, but rather executors of commands already established by the legislator, applying the sanction provided to ensure obedience.

Hence Austin distinguished between general command, inherent in law, and particular command, corresponding to specific orders such as judicial resolutions. The former are abstract in nature and are directed to classes of acts or persons; the latter are occasional and apply to specific individuals. The judge, therefore, operates on a level of subordination, since his particular commands depend on the prior existence of general commands issued by the sovereign. In his words: "judicial commands are commonly occasional or particular, though the commands they are designed to enforce are commonly laws or rules" (Austin, 1869, p. 15). This classification reinforces the non-autonomous nature of the judicial function, subordinate to legislation.

The author's emphasis lies on the supremacy of statutory law over custom and precedent. He rejects the notion that custom constitutes a source of law in and of itself, since as long as it is not recognized by the courts and sanctioned by the sovereign, it remains a rule of positive morality. Similarly, judicial decisions are not an independent source since their force derives from sovereign delegation. Therefore, he states: "customary laws, considered as positive law, are not commands... and consequently are not laws or rules in the proper sense" (Austin, 1869, p. 27). With this conception, both custom and jurisprudence are located within

statutory law, reinforcing the centrality of the sovereign as the sole valid normative source.

The conceptual refinement is completed with the distinction between proper and improper laws. The former meet all the requirements of the coercive command; the latter are called laws only by analogy, as is the case with moral or religious rules, which guide conduct but lack legal sanction (Austin, 1869, pp. 126-134). This classification clearly establishes the object of analytical jurisprudence and strengthens the role of the judge as the operator of a closed system of positive norms, without the capacity to derive legitimacy from external values.

Benthamite utilitarianism is reflected in the way Austin evaluates rules. It is not a question of judging isolated acts, but rather of considering the tendency of the type of behavior regulated. Thus, stealing a small amount of money from a wealthy person may seem harmless in a specific case, but when such behavior is widespread, the security of property and, with it, social stability collapses (Austin, 1869, pp. 37-39). The judicial function then takes on an instrumental character: ensuring the uniform application of general rules dictated on the basis of utility, avoiding casuistry and ensuring certainty for the community.

In short, Austin shifted the influence of analytical positivism toward a system of legislated law, where the judicial function was limited to applying the sovereign's general commands. His proposal offered certainty and predictability at the cost of excluding any creative role for the judiciary. This vision opened a debate that would mark the subsequent development of positivism: Hart, for example, would underline the inadequacy of conceiving law as a set of orders backed by sanction, by introducing the need for rules of recognition and adjudication that explain legal practice beyond the imperative scheme. For his part, Kelsen would take the reflection even further by designing a hierarchical normative model where the judicial function is integrated as the application of valid norms within a relatively closed system, overcoming the reduction of law to individual command.

V. THE CRISIS OF THE CLASSICAL MODEL
AND THE Kelsenian THRESHOLD
OF THE JUDICIAL FUNCTION

Towards the end of the 19th century, the architecture of classical positivism showed clear signs of exhaustion. The absolute centrality of written law and the reduction of the judge to a merely declarative role eventually revealed fissures that were impossible to ignore. Exegesis, with its unrestricted trust in the literal meaning of the code, transformed the judicial function into a rigid mechanism that sacrificed equity for the sake of predictability. The Historical School, by insisting on the historicity of law, demonstrated the inadequacy of a closed and purely textual system. In the analytical tradition, Bentham and Austin refined the notion of positive law with conceptual rigor, but at the cost of relegating the judicial function to a subordinate position, limited to the execution of general commands. The result was a theoretically coherent model, but ineffective in accounting for the complexity of legal systems in changing societies.

Critics concurred in pointing out the classical model's inability to address the plurality of conflicts and the diversity of social practices. On the continent, exegetical formalism clashed with demands for flexibility and adaptation; in England, the idea of law as a legislated command failed to explain the operative force of custom, precedent, or everyday judicial practice. These tensions revealed a structural limitation: the judge could no longer be conceived as a simple "mouth of the law", since his or her role necessarily involved margins of interpretation, selection of meanings, and construction of decisions. The classical paradigm had underestimated this dimension, creating a gap between the theory and the reality of the judicial function.

In this context, Hans Kelsen's proposal emerged as a turning point. As previously noted, when outlining Kelsen's systematization of law, his proposal was based on the identification of the State with the normative order. However, in the judicial function,

this same conception took on a different nuance: instead of reducing the judgment to the simple application of a general norm, he described it as an individual norm belonging to the system itself. In this way, each judicial decision is integrated into the hierarchical structure of law and contributes to its dynamic reproduction. Kelsen also recognized that every superior norm leaves open spaces to be filled through acts of application, which grants the judge a margin of discretion. However, this discretion is not presented as unlimited power, but rather as a power controlled by the normative framework as a whole.

The transition to Kelsen can be understood, then, as a shift from a model centered on the absolute subordination of the judge to one that allows judicial creativity within strict normative limits. In contrast to the classical view, which understood the judicial function as a mechanical activity, Kelsen offered a more realistic framework in which the interpretation and production of law are intertwined. This reformulation did not represent a break with positivism, but rather its evolution toward a theory capable of more faithfully describing legal practice. The judge was no longer viewed as a mere executor and was conceived as a participant in the creation of law, always under the authority of higher norms that guarantee the unity and coherence of the system.

In sum, the crisis of the classical model opened the way for a rethinking of the place of the judiciary within positivism. The rigidity of the exegesis and Austin's analytical reduction proved insufficient, while Kelsen outlined a horizon in which the judicial function is explained as an act of normative production, limited by the legal hierarchy but indispensable to the vitality of the legal order. This marks the threshold of a new paradigm, which will be the subject of detailed analysis in the following chapters, which will examine both the general foundations of the *Pure Theory of Law* and its specific conception of the jurisdictional function.