

VOLKSgeist VS. SOVEREIGN COMMAND: A COMPARATIVE ANALYSIS OF LAW'S SOURCE IN SAVIGNY AND AUSTIN

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Abstract

The question of law's ultimate source has divided jurists for centuries, with profound implications for how legal systems are built, reformed, and legitimated. This paper undertakes a comparative analysis of two seminal 19th-century answers: John Austin's command theory, which locates law in the will of a determinate sovereign backed by sanction, and Friedrich Carl von Savigny's doctrine of the Volksgeist, which sees law as the organic expression of a people's historical and cultural consciousness. The study first reconstructs Austin's positivist model of law as "properly so called," highlighting its emphasis on clarity, sovereignty, and the separation of law from morality. It then examines Savigny's historical jurisprudence, which rejects deliberate legislation in favour of custom and juristic science as conduits for the national spirit. A systematic comparison reveals fundamental divergences on the nature of legal validity, the role of history, attitudes to codification, and the relationship between law and society. While Austin's theory underpins modern statute-based systems and offers analytical precision, it struggles to account for customary and international law or to identify the sovereign in complex democracies. Savigny's Volksgeist, though influential in comparative law and postcolonial jurisprudence, risks romanticism and cannot easily accommodate plural, multi-ethnic states. Using Nigeria's dual legal heritage of received English law and indigenous customary law as a reference point, the paper argues that neither theory alone provides a complete account of law's source. Instead, a durable legal order requires both Austinian authoritative pedigree and Savignian social congruence. Law, it concludes, is at once command and culture.

Keywords: Command theory, Volksgeist, Sovereignty, Morality, Multi-ethnic states

1. Introduction

One of the oldest and most persistent questions in legal theory is deceptively simple: what makes law, law? Beyond statutes, judgments, and customs lies a deeper inquiry into the source of legal validity, the ultimate ground from which rules derive their binding force. The answer matters not only for philosophers but for legislators, judges, and citizens. It determines whether law is conceived as an instrument of political will, a mirror of social life, or something else entirely. It shapes attitudes to codification, legal reform, colonial legal transplants, and the status of customary norms. The 19th century produced two of the most influential and diametrically opposed answers to this question. In England, John Austin, building on Jeremy Bentham's utilitarian foundations, articulated what became the classical statement of legal positivism: law is the command of a sovereign, habitually obeyed by the bulk of the population, and backed by the threat of sanction.¹ For Austin, the source of law was political and institutional. It could be identified without recourse to history, morality, or popular sentiment. Law "properly so called" was separate from "positive morality" and from the vague dictates of nature or reason.²

At almost the same moment in Germany, Friedrich Carl von Savigny offered a radically different vision. Writing in reaction to proposals for a unified German civil code modelled on the Napoleonic Code, Savigny argued in *Vom Beruf unserer Zeit für Gesetzgebung und*

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¹ John Austin, "The Province of Jurisprudence Determined: (1995) (W. Rumble ed, Cambridge University Press) 21.

² Ibid 157

Rechtswissenschaft that law is not made but found.³ It grows organically with a people as an expression of their *Volksgeist* which is the distinctive spirit or national consciousness shaped by history, language, and culture. For Savigny, legislation was a late and often dangerous stage in legal development. The true organs of law were custom and the juristic class, who articulated the unconscious convictions of the people.⁴ The source of law, then, was social and historical rather than political and voluntarism.

These two conceptions, sovereign command versus popular spirit represent more than a historical debate between English analytical jurisprudence and German historical jurisprudence. They embody enduring tensions within legal theory: between certainty and legitimacy, between will and culture, between law as an act of power and law as an expression of identity. The tension did not end in the 19th century. Austin's model directly informs H.L.A. Hart's concept of law as a union of primary and secondary rules and Hans Kelsen's *Grundnorm*, while Savigny's thought echoes in modern legal pluralism, the recognition of customary and indigenous law, and postcolonial critiques of legal transplantation.⁵

This paper undertakes a comparative analysis of Austin and Savigny to interrogate the source of law. It proceeds in five stages. Section 2 reconstructs Austin's command theory and its claims to analytical clarity. Section 3 sets out Savigny's *Volksgeist* and the historical school's opposition to codification. Section 4 systematically compares the two on validity, history, codification, and the law-morality relation. Section 5 evaluates their critiques and limitations, drawing on Hart, Fuller, and later jurisprudence. Section 6 considers modern relevance, using Nigeria's dual heritage of received English law and indigenous customary law to test which theory better explains plural legal orders. The paper argues that while Austin provides the grammar of authority and Savigny the grammar of legitimacy, neither alone accounts for law's complexity. A viable legal order requires both: the institutional pedigree of command and the social resonance of culture.

2. John Austin and the Command Theory of Law

John Austin⁶ occupies a pivotal place in the history of jurisprudence as the first thinker to attempt a systematic, scientific account of law stripped of moral and historical baggage. His project, set out in the 'Province of Jurisprudence Determined' was to isolate "law properly so called" from cognate phenomena and thereby establish jurisprudence as an autonomous discipline.⁷ The result was the classical formulation of legal positivism: law as the command of a sovereign.

2.1 Intellectual Context: Bentham's Shadow and the Rejection of Natural Law

Austin did not write in a vacuum. His thought was deeply indebted to Jeremy Bentham, whose utilitarianism and codification campaigns shaped early 19th-century English legal reform.⁸ Bentham had attacked William Blackstone's portrayal of English common law as an expression of reason and custom, dismissing it as "nonsense upon stilts."⁹ For Bentham, law was a human artifact, to be evaluated by its utility and expressed in clear, codified commands. Austin adopted this anti-natural law stance but sought to give it analytical precision rather than reformist

³ F.C. von Savigny, "Of the Vocation of Our Age for Legislation and Jurisprudence" (1831) (Abraham Hayward tr, Littlewood) 24.

⁴ Ibid 30

⁵ See H.L.A. Hart, *The Concept of Law* (2012) (3rd edn, OUP) 18–25; Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokai University Press 1989).

⁶ (1790–1859)

⁷ John Austin, *The Province of Jurisprudence Determined* (1995) (W. Rumble ed, CUP) 1.

⁸ W.L. Morison, *John Austin* (1982) (Stanford UP) 12–18.

⁹ Jeremy Bentham, *Anarchical Fallacies in Works* (1843) vol 2 (Bowring ed) 501.

zeal. His aim was descriptive: to state what law is, not what it ought to be. This entailed a deliberate separation of law from morality, justice, and history—a separation that became the hallmark of analytical jurisprudence.¹⁰

2.2 Core Elements: Sovereign, Command, Duty, Sanction

Austin's definition of law proceeds in stages. First, laws are a species of commands. A command, he argued, is an expression of wish by a rational being that another rational being shall do or forbear, combined with the power and purpose to inflict an evil if the wish is disregarded.¹¹ From this, three elements follow: (i) a wish or will conceived by the commander, (ii) a communication of that wish, and (iii) a sanction – the evil to be imposed for disobedience. Duty, for Austin, is simply the liability to sanction. Where there is no sanction, there is no duty, and therefore no law.¹² But not every command is law. Commands given by a master to a servant or by a parent to a child are not law “properly so called.” To qualify as positive law, a command must emanate from a political superior to a political inferior. This introduces the concept of the sovereign. For Austin, the sovereign is that determinate human superior, not in a habit of obedience to a like superior, who receives habitual obedience from the bulk of a given society.¹³ The key tests are determinacy— the sovereign must be identifiable persons or a body, not an abstract “people” and habitual obedience. The bulk of society must be in the habit of obeying the sovereign, while the sovereign obeys no one else. Law, then, is the general command of a sovereign backed by sanction. Austin further distinguished law “properly so called” from “positive morality.” The latter includes rules set by opinion, such as the laws of fashion or international law, which lack a determinate sovereign and sanction.¹⁴ International law was therefore not law but positive morality, a conclusion that drew immediate criticism but followed logically from his premises.

2.3 The Province of Jurisprudence: General and Particular

Austin envisaged jurisprudence as having two branches; General jurisprudence studies principles, notions, and distinctions common to all mature legal systems, concepts like right, duty, person, thing, act.¹⁵ Particular jurisprudence is the science of any actual system of law or portion of it. His own work was an exercise in general jurisprudence, aiming to clarify the conceptual structure that any system of positive law must exhibit. This universalizing ambition explains why Austin paid little attention to history or comparative detail. If law is a command structure, its logical features can be stated without reference to how any particular society developed its rules.

2.4 Strengths: Certainty, Clarity, and the Foundation of Positivism

The command theory had immediate intellectual advantages. First, it provided certainty. By identifying law with the ascertainable will of a determinate sovereign, Austin offered a test for legal validity that did not depend on contested moral judgments or obscure historical inquiries.¹⁶ A rule was law if it was commanded by the sovereign; it was not law if it lacked that pedigree. Second, it enabled a clear separation of law and morality. This allowed jurists to describe bad laws as laws nonetheless, avoiding the confusion of *lex* and *ius* that Austin thought plagued

¹⁰ Austin (n 1) 157.

¹¹ Ibid 21

¹² Ibid 24

¹³ Ibid 193–195.

¹⁴ Ibid 142, 201.

¹⁵ Ibid 11

¹⁶ See Michael Freeman, Lloyd's Introduction to Jurisprudence (2014) (9th edn, Sweet & Maxwell) 200.

natural law theory. Third, it laid the groundwork for modern analytical positivism. Though later positivists like H.L.A. Hart would abandon the command model, they retained Austin's core insight that the existence of law is a social fact, not a moral one.¹⁷

2.5 Influence and Legacy: From Hart to Kelsen

Austin's direct influence in 19th-century England was limited, his lectures were poorly attended and his book sold few copies in his lifetime.¹⁸ Yet his ideas were resurrected in the 20th century. H.L.A. Hart's 'The Concept of Law' begins with a sustained critique of Austin but preserves the positivist project by replacing commands with rules and the sovereign with the rule of recognition.¹⁹ For Hart, law is a union of primary rules of obligation and secondary rules of recognition, change, and adjudication. The rule of recognition, accepted by officials, performs the identifying function that Austin assigned to the sovereign. Similarly, Hans Kelsen's Pure Theory of Law retains the notion of a hierarchical structure of norms culminating in a *Grundnorm*, though Kelsen rejected Austin's psychologistic account of sanction and obedience.²⁰ In common law systems, Austin's emphasis on legislation as the paradigm of law anticipated the 20th-century rise of the regulatory state, where Parliament or Congress is recognizably the "sovereign" issuing commands across social life.

Austin's model also shaped colonial legal thought. In British colonies, including Nigeria, the reception of English law was justified precisely because it emanated from the imperial sovereign and was backed by the sanctions of the colonial state.²¹ Customary law was tolerated only insofar as it was not "repugnant to natural justice, equity and good conscience", a formula that subordinated it to the commands of the colonial sovereign.²² In that sense, Austinian jurisprudence provided the conceptual architecture for legal dualism.

To summarize, Austin's command theory reduces law to an empirical fact: the expressed will of a political superior habitually obeyed. It is elegant, parsimonious, and conceptually tidy. It tells us where to look to find law — in the statute book, not in the mists of history or the conscience of the people. Yet that very tidiness raises questions. Can we always identify a determinate sovereign in a federal or democratic state? What of customary law observed without legislation? What of international law, which lacks a global sovereign? And is a gunman's order backed by a threat any different from law, save for habitual obedience? These questions, pressed most forcefully by Hart,²³ expose the limits of command as a model of law. They also set the stage for Savigny's rival vision: that law's source lies not in the will of a ruler but in the life of a people.

3. Friedrich Carl Von Savigny and the Volksgeist

If John Austin sought to make jurisprudence a science by isolating law from history and morality, Friedrich Carl von Savigny (1779–1861) sought to return it to both. Writing in the aftermath of the Napoleonic Wars, Savigny articulated a vision of law as the product of a nation's historical life rather than the will of a legislator. His doctrine of the *Volksgeist*—the spirit of the people—became the foundation of the German Historical School and a direct challenge to both rationalist codification and Austinian positivism.²⁴

¹⁷ H.L.A. Hart, *The Concept of Law* (2012) (3rd edn, OUP) 18.

¹⁸ J. Morison (n 2) 3.

¹⁹ Hart (n 11) 20–25.

²⁰ Hans Kelsen, *Pure Theory of Law* (1967) (Max Knight tr, 2nd edn, University of California Press) 193–200.

²¹ See T.O. Elias, *The Nature of African Customary Law* (1956) (Manchester UP) 12.

²² Supreme Court Ordinance 1914, s 17; now Evidence Act 2011, s 18(3).

²³ H.L.A. Hart, *The Concept of Law* (2012) (3rd edn, OUP) 18.

²⁴ F.C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (1831) (Abraham Hayward tr, Littlewood) 24.

3.1 Intellectual Context: Romanticism and Reaction to Codification

Savigny's jurisprudence cannot be understood outside the political and intellectual climate of early 19th-century Germany. The Holy Roman Empire had collapsed in 1806, and the German states were left fragmented, occupied, and debating their future. The French Civil Code of 1804, exported by Napoleon's armies, represented a model of law as rational, universal, and legislated from above.²⁵ To many German jurists, notably A.F.J. Thibaut, this seemed an opportunity: Germany should enact its own uniform civil code to unify the nation and modernize private law.²⁶

Savigny's *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, translated as 'Of the Vocation of Our Age for Legislation and Jurisprudence', was a direct reply to Thibaut.²⁷ He argued that Germany was not ready for codification.²⁸ More fundamentally, he denied that law could be made in the way a code presupposed. His opposition was not merely practical but philosophical. Influenced by German Romanticism and the work of Herder and Hegel, Savigny conceived nations as organic entities, each with a distinctive language, culture, and historical trajectory.²⁹ Law, like language, was one expression of that organic life. To impose a code was to sever law from the soil in which it grew. The result would be artificial, rootless, and illegitimate.

3.2 Law as Expression of the Volksgeist

The central claim of Savigny's jurisprudence is that law is not the creation of an individual will but the gradual manifestation of the *Volksgeist*, the common consciousness or spirit of the people.³⁰ In its earliest stage, law exists as custom, "immediately and invisibly" within the life of the community. It is not commanded but lived. As societies become more complex, two specialized "organs" develop to articulate the *Volksgeist* with greater precision: first, jurists and legal science; later, legislation.³¹

Crucially, even legislation is not an act of pure will for Savigny. The legislator does not create law *ex nihilo*; he declares what already exists in the national consciousness. "The legislator," Savigny wrote, "is only the organ of the national conviction."³² Thus the source of law remains the people, not the state. The role of the jurist is similarly interpretive rather than creative. Through technical elaboration, the jurist makes explicit the principles already immanent in custom and legal relations. Roman law, which Savigny studied extensively, provided the best historical example: it developed over centuries through juristic commentary before being codified by Justinian.³³

This organic model has three implications. First, law has a national character. Just as German and French are different languages, German and French law reflect different spirits and cannot be exchanged without loss. Second, law has a historical dimension. Present law can only be understood through its past; to cut off that history is to misunderstand the rules themselves.

²⁵ Franz Wieacker, *A History of Private Law in Europe* (1995) (Tony Weir tr, OUP) 279–281.

²⁶ A.F.J. Thibaut, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (1814).

²⁷ Savigny (n 1).

²⁸ Thibaut and Walker's (1975, 1978) foundational position on procedural justice, often referred to as the instrumental model, posits that individuals value fair procedures primarily as a tool to ensure a favorable outcome.

²⁹ On Savigny and Romanticism, see Mathias Reimann, 'The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 *American Journal of Comparative Law* 95, 100–103.

³⁰ Savigny (n 1) 24, 27.

³¹ *ibid* 28–30.

³² *ibid* 30.

³³ F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter* (2nd edn, 1834–1851).

Third, law is non-voluntarist. It is not reducible to the command of any person or assembly, however sovereign. To treat it so is to mistake the surface for the substance.

3.3 The Role of Custom, Jurists, and Legal Science

For Savigny, custom is the first and most authentic form of law because it arises directly from the people's life without mediation.³⁴ Yet custom is not static. As social relations become complex, custom alone cannot provide the technical refinement required for commercial and urban life. At that point, legal science — the systematic work of jurists becomes the primary vehicle of the *Volksgeist*. The jurist does not impose his own views; he discerns, through historical and dogmatic study, the principles already latent in the legal relations of the community.³⁵ This explains Savigny's lifelong project: the historical study of Roman law in the Middle Ages. By tracing how Roman rules were received and transformed in Germany, he aimed to show that contemporary German law was a continuation of that tradition, not a candidate for replacement by French-inspired codes.³⁶ Legal science, then, is both historical and constructive. It preserves continuity while enabling development. Only when both custom and juristic science have fully matured is legislation appropriate and even then, it should merely restate what already exists, not innovate.³⁷

3.4 Opposition to Hasty Legislation and Codes

Savigny's opposition to codification was therefore principled, not merely dilatory. He feared that a code would "petrify" law, fixing it at a single moment and cutting it off from the organic process of growth.³⁸ A code presupposes that law can be comprehended as a complete, rational system by a legislator. Savigny thought this impossible: law's principles are too deeply interwoven with national life to be captured in a single act of will. Moreover, Germany in 1814 lacked, in his view, both the political unity and the juristic maturity to produce a good code. A premature code would be either a foreign transplant or a defective expression of the *Volksgeist*.³⁹ Ironically, Savigny's historical method ultimately enabled the German Civil Code (BGB) of 1900. By the late 19th century, German jurists had used his techniques to systematize German private law, and the BGB was drafted as a scientific restatement of that tradition rather than a political imposition.⁴⁰ Thus Savigny did not reject legislation as such; he rejected voluntaristic legislation that ignored history and national character.

3.5 Savigny's Influence: Historical School, Comparative Law, and Beyond

The Historical School dominated German jurisprudence for much of the 19th century and shaped legal education across Europe.⁴¹ Its emphasis on history and system influenced the Pandectist movement and, through it, the structure of modern civil codes.⁴² More broadly, Savigny legitimated the study of law as a cultural phenomenon. By treating law as an expression of national spirit, he opened the door to comparative law and legal sociology.

His ideas also resonated outside Europe. In postcolonial contexts, the claim that law must reflect the historical consciousness of a people became a resource for resisting wholesale reception of

³⁴Savigny (n 1) 27.

³⁵ *ibid* 31–33.

³⁶Wieacker (n 2) 303–307

³⁷Savigny (n 1) 35.

³⁸ *ibid* 36–37.

³⁹ *ibid* 40–43.

⁴⁰Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) (OUP) 10–12.

⁴¹Reimann (n 5) 95.

⁴²*ibid*

foreign law.⁴³ The recognition of customary law in African and Asian states including Nigeria can be read as a Savignian moment: an acknowledgment that imported statutes cannot displace the lived norms of a community without losing legitimacy.⁴⁴ At the same time, the *Volksgeist* has been criticized for its romantic vagueness and its potential to justify exclusionary nationalism. Who defines the “spirit of the people,” and what happens when a state contains many peoples? These questions anticipate the critique of Savigny in Section 5.

In sum, Savigny reversed Austin’s image of law. For Austin, law is vertical: it descends from sovereign to subject as command. For Savigny, law is horizontal: it emerges from the life of the community and is articulated by jurists and, only late, by legislators. The source of law is not will but history; not command but culture. That reversal sets up the systematic comparison in the next section.

4. Comparative Analysis: Points of Divergence

Having reconstructed Austin’s command theory and Savigny’s doctrine of the *Volksgeist*, the contrast between them can now be drawn systematically. The two jurists agree that law is a social phenomenon and that jurisprudence must identify what distinguishes law from other normative orders. Yet they disagree on nearly every substantive point: the source of legal validity, the role of history, the attitude to codification, the relation between law and morality, the conception of the legal subject, and the temporal character of law. These divergences are not mere differences of emphasis; they reflect incompatible assumptions about the nature of political and social order.

4.1 Source of Legal Validity: Determinate Sovereign vs. Indeterminate National Spirit

For Austin, the question “what is law?” is answered by a pedigree test. A rule is law if and only if it can be traced to the command of a sovereign, defined as a determinate person or body habitually obeyed by the bulk of society and not itself in the habit of obedience to a like superior.⁴⁵ Validity is thus institutional and voluntarist. It depends on the fact of enactment by an identifiable political superior, coupled with the capacity to sanction. The content of the rule, its historical origin, and its congruence with popular sentiment are irrelevant to its status as law. An unjust command remains law; a widely observed custom is not law until commanded.

Savigny inverts this picture. The source of validity is not the will of any determinate superior but the *Volksgeist*—the common consciousness of the nation.⁴⁶ Law is valid because it expresses, however imperfectly, the convictions of the people as they have developed through history. The legislator does not confer validity; he recognises it. A statute that contradicts the *Volksgeist* is, for Savigny, defective law, even if duly enacted and backed by sanction. Conversely, a custom that embodies the national spirit is law even before any legislative act. Validity is therefore social and historical rather than institutional and voluntarist.

The contrast can be sharpened by asking: what would each theorist say about a newly independent state? For Austin, the moment a determinate sovereign emerges and secures habitual obedience, its commands become law, irrespective of whether they reflect prior customs.⁴⁷ For Savigny, political independence is insufficient; the new state must allow its law to grow from the

⁴³ See Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (1989) (Tokai UP) 45.

⁴⁴ T.O. Elias, *The Nature of African Customary Law* (1956) (Manchester UP) 18–22.

⁴⁵ John Austin, *The Province of Jurisprudence Determined* (1995) (W. Rumble ed, CUP) 193–195.

⁴⁶ F.C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (1831) (A. Hayward tr,) 24.

⁴⁷ Austin (n 41) 199.

historical life of its people, and hasty legislation would be illegitimate.⁴⁸ This divergence anticipates the postcolonial problem of received law, to which we return in Section 6.

4.2 Attitude to Codification: Will vs. Organism

The second major divergence concerns codification. Austin, following Bentham, was sympathetic to comprehensive legislation. Because law is a command, it ought to be expressed clearly, prospectively, and systematically so that subjects can know their duties.⁴⁹ A code is the most rational form for commands to take. Austin's own project of general jurisprudence was intended to provide the conceptual tools for such codification. He saw the common law's reliance on judicial precedent as an inferior, "ex post facto" mode of legislation.⁵⁰

Savigny's *Vom Beruf* was written precisely to resist codification on the German model of the French Civil Code.⁵¹ For him, a code presupposes that law can be grasped as a complete system at a single moment and imposed by legislative will. This contradicts the organic character of law. Law, like language, cannot be manufactured; it grows. To codify prematurely is to "petrify" law and sever it from the *Volksgeist*.⁵² Legislation is legitimate only at a late stage of legal development, and even then it must be a restatement, not an invention. The difference is thus one of method: Austin's jurisprudence is architectural, that law is built by design. Savigny's is horticultural as law is cultivated.

4.3 Role of History: Irrelevant vs. Constitutive

The two theories also diverge on the relevance of history to legal science. Austin's analytical method is deliberately a-historical. The logical structure of law sovereign, command, sanction can be stated without reference to how any particular system emerged.⁵³ History may explain why a sovereign has power, but it does not enter into the definition of law. For this reason, Austin's *Province* contains almost no historical discussion. He sought universal propositions applicable to all "mature" systems.

For Savigny, history is not merely relevant; it is constitutive. Present law is unintelligible without its past because the *Volksgeist* is itself a historical product.⁵⁴ Legal concepts are the sediment of centuries of practice, and the jurist's task is to trace their development. Roman law mattered to 19th-century Germany not as a foreign imposition but as part of the German legal tradition, received and transformed through medieval practice.⁵⁵ To cut off that history, as a code might, is to misunderstand the law itself. Thus while Austin's jurisprudence could be written in a library with no knowledge of English legal history, Savigny's required archival immersion.

4.4 Law and Morality: Separation vs. Potential Fusion

Austin is famous for insisting on the separation of law and morality. The existence of law is one thing; its merit or demerit another.⁵⁶ This "separability thesis" became the cornerstone of legal positivism. It allowed Austin to say that an iniquitous statute is still law, and that the question of obedience is a moral one, not a legal one. The separation was analytical: law and morality are different kinds of norms, identified by different tests.

⁴⁸Savigny (n 42) 40–43.

⁴⁹ Austin (n 41) 35–37; Jeremy Bentham, *Of Laws in General* (H.L.A. Hart ed, 1970) 1.

⁵⁰ Austin (n 41) 31.

⁵¹Savigny (n42) 3–5.

⁵² *ibid* 36–37.

⁵³ Austin (n 41) 11.

⁵⁴Savigny (n4 2) 27–28.

⁵⁵Franz Wieacker, *A History of Private Law in Europe* (1995) (Tony Weir tr, OUP) 303–307.

⁵⁶ Austin (n 41) 157.

Savigny never endorsed natural law, but his theory makes a strict separation harder to maintain. If law expresses the convictions of a people, and those convictions include moral and ethical life, then law and morality are historically intertwined.⁵⁷ Custom, the primary source of law, often embodies a community's sense of right. The jurist who articulates the *Volksgeist* is therefore articulating a normative life that is not cleanly divided into "legal" and "moral." Savigny did not claim that all popular morality is law, but he denied that law could be identified without reference to the ethical life of the nation. In this sense, his theory anticipates later anti-positivist arguments by Lon Fuller and Ronald Dworkin that law has an inner morality or integrity.⁵⁸

4.5 Conception of the People: Passive Subjects vs. Active Creators

Underlying these doctrinal differences is a different conception of the legal subject. For Austin, the bulk of society is passive. Their role is to obey habitually. They are not authors of law; they are its addressees.⁵⁹ The sovereign commands; the people comply. This top-down model fits monarchies and unitary states but struggles, as Hart showed, with democracies where the people are also, in some sense, sovereign.⁶⁰ For Savigny, the people are active, even if unconsciously so. Through their daily interactions, disputes, and customs, they generate the legal material that jurists later systematize.⁶¹ The legislator and the judge are organs of the people, not their masters. Law is thus democratic in a sociological if not procedural sense: it emerges from below. This explains why Savigny was hostile to enlightened absolutism and Napoleonic legislation, they substituted the will of a ruler for the life of a nation.

4.6 Time Dimension: Instantaneous vs. Evolutionary

Finally, the two theories differ in their temporal ontology of law. Austin's law is instantaneous. A command becomes law at the moment it is issued by the sovereign. Its validity does not depend on how long it has existed or whether it coheres with past practice.⁶² Repeal is equally instantaneous: a new command deletes the old. This fits a world of statutes and executive orders. Savigny's law is evolutionary. It has no single moment of birth. It exists "immediately and invisibly" in the *Volksgeist* and becomes visible only gradually through custom and juristic science.⁶³ Legislation is a late stage, not the beginning. Correspondingly, law cannot be repealed by fiat if it remains alive in the consciousness of the people. This explains Savigny's fear that codes would interrupt legal development. For him, law is a process, not an event.

The Austin-Savigny debate is therefore a debate about the metaphysics of law. Is law an act or a process? Is it imposed or inherited? Is its authority derived from power or from culture? Austin gives us a theory of law for a centralized, bureaucratic state that values certainty and change through legislation. Savigny gives us a theory for a culturally cohesive nation that values continuity and legitimacy through history. Each captures something true about legal experience, yet each, as Section 5 will show, is vulnerable to critique when confronted with legal phenomena it cannot easily explain.

⁵⁷Savigny (n 42) 30.

⁵⁸ See Lon L. Fuller, *The Morality of Law* (1964) (Yale UP); Ronald Dworkin, *Law's Empire* (Harvard UP 1986).

⁵⁹ Austin (n 41) 195.

⁶⁰ H.L.A. Hart, *The Concept of Law* (2012) (3rd edn, OUP) 50–60.

⁶¹Savigny (n 42) 27–28.

⁶² Austin (n 41) 21.

⁶³Savigny (n 42) 24, 28.

5. Critique and Limitations

Neither Austin's command theory nor Savigny's *Volksgeist* has survived intact into contemporary jurisprudence. Each, while powerful in its own context, encounters decisive objections when confronted with the complexity of modern legal systems. The critiques reveal not only the limits of 19th-century jurisprudence but also why later theorists such as H.L.A. Hart, Hans Kelsen, and legal pluralists sought to move beyond both models. This section examines the principal objections to Austin and Savigny in turn, before considering a shared problem: the question of unjust law.

5.1 Critique of Austin: The Sovereign, Custom, and the Gunman

The most enduring line of attack on Austin was developed by H.L.A. Hart in "The Concept of Law".⁶⁴ Hart accepted Austin's positivist separation of law and morality but argued that the command model fails to capture the character of law in three respects.

First, the idea of a determinate sovereign who is habitually obeyed and obeys no one is difficult to locate in modern states. In a democracy, who is sovereign: the electorate, Parliament, the constitution, or the courts?⁶⁵ In federal systems such as the United States or Nigeria, sovereignty is divided between federal and state levels, and no single body is habitually obeyed in all matters. Austin's model, derived from the unitary, parliamentary sovereignty of 19th-century Britain, cannot easily describe these arrangements.⁶⁶ Hart replaced the sovereign with the rule of recognition: law is whatever is identified as law by the officials of the system according to accepted criteria. This allows for divided or limited sovereignty without collapsing the concept of law.

Second, Austin's theory cannot account for customary law or judge-made law except by fiction. If custom is not law until commanded by the sovereign, then much of the common law was not law until a statute or judicial decision declared it so.⁶⁷ Yet courts routinely apply customs precisely because they are customs, not because a sovereign commanded them. Austin's answer that judges are delegates of the sovereign and that their decisions are "tacit commands" strains credulity.⁶⁸ It treats all law as legislation, which mis-describes how common law systems actually operate.

Third, the command theory fails to distinguish law from coercion. Austin's sanction-based model makes law resemble the order of a gunman: "Your money or your life."⁶⁹ Both involve a wish backed by a threat. Hart argued that law is different because it provides reasons for action, not merely threats. Citizens and officials accept legal rules as standards of conduct; they adopt an "internal point of view" toward them.⁷⁰ Austin's theory, by reducing duty to liability to sanction, cannot explain this normative dimension. It portrays law as something imposed on a generally alienated populace, whereas most people in stable legal systems treat law as authoritative without calculating the probability of punishment.

Finally, Austin's exclusion of international law as mere "positive morality" seemed, even to contemporaries, to define away a central legal phenomenon.⁷¹ If millions of people regard

⁶⁴ H.L.A. Hart, *The Concept of Law* (2012) (3rd edn, OUP) chs 2–4.

⁶⁵ *ibid* 50–60.

⁶⁶ See Peter C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (2005) (OUP) 25–30.

⁶⁷ Hart (n 60) 43–48.

⁶⁸ John Austin, *The Province of Jurisprudence Determined* (1995) (W. Rumble ed, CUP) 31–32.

⁶⁹ Hart (n 60) 19–20.

⁷⁰ *ibid* 55–57.

⁷¹ Austin (n 41) 201.

treaties and customary international norms as law, a theory that denies them that status is revisionary rather than descriptive. Later positivists, including Hart and Kelsen, sought to accommodate international law within a positivist framework, precisely to avoid Austin's conclusion.⁷²

5.2 Critique of Savigny: Vagueness, Romanticism, and Pluralism

Savigny's *Volksgeist* faces a different set of objections. The first is analytical vagueness. What is the "spirit of the people," and how is it identified?⁷³ Savigny never provided a test. The *Volksgeist* is not observable; it is inferred from customs and juristic writings, which are themselves selected by jurists. This circularity allows the concept to justify almost any conclusion. In practice, the Historical School tended to treat the writings of Roman jurists and German professors as the voice of the *Volksgeist*, raising the suspicion that "the people" meant "the legal elite."⁷⁴

Second, the theory has romantic and nationalist overtones that became politically suspect in the 20th century. By tying law to a unitary national spirit, Savigny's model struggles with multi-ethnic, multi-lingual, or immigrant societies.⁷⁵ Which *Volksgeist* governs in Switzerland, Belgium, or Nigeria? If each ethnic group has its own spirit, do they each have their own law, and how are conflicts resolved? Savigny's answer that genuine nations are culturally homogeneous was plausible in the context of German unification but is unhelpful for plural states. Worse, the *Volksgeist* was later appropriated by German National Socialist jurists to argue that law should reflect the racial spirit of the Volk, showing how a vague cultural concept can be turned to exclusionary ends.⁷⁶

Third, Savigny's hostility to legislation and reform makes his theory conservative in a way that seems to deny law's instrumental role. If law must grow organically, how can a society deliberately abolish slavery, enfranchise women, or adopt commercial codes to facilitate trade?⁷⁷ Savigny's claim that premature legislation is illegitimate would condemn most 19th- and 20th-century legal reforms. Yet many such reforms are now regarded as morally and socially necessary. The *Volksgeist*, by privileging continuity, risks consecrating existing injustices as expressions of national character.

Fourth, the theory has descriptive gaps. It cannot explain revolutionary law-making, colonial legal transplants, or the deliberate construction of new legal systems, all of which are common in modern history. The Turkish Civil Code of 1926, the Japanese Meiji codes, and the reception of English law in British colonies were acts of will that created functional legal orders without waiting for an organic *Volksgeist*.⁷⁸ Savigny would have to describe these as defective or inauthentic, yet they operate as law.

⁷²Hart (60) ch 10; Hans Kelsen, *Pure Theory of Law* (1967) (Max Knight tr, 2nd edn, University of California Press) 320–347.

⁷³ See Roger Cotterrell, *The Politics of Jurisprudence* (2003) (2nd edn, OUP) 71.

⁷⁴ Mathias Reimann, 'The Historical School Against Codification' (1989) 37 *American Journal of Comparative Law* 95, 106–108.

⁷⁵ William Ewald, 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' (1995) 143 *University of Pennsylvania Law Review* 1889, 1965.

⁷⁶ Michael Stolleis, *A History of Public Law in Germany 1914–1945* (2004) (Thomas Dunlap tr, OUP) 343–347.

⁷⁷ See Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1911) 25 *Harvard Law Review* 489, 500.

⁷⁸ See EsinÖrücü, 'The Enigma of Comparative Law' (2004) (MartinusNijhoff) 153–160.

5.3 Both Theories and the Problem of Unjust Law

A final critique applies to both Austin and Savigny, though for opposite reasons. Austin's separation of law and morality permits him to say that an iniquitous statute is still law.⁷⁹ This avoids confusion but seems to detach law from any claim to legitimacy. Savigny's theory, by grounding law in the convictions of the people, appears to give law a moral foundation, but it does so at the cost of relativism: if the *Volksgeist* endorses oppressive customs, are they law and therefore legitimate?⁸⁰ Savigny has no internal resource to condemn a custom that is genuinely popular. Thus Austin risks amorality; Savigny risks moral majoritarianism. Later natural law and interpretivist theories, from Lon Fuller to Ronald Dworkin, attempted to navigate between these poles by arguing that law necessarily has a moral dimension but is not reducible to popular conviction.⁸¹

In sum, Austin's command theory is too narrow to capture the variety of legal phenomena, while Savigny's *Volksgeist* is too diffuse to provide a workable test of validity. Austin cannot explain customary or international law; Savigny cannot explain deliberate legislation or plural societies. Both struggle with the problem of unjust law, though from opposite directions. These limitations set the stage for 20th-century attempts at synthesis, and for the question, addressed in Section 6, of whether either theory can explain the dual legal heritage of a state like Nigeria.

6. Modern Relevance and Application

Though Austin and Savigny wrote for the legal and political conditions of the early 19th century, their opposing accounts of law's source continue to structure contemporary debates. Austin's command model anticipates the modern regulatory state and the primacy of statute; Savigny's *Volksgeist* resonates with arguments for legal pluralism, customary law recognition, and cultural legitimacy in postcolonial settings. Neither theory alone is adequate, but each illuminates a dimension of law that remains salient. This section traces their modern legacies before using Nigeria's dual legal heritage as a test case for their explanatory power.

6.1 Austin Today: Statute, Sovereignty, and the Regulatory State

The 20th and 21st centuries have been, in many respects, Austinian. The expansion of the administrative state, welfare legislation, and codified criminal and commercial law reflects a world in which law is predominantly enacted by identifiable institutions and backed by organized sanction.⁸² Parliamentary sovereignty in the United Kingdom, congressional legislation in the United States, and decree-making under military regimes all fit the Austinian picture of law as the will of a political superior. Even in civil law jurisdictions, the primacy of the code and the legislature over custom embodies Austin's voluntarist premise.

Analytical positivism, though it abandoned Austin's crude command model, retained his core insight that legal validity is a matter of social fact.⁸³ H.L.A. Hart's rule of recognition and Joseph Raz's authority-based account of law are heirs to Austin's project of describing law without moral evaluation.⁸⁴ In international law, the move from custom to treaty as the dominant source, and the role of the United Nations Security Council's "legislative" resolutions, suggest that Austin's exclusion of international law was premature: once determinate institutions emerged,

⁷⁹ Austin (n 41) 157.

⁸⁰ Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (A. Hayward tr, 1831) 30.

⁸¹ Lon L. Fuller, *The Morality of Law* (1986) (Yale UP 1964); Ronald Dworkin, *Law's Empire* (Harvard UP).

⁸² See Michael Taggart, 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 869.

⁸³ H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 185–186.

⁸⁴ Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 37–52.

his model could be extended.⁸⁵ Thus, for describing statute-based, institutionalized legal systems, Austin remains indispensable.

6.2 Savigny Today: Customary Law, Legal Pluralism, and Postcolonial Jurisprudence

Savigny's legacy is visible wherever law's legitimacy is thought to depend on its congruence with social life. The global "turn to custom" in the late 20th century, the recognition of indigenous law in Canada, Australia, and South Africa, the revival of Islamic finance, and the codification of customary family law echoes, his claim that law must grow from the life of a people.⁸⁶ Legal pluralism, as theorized by John Griffiths and Masaji Chiba, treats state law as only one normative order among many, with customary, religious, and community norms operating as law for their adherents.⁸⁷ This is Savignian in spirit, even if pluralists reject his nationalist monism.

In postcolonial states, Savigny's warning against hasty transplantation of foreign codes has been vindicated repeatedly. Legal transplants that ignore local context often fail to secure compliance or legitimacy.⁸⁸ The World Bank's law-and-development projects of the 1960s–1980s, which sought to impose Western commercial codes on African and Asian states, are now criticized precisely in Savignian terms: they lacked roots in the *Volksgeist*.⁸⁹ Contemporary constitution-making therefore emphasizes public participation and congruence with local values, an implicit concession to Savigny's point that law must be felt as one's own.

6.3 Nigeria: Between Received Law and Living Custom

Nigeria provides a particularly sharp test for Austin and Savigny because its legal system is formally dualist. The 1999 Constitution, statutes of the National Assembly, and decisions of superior courts as well as the received English law, operating in an Austinian fashion: identifiable institutions issue commands backed by state sanction.⁹⁰ Yet the same Constitution recognizes "customary law" and "Islamic personal law," to be applied by Customary and Sharia Courts of Appeal. These bodies adjudicate marriage, inheritance, and land disputes by reference to norms that often predate colonial rule and derive their authority from community acceptance rather than legislation.⁹¹

Which theory better explains Nigeria? Austin can account for federal statutes, the Criminal Code, and the Constitution itself. The Supreme Court's power of judicial review is explicable as delegated sovereign authority.⁹² But Austin struggles with customary law. Is a Yoruba custom regarding land tenure "law" before a court applies it? Austin must say no, or treat the judge as a delegate issuing a tacit command.⁹³ Yet communities follow such customs without state enforcement, and courts often defer to them precisely because they are not state commands.

⁸⁵ See José E. Alvarez, *International Organizations as Law-makers* (OUP 2005) 120–145.

⁸⁶ Constitution of the Republic of South Africa 1996, s 211(3); *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁸⁷ John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1; Masaji Chiba, *Legal Pluralism* (Tokai UP 1989).

⁸⁸ See Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

⁸⁹ David M. Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062.

⁹⁰ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 4.

⁹¹ *ibid* ss 262, 277.

⁹² *ibid* s 1(3).

⁹³ T.O. Elias, *The Nature of African Customary Law* (1956) (Manchester UP) 12–15.

Savigny, conversely, captures the legitimacy and resilience of customary law. His theory explains why the wholesale replacement of indigenous norms by English law during colonialism produced a legitimacy gap that persists today.⁹⁴ The periodic crises over the application of Sharia penal codes in northern states reflect a Savignian claim: law that contradicts the lived convictions of a community will be resisted, regardless of formal validity.⁹⁵ Yet Savigny cannot explain the Constitution itself, the Companies and Allied Matters Act, or the criminal jurisdiction of the federal High Courts. These are Austinian creations, willed into existence and effective despite shallow roots in precolonial custom.

6.4 Towards Synthesis: Law as Command and Culture

The Nigerian example suggests that modern legal orders require both Austinian and Savignian elements. State law provides certainty, change, and coordination across a plural society; customary and religious law provides legitimacy, identity, and social congruence. Hart's theory of law as a union of primary and secondary rules, accepted by officials and generally obeyed by citizens, is one attempt at synthesis.⁹⁶ It retains Austin's institutionalism but replaces commands with rules and adds the requirement of official acceptance, a sociological concession to Savigny. Legal pluralism goes further, treating state law and customary law as distinct but interacting legal orders, each with its own source of validity.⁹⁷

Thus, neither Austin nor Savigny alone can explain 21st-century law. Austin gives us the grammar of authority; Savigny gives us the grammar of legitimacy. A durable legal system must speak both.

7. Conclusion

The enduring debate between Austin and Savigny is, at bottom, a debate about what makes law possible as a social institution. Austin's answer is that the command of a determinate sovereign captures law's capacity to coordinate behaviour through institutional authority and to change rapidly by legislative will. It explains the modern regulatory state, codified systems, and the centrality of statutes and constitutions. Savigny's answer is that it is the organic expression of a people's historical consciousness that captures law's need for cultural resonance and its dependence on customs and beliefs that precede the state. It explains the persistence of customary and religious law, the failures of transplanted codes, and the demand that law be experienced as legitimate, not merely coercive.

As the Nigerian case illustrates, most contemporary legal systems are neither purely Austinian nor purely Savignian. They are hybrid orders in which legislation and custom, state and society, command and culture coexist and compete. The critiques of both theories suggest that law's source cannot be reduced to a single point: neither sovereign will nor national spirit alone suffices. Following Hart and later pluralists, we may conclude that a viable legal order requires both an institutional pedigree that identifies valid rules and a social foundation that secures their acceptance. Law, in short, is at once command and culture. Its authority depends on power, but its durability depends on meaning. Any project of legal reform that ignores either dimension risks producing rules that are valid yet inert, or legitimate yet unenforceable.

⁹⁴Nonso Okereke Ezeke, *Law and Justice in Post-British Nigeria* (Greenwood 2002) 88–92.

⁹⁵ See *Attorney-General v. Attorney-General of Abia State* 6 NWLR (Pt 763) 264.

⁹⁶ Hart (n 60) 94–95.

⁹⁷ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (2002) (OUP 2001) 171–176.