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1. Introduction of Jurisprudence

1.1 Meaning of Jurisprudence

Jurisprudence or legal theory is the philosophy of law, i.e., the science of law. It is the study of the theories and principles on which a legal system is founded. Jurisprudence is the science. The term may also refer to a department of law, as in 'medical jurisprudence.'

The English term is based on the Latin word *jurisprudentia:* juris is the genitive form of jus meaning "law", and *prudentia* means "knowledge". The word was first attested in English in 1628, at a time when the word 'Prudence' had the then obsolete meaning of "knowledge of or skill in a matter". The word may have come via the French jurisprudence, which is attested earlier. Where there is a systemize branch of knowledge its science comes into existence, since law is a systemized branch of knowledge, it is a science. The name of the science is Jurisprudence.

This word has its roots in the **Latin word "Jurisprudentia".**

Juris = law

prudentia = knowledge.

Philosophy of law is termed as 'Jurisprudence'

Thus, jurisprudence is knowledge of law or skill in law. It is the `science of legal principles and philosophy of law which includes the entire, system of legal doctrine.

Most of our law has been taken from Common Law System.

Father of Jurisprudence = Bentham. (Austin took his work further).

Bentham was the first one to analyse what is law. He divided his study into two parts:

1. Examination of Law as it is – **Expositorial Approach** – Command of Sovereign.
2. Examination of Law as it ought to be – **Censorial Approach** – Morality of Law.

However, Austin stuck to the idea that law is command of sovereign. The structure of English Legal System remained with the formal analysis of law (Expositorial) and never became what it ought to be (Censorial).

Thus, we see that there can be no goodness or badness in law. Law is made by the State so there could be nothing good or bad about it. Jurisprudence is nothing but the science of law.

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1.2 Definitions of Jurisprudence

(1) Austin's Definition : "Science of Jurisprudence is concerned with Positive Laws that is laws strictly so called. It has nothing to do with the goodness or badness of law.

This has two aspects attached to it :

1. General Jurisprudence : It includes such subjects or ends of law as are common to all system.

2. Particular Jurisprudence : It is the science of any actual system of law or any portion of it.

Basically, in essence they are same but in scope they are different.

Salmond's Criticism of Austin

He said that for a concept to fall within the category of 'General Jurisprudence', it should be common in various systems of law. This is not always true as there could be concepts that fall in neither of the two categories.

(2) Holland's Criticism of Austin : Jurisprudence means the formal science of positive laws. It is an analytical science rather than a material science. *It is only the material which is particular and not the science itself.*

1. He defined the term positive law. He said that Positive Law means **the general rule of external human action enforced by a sovereign political authority.**

2. We can see that; he simply added the word **'formal'** in Austin's definition. Formal here means that we **study only the form and not the essence.** We study only the external features and do not go into the intricacies of the subject. According to him, how positive law is applied and how it is particular is not the concern of Jurisprudence.

3. The reason for using the word 'Formal Science' is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. **Therefore, Jurisprudence is a Formal Science.**

4. Holland said that Jurisprudence is a science because **it is a systematized and properly co-ordinated knowledge of the subject of intellectual enquiry.** The term positive law confines the enquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.

5. Formal as a prefix indicates that the science deals only with the **purposes, methods, and ideas** on the basis of the legal system as distinct from material science which deals **only with the concrete details of law.**

6. This definition has been criticized on the ground that this definition is concerned only with the form and not the intricacies.

Gray and Dr. Jenks Criticism : Jurisprudence is a formal science because it is concerned with the form, conditions, social life, human relations that have grown up in the society and to which society attaches legal significance.

(3) **Salmond :** He said that **Jurisprudence is Science of Law.** By law he meant law of the land or civil law. Jurisprudence thus deals with civil law or the law of the state. This kind of law consists of rules applied by courts in the administration of justice. He divided Jurisprudence into two parts:

1. **Generic :** This includes the entire body of legal doctrines.
2. **Specific :** This deals with the particular department or any portion of the doctrines.

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'Specific' is further divided into three parts:

1. **Analytical, Expository or Systematic :** It deals with the contents of an actual legal system existing at any time, past or the present.

2. **Historical :** It is concerned with the legal history and its development

3. **Ethical :** According to him, the purpose of any legislation is to set forth laws as it ought to be. It deals with the 'ideal' of the legal system and the purpose for which it exists.

Criticism of Salmond's Definition : Critics say that it is not an accurate definition. Salmond only gave the structure and failed to provide any clarity of thought.

4. **Keeton :** He considered **Jurisprudence as the study and systematic arrangement of the general principles of law.** According to him, Jurisprudence deals with the distinction between Public and Private Laws and considers the contents of principle departments of law.

5. **Roscoe Pound :** He described **Jurisprudence as the science of law** using the term **'law'** in **juridical sense** as denoting the body of principles recognized or enforced by public and regular tribunals in the Administration of Justice.

6. Dias and Hughes : They believed **Jurisprudence as any thought or writing about law rather than a technical exposition of a branch of law itself.**

7. Dr K. C. Allen : Jurisprudence is the scientific synthesis of all the essential principles of law.

8. G.W. Paton : Jurisprudence is a particular method of study, not the law of one country, but of the general notion of law itself.

9. Julius Stone : Jurisprudence is the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals, and techniques of the law in the light derived from present knowledge in disciplines other than the law.

10. Gray : jurisprudence is the science of law, the statement and systematic arrangement of the rules followed by the Court and the principles involved in those rules.

Criticism : Stone has Criticised Gray's Definition and said that Gray has failed to determine any province of jurisprudence rather he has reduced jurisprudence to merely a matter of arrangement of rules.

11. Ulpian : Ulpian a Roman Jurist defines jurisprudence as "Jurisprudence is the knowledge of things divine and human, the science of just and unjust."

12. Dr M.J. Seth : Jurisprudence is a study of fundamental legal principles including their philosophical, Historical, and sociological bases and analysis of legal concepts.

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13. H.L.A Hart : A legal system consists of primary and secondary rules. These rules explain the nature of law and provides key to the science of jurisprudence. He viewed Jurisprudence as a science of law in a border perspective by co-relating law and morality.

Thus, we can safely say that **Jurisprudence is the study of fundamental legal principles.**

Definition of Jurisprudence & Law

Approach to legal Studies ← → Inference about law from such legal studies

Jurisprudence	Law
1. Salmond : Science of first principle of civil law	The body of principles recognized and applied by the state in the administration of Justice
2. Austin : Philosophy of positive law	It is the aggregate of the command of sovereign to Men as political subject
3. Jhering : It is the study of law in its social Perspective & is the process & Understanding of balancing of Interests.	It is the form of the guarantee of the conditions of life of society, assured by status (Power of Contestan).
4. Pound : Social facts & social engineering + Balancing of interests	A social institution to satisfy social wants
5. Ulpian : It is the knowledge of things divine & human things (right & wrong)	The art or science of what is equitable & good

1.3 Role of Jurisprudence in Law

Jurisprudence is said to be the eye of law. It is also said to be the grammar of law. By understanding the concept and distinction of nature of law, a lawyer can find out the actual rules of law. Jurisprudence trains the critical faculties of its students so that they can detect fallacies and use accurate legal terminologies and expressions.

The legislature who are subject of creating law, are also provided a precise and unambiguous terminology by jurisprudence through its study. "it relieves them of the botheration of defining again and again in each act certain expressions such as right, duty, possession, ownership, liability, negligence."

> *Dr. M. J. Sethna, "the value of jurisprudence lies in examining the consequences of law and its administration on social welfare and suggesting changes for the betterment of the superstructure of laws."*

1.4 Scope of Jurisprudence

(Relationship of Jurisprudence with other Social Sciences)

After reading all the above-mentioned definitions, we would find that Austin was the only one who tried to limit the scope of jurisprudence. He tried to segregate morals and theology from the study of jurisprudence.

However, the study of jurisprudence cannot be circumscribed because it includes all human conduct in the State and the Society.

1. Sociology and Jurisprudence : There is a branch called as Sociological Jurisprudence. This branch is based on social theories. It is essentially concerned with the influence of law on the society at large particularly when we talk about social welfare. The approach from sociological perspective towards law is different from a lawyer's perspective. The study of sociology has helped Jurisprudence in its approach. Behind all legal aspects, there is always something social. However, Sociology of Law is different from Sociological Jurisprudence.

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2. Jurisprudence and Psychology : No human science can be described properly without a thorough knowledge of Human Mind. Hence, Psychology has a close connection with Jurisprudence. Relationship of Psychology and Law is established in the branch of Criminological Jurisprudence. Both psychology and jurisprudence are interested in solving questions such as motive behind a crime, criminal personality, reasons for crime etc.

3. Jurisprudence and Ethics : Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behaviour. This is how Ethics and Jurisprudence are interconnected:

(a) **Ideal Moral Code :** This could be found in relation to Natural Law.

(b) **Positive Moral Code :** This could be found in relation to Law as the Command of the Sovereign.

(c) Ethics is concerned with good human conduct in the light of public opinion.

(d) Jurisprudence is related with Positive Morality as far as law is the instrument to assert positive ethics.

(e) Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.

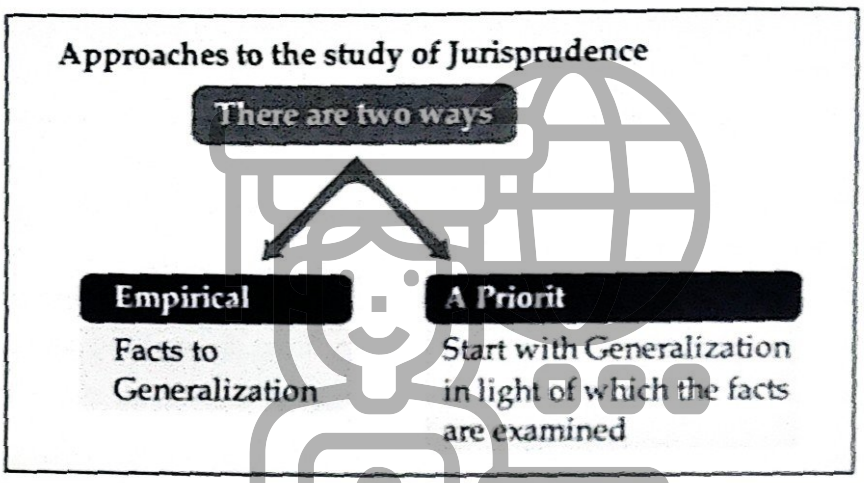
(f) Ethics believes that No law is good unless it is based on sound principles of human value.

(g) A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law. However, Austin disagreed with this relationship.

4. Jurisprudence and Economics : Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences, and both aim to regulate lives of the people. Both of them try to develop the society and improve life of an individual. Karl Marx was a pioneer in this regard.

5. Jurisprudence and History : History studies past events. Development of Law for administration of justice becomes sound if we know the history and background of legislations and the way law has evolved. The branch is known as Historical Jurisprudence.

6. Jurisprudence and Politics : In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connection between politics and Jurisprudence and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connection between politics and Jurisprudence.



1.5 Significance and Utility of the Study of Jurisprudence

1. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political, and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.
2. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.
3. The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.
4. Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.
5. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rule of law. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.
6. It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.
7. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.

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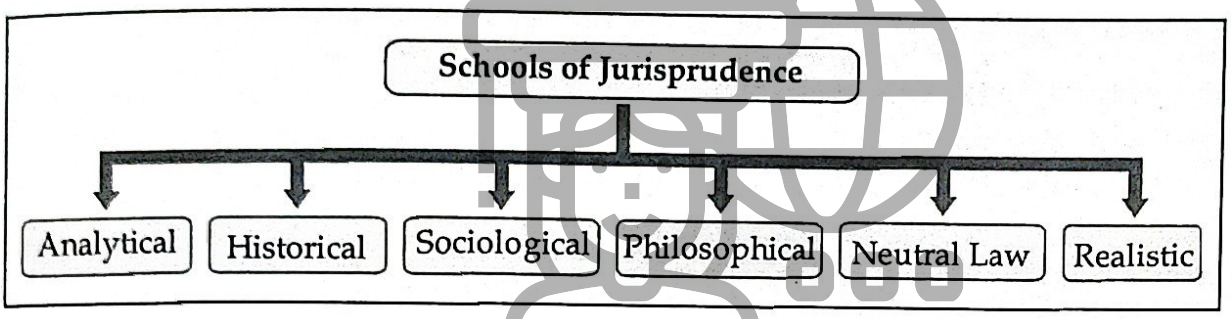
8. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place, and circumstances.

9. Professor Dias said that 'the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence'.

2. *Schools of Jurisprudence*



(i) Analytical School

Central idea : Law as it exists i.e. law as it is, regardless of good or bad, past, or future.

> *"a law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation."*

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Different Names

Positive School : Because it focused on "positum" (Latin), which means 'as it is.'

English School : Because this school was dominant in England.

Austinian School : Because it was founded by John Austin.

Analytical jurisprudence is a legal theory that draws on the resources of modern analytical philosophy to try to understand the nature of law. Since the boundaries of analytical philosophy are somewhat vague, it is difficult to say how far it extends. H. L. A. Hart was probably the most influential writer in the modern school of analytical jurisprudence, though its history goes back at least to Jeremy Bentham.

Analytical jurisprudence is not to be mistaken for legal formalism. Indeed, it was the analytical jurists who first pointed out that legal formalism is fundamentally mistaken as a theory of law.

Analytic, or 'clarificatory' jurisprudence uses a neutral point of view and descriptive language when referring to the aspects of legal systems. This was a philosophical development that rejected natural law's fusing of what law is and what it ought to be. David Hume famously argued in A Treatise of Human Nature that people invariably slip between describing that the world is a certain way to saying therefore we ought to conclude on a particular course of action, but as a matter of pure logic, one cannot conclude that we ought to do something merely because something is the case. So, analysing and clarifying the way the world is must be treated as a strictly separate question to normative and evaluative ought questions.

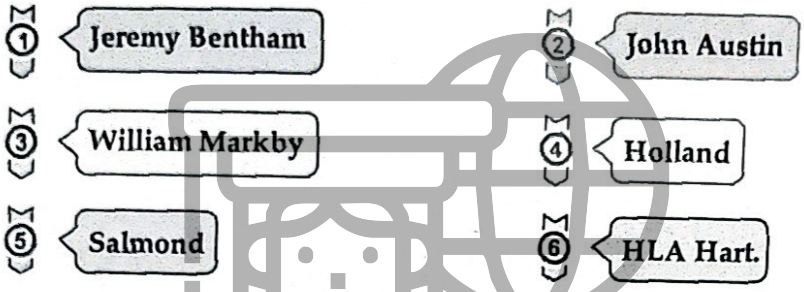
The most important questions of analytic jurisprudence are: "What are laws?"; "What is the law?"; "What is the relationship between law and power/sociology?"; and, "What is the relationship between law and morality?" Legal positivism is the dominant theory, although there are a growing number of critics, who offer their own interpretations.

Origin

Imperative concept of law was first proposed by Bentham during his life time (1742-1832), but his work remained unpublished till 1945.

Prof. Dias points that until recently John Austin used to be styled the "father of the English jurisprudence", but it is now clear from a work of Bentham first published in 1945 that it is he, if anyone, who deserved such a title. However, John Austin is considered the de facto originator of this school of jurisprudence.

Chief exponents of Analytical School of Jurisprudence



1. Jeremy Bentham (1742-1832)

"Law is an assemblage of signs, declarative of volition, conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons who in the case in question are supposed to be the subject to his power."

- Bentham's theory contains key concepts viz. Sovereignty, Command and Sanctions.
- Bentham believed that there was the possibility of complete scientific codification of law.
- Bentham was against the judge-made law.
- Bentham attributed the element of "utility? to law. He defined utility as, "the property of a thing to prevent some evil or to produce some good."

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Jeremy Bentham is one of the greatest analytical jurists of all time who discarded, rejected, and even ridiculed natural law not law at all but merely a so-called law as it was not emanating from the sovereign. It is not Austin but Bentham who is the actual father of English Analytical Jurisprudence. Thus, with Bentham came in England the advent of positivism, sovereignty, command duty and sanction-the basic elements of Analytical Jurisprudence which were subsequently borrowed by John Austin. It was Jeremy Bentham who defined law as a command of the sovereign-an idea which he had taken from Hobbes.

Theory of Utilitarianism

Utilitarianism is a normative ethical **theory** that places the locus of right and wrong solely on the outcomes (consequences) of choosing one action/policy over other actions/policies. As such, it moves beyond the scope of one's own interests and considers the interests of others.

In order to reform law, Austin viewed law in terms of ends or purposes i.e. utility. Therefore, all laws were to be tested in terms of man's greatest happiness. In his book ***'Limits of Jurisprudence Defined'***, Bentham enunciated the concept of law in terms of utility emanating from the sovereign. *These two concepts that 'law is the command of the sovereign' and 'law is to promote individual pleasure' and decrease pain were masterly analysed by him much before Austin took both these ideas from Bentham.* The concept of positive law in the nature of command from Bentham and made it the kernel of his jurisprudence. He took the other part also, i.e. the theory of utility, but rejected this concept on the ground that it has nothing to do with positive law. Austin thereby identified the theory of utility with the theory of natural law or law of God and, therefore, rejected it on the ground of its being unscientific. Describing the theory of utility as science of legislation Austin was of the view that it has nothing to do with science of

jurisprudence. Bentham's philosophy of law created two schools-the pure analyst interested in the analysis of positive law and the theological writers interested in the ends or purposes of law which it should serve. It was a disaster for English jurisprudence that Bentham's work was not taken in its entirety. This disaster was created by Austin who viewed law without social purposes or goals in its barren and isolated fashion. Many of the modern jurists consider Austin 'as the father of analytical jurisprudence, but it was much before Austin that Bentham had adopted and refined' the analytical approach in discovering the good laws from those which were inconvenient and unnecessary. It is, therefore, Bentham who should be rightly designated as the real father of analytical jurisprudence.

There are four distinguishable sources from which pleasure and pain are in use to flow: considered separately they may be termed the *physical*, the *political*, the *moral* and the *religious*: and inasmuch as the pleasures and pains belonging to each of them are capable of giving a binding force to any law or rule of conduct, they may all of them termed sanctions.

Ques. : Which one of the following groups indicate the four sanctions as enumerated by Bentham for various kinds of pleasure and pain ? **(NTA UGC-NET July 2016 P-II)**

(1) Physical, Moral, Ethical and Political

(2) Physical, Political, Moral and Religious

(3) Moral, Social, Legal and Political

(4) Legal, Ethical, Moral and Social

Ans. : (2)

Physical, Political, Moral and Religious

2. John Austin (1790-1859)

Austin's Theory of Law also known as the imperative theory of law. According to Austin, positive law has three main features:

- It is a type of command.
- It is laid down by a political sovereign.
- It is enforceable to sanction.

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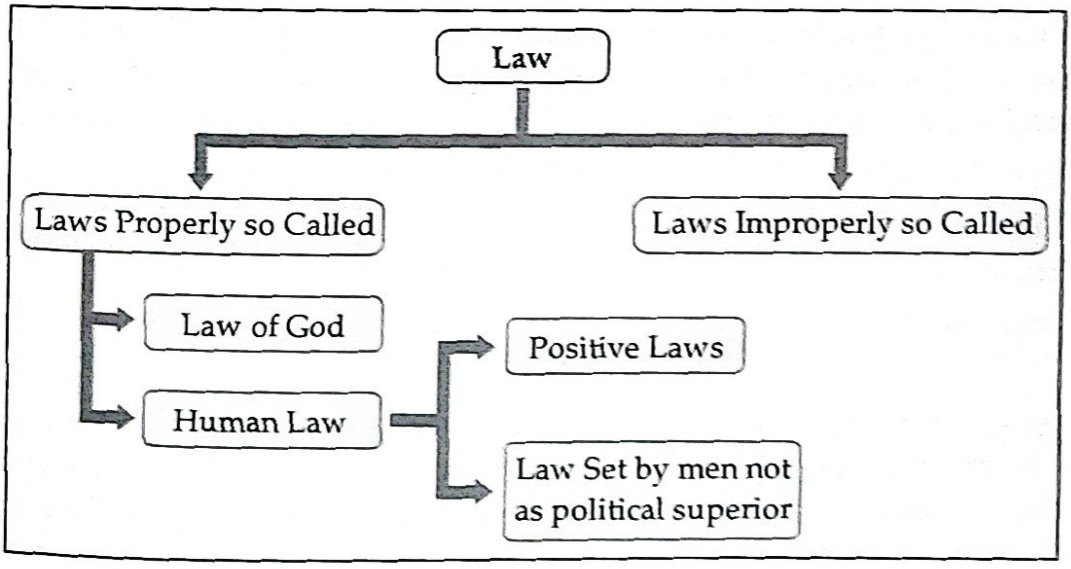
The relationship of superior to inferior consist for Austin in the power which the former enjoys over the other i.e., his ability to punish him for disobedience. The idea of sanction is built in Austin in notion of command. There are commands which are laws and commands which are not law. Austin distinguish law from other commands by their generality. Laws are general commands. However, there can be exceptions. There can exist laws such as acts of attainder which lack the character of generality.

According to Austin, law is law only if it is effective and it must be generally obeyed. Perfect obedience is not necessary without general obedience, the commands of law maker are empty as language which is no longer spoken. What is sufficient for a legal theorist is that obedience exists.



Command is wish/desire to another so that he shall do a particular thing or refrain from doing a particular thing .in case of non-compliance with command, he has to for evil consequences. The sanction behind law is the evil which is to be influenced in case of disobedience.

John Austin

John Austin was born in 1790. In 1818 he was called to the bar for seven years, he practised law but without success. In 1819, he married Sarah Taylor a woman of great intelligence, energy, and beauty. When the university of London was founded, Austin was appointed as professor of jurisprudence and he spent the next two years in preparing his lectures. Austin is called as the father of English jurisprudence and the founder of the analytical school. Allan prefers to call Austin school as the imperative school. It is contented that Austin does not fit exactly into any of the important schools.

Austin Theory of Law

Austin most important contribution to Legal theory was substitution of the command of the sovereign for any ideal of justice in the definition of law. He, defined law as "a rule laid down for the guidance of intelligent being by an intelligent being having power over him" law is strictly diverged from justice. It is based on the power of a superior.

In Austin positivists of law, the law of god seem to fulfil too others function then that of serving. As respectable for Austin's utilisation beliefs, the principle of utility is the law of god Laws properly so called (positive law): Human laws are divisible into Law improperly so called. Human law are divisible into possible laws and laws improperly so called. The former are law set by political superiors to political subordinate or laws set by subjects as private person in prudence of legal rights granted to them.

Laws improperly so called are those laws which are not set directly or indirectly by a political superior. In this category diverse type of rules are there, such a rules of clubs, law of fashion, laws of natural science, the rules of so called international law. Austin gave these the name of positive morality. Laws improperly so called also included a final category called "laws by metaphor which covered expression of uniformities of nature."

According to Austin positive law has four elements :

- Command
- Sanction
- Duty
- Sovereignty

According to Austin **"law is a command of the sovereign** "command implies duty and sanction law properly so called are species of commands. Every law properly so-called flow from a determinate source or emanate from a determine author. *The power and purpose to inflict penalty for disobedience are the very essence of a command. The person liable to the eviler penalty is under a duty to obey it. The eviler penalty for disobedience is called sanction.* However, all the command is not laws; it is only the general command which obliges to a course of conduct is law.

Austin provides some exceptions which though are not commands are still in the province of jurisprudence.

- Declaratory or explanatory laws
- Laws to repeal law
- Laws of imperfect obligation.

Prof. Dias point out that distinction drawn by Austin was entirely arbitrary. He adds that the case of sanction is not the sole or even the principle motive for obedience. There are many objections to the association of duty with sanctions. The view of Austin is that it is the sanction alone which induces men to obey law. This is not a corrective view. According to lord Bryce, the motives which induces a man to obey law are indolence, deference, sympathy, fear

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and reason. The last resort to secure obedience. In the opinion of Léon Duguit, the notion of command is not applicable to modern social legislation which binds the state rather than the individual. This view is also accepted by the supreme court of India. Critics point out that law is not an arbitrary command as conceived by Austin but growth of organic nature. Law has not growth due to blind force but due to conscious efforts for definite ends.

Criticism of Austin Theory of Law

Law Before State : The definition of law in terms of state has been utilised by jurists belonging to the historical and sociological schools. According to the school law is prior to and independent of political authority and enforcement. A state enforces it because it is already law. It is nor correct that it become law before the state enforce it.

Although Salmond is not a supporter of the imperative theory. He does not accept the criticism of historical school. He points out that the rule which were in existence prior to the existence of a political state were not law in the real sense of the terms. They resembled laws. They were primitive substitutes for law but not laws.

Lord Bryce writes, *"law cannot be always and everywhere the creation of state because instances can be ad descend where law existed in a community before there was any state"*

Pollock observes *"not only law, but law with a good deal of compelling its observance and induced before there was and regular process of enforcement at all"*

Generality of Law : According to Austin, *law is a general rule of conduct, but that is got practical in every sphere of law.* Law is the sense of legal system can be particular. The requirement that law should be general is extremely difficult to maintain. There are degrees of generality. Some particular precepts may concern especially important person as king. (e.g.) abdication act .it has to be considered as a part of law.

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Promulgation : *Law is a command and that has to be communicated to people by whom it is meant to be obeyed or followed.* This view of Austin is not tenable. Promulgation is usually resorted to but is `not essential for the validity of rule of law.

Not Applicable to International and Constitutional Law : International law is not the command of any sovereign, yet it is considered to be law by all conserved. It does not apply to constitutional law also. As a matter of fact, constitutional law of country defines the power of various organs of the state. Nobody can be said to command himself. Austin's definition cannot be applied for Hindu, Muhammad, and the Canon law. These laws came into existence long before the state began to perform legislative functions.

Disregard of Ethical Elements : The main criticism of Salmond is that the theory disregards the moral or ethical elements of law. The end of law is justice. Any definition of law without reference to justice is inadequate. The view of Salmond is that Austin's definition of law refers to "a law" and not "the law". The term "a law" is used in a concrete sense to denote a statute while the term "the law" is used in an abstract sense to denote legal principles. A good definition of law must deal with both aspects of law.

Purpose of Law Ignored : Austin's theory of sovereignty ignores the purpose of law. Burkland writes, *'This at first right, looks like circular reasoning. Law is law since it is made by the sovereign.'* The sovereign is sovereign because he makes the law. But this is not circular meaning. It is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference.

Salmond On Austin's Theory of Law

1. Austin's theory of law is one sided and inadequate; it does not contain the whole truth. It eliminates all elements except that of force. Austin has missed the ethical element in law or the idea of right or justice.
2. Law is the declaration of a principle of justice. As Austin's theory of law does not take into consideration the purpose of law, it is not an adequate definition of law.
3. Austin's theory not only misses the ethical aspect of law but over emphasises on in imperative aspect.
4. According to Salmond, "All legal principles are not commanding of the state and those which are at the same thing and in their essential nature, something more; of which the imperative theory takes no account".
5. Law in abstract sense is more comprehensive in its signification than law in the concrete sense. To quote Salmond "The central idea of juridical theory is not lex but Jus, in gestez and recht".

HLA Hart's Contribution to Positivistic Jurisprudence

There is a century gap between legal theories of John Austin and Professor H.L.A. Hart. John Austin's model of positivism conditioned by anti-natural law scientific theories and Jeremy Bentham's legal thinking emanated in his Lectures on Jurisprudence in the Universal of London finally concretized in Province of Jurisprudence Determined In 1832 H.L.A. Hart, Professor of Jurisprudence in the University of Oxford produced his monumental work The Concept of Law in 1961 highlighting the various difficulties and inadequacies besetting Austin's theory of Jurisprudence The concept of law is thus a critical evaluation of the development of positivism in law from John Austin to Hart Indeed, Professor Hart has been careful to exclude all the defects from which John Austin's jurisprudence has been suffering and thereby has enunciated a much reformed and socially oriented positivistic theory of law.

Hart's Dual System of Law

Hart has been anti-Austinian who has rejected the Austinian model as it is exclusively based on the trilogy of command, sanction and sovereign which Austin described as *'key to the science of Jurisprudence'*. Such pattern, says Hart, is exclusively applicable to criminal pattern of law and is inapplicable to modern legal systems. Hart's analysis of legal system is quite elaborate and sociological and not merely a kind of command or orders of gunman or gangster. In place of Austin's monolithic legal structure Hart provides a dual system of law consisting of two types of rules which he describes as primary and secondary rules. Primary rules are those which lay down standards of behaviour and are rules of obligation-that is the rules which impose duties. The Secondary rules, on the other hand, are such rules which specify the rules in which primary rules may be ascertained, amended, rescinded, and enforced. The addition of secondary rules to a set of primary rules is, says Hart, 'a step forward as important to society as the invention of the wheel'. It is this step which Hart declared as *'the step from pre-legal into the legal world'*. The combination of primary rules of obligations and the secondary rules of recognition, says Hart, is the *'Key to the science of Jurisprudence'*. Thus, it is the union of primary and secondary rules which constitute the core of the legal system and can be justly regarded as the 'essence' of law.

Rule of Recognition-a Neo Austinian Sovereign

According to Hart *the regime of primary rules suffers from doubt or uncertainty as to the question about what the rules of community are or what is their exact scope.* The remedy for uncertainty is the introduction of what Hart calls the rule of recognition which authoritatively settles what the rules are or what their scope is. The rule of recognition provides the criterion for identifying the valid law. It is the rule of recognition which provides the standard to distinguish things which are law, and which are not law. This rule of recognition is analogous to Austin's sovereign. Rules of recognition like Austin's sovereign just exist, while the latter die the former fade away (into disuse). **'The rule of recognition' Hart concludes 'exists only as a complex but normally concordant practice of the courts, officials and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact'.** As it is not possible to question the legal validity of the commands of an Austinian sovereign, neither can we question the legal validity of Hart's rule of recognition. In short, the rule of recognition is Hart's important feature of positivistic theory of law in the twentieth century.

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Hans Kelsen's Introduction to Pure Theory of Law

The two editions of Kelsen's book were separated by twenty-six years, and the second edition (1960) was almost twice the length of the first in the detail of its presentation. The original terminology which was introduced in the first edition was already present in many of Kelsen's writings from the 1920s and were also subject to discussion in the critical press of that decade as well, before it was first published in 1934. This theory of positive law is then presented by Kelsen as forming a hierarchy of laws which start from a Basic Norm or Grundnorm where all other norms are related to each other by either being inferior norms, when the one is compared to the other or superior norms. The interaction of these norms is then further subject to representation as a static theory of law or as a dynamic theory of law

Law and Morals in the Pure Theory of Law

Kelsen's strict separation of law and morals was an integral part of his presentation of the pure theory of law. The application of the law, in order to be protected from moral influence or political influence, needed to be safeguarded by its separation from the sphere of conventional moral influence or political influence. Kelsen did not deny that moral discussion was still possible and even to be encouraged in the sociological domain of intersubjective activity. However, the static operation of the pure theory of law.

Law and Science

Kelsen, defined the application of norms to its function for the state. Science was generally the domain of the causal understanding of epistemological data and its primary logical and causally oriented technique was to be distinguished from the normative reasoning as was to be found in the pure theory of law.

The Static aspect of Law

Kelsen distinguished the static theory of law from the dynamic theory of law. The static theory of law represented the law as a hierarchy of laws where the individual laws were related the one to the other as either being inferior, the one to the other, or superior with respect to each other. This hierarchical theory was largely adopted from Adolf Julius Merkl research in the structural aspects of the law while Kelsen was still in Vienna.

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Law and State

This is Kelsen's highly functional theory of the state and the law as representing the same entity. It is not to be confused with the sociological domain or the cultural domain of inter subjective activity. Nor is it to be confused with the political or even the religious domain of inter subjective interaction among individuals.

State Law and International Law

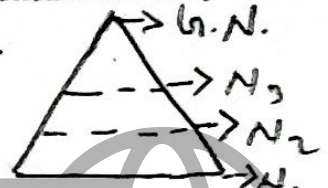
For Kelsen, the assessment of international law is that it represents a very primitive form of law in distinct contract to the highly developed forms of law as may be found in individual nations and states. As a result, Kelsen emphasizes that international law is often prone to the conduct of was and severe diplomatic measures (blockade, seizure, internment, etc.) as offering the only corrective measures available to it in regulating the conduct between nations. For Kelsen, this is largely inevitable due to the relative primitiveness of international law in contemporary society.

Legal Orders

For Kelsen as for other Central European contemporaries, norms occur not singly but in sets, termed 'orders'. The ordering principle of an order of moral norms, and of an order of natural law, if one could exist- world be logical, as deduction. From the general norm 'do not kill other human beings', it follows deductively that A must not kill any other human being. Kelsen calls this a 'static' order. An order of positive law. 'Dynamic', in that its ordering principle is authorisation. Each relatively 'higher' norm authorises someone (an individual or an organ, primarily of the state) to create further and relatively 'lower' norms.

Basic Norm (Grundnorm)

Kelsen assumes, however, that the scientific representation of a positive-legal order, as a hierarchy of legal propositions, must have a guarantor of unity. This guarantor cannot be other than a component of the representation, hence legal proposition. Being a legal proposition, it counts as a representation of an actual norm. So Kelsen calls it, elliptically, a 'basic norm (Grundnorm), A basic norm is 'presupposed' in legal science for each order of positive law, to make it possible to understand that material as an order of positive law. This norm is simply that 'the historically first constitution is to be obeyed'. That constitution may have become established by custom or by revolution: the jurist does not evaluate the circumstances.



(ii) Historical School

The rise of Historical school of jurisprudence may be traced to many causes. The first is the reaction against the unhistorical assumptions of the natural law theorists. Secondly, the attempt to find legal systems based on reason without reference to past or existing circumstances was revolutionary in execution. The culmination elf it was the French Revolution. Thirdly, the French conquests under Napoleon aroused the nationalism Europe. The French also spread the idea of codified law, and as a reaction to anything, which French carried with them an aversion to the code was the result.

The term **"Historical jurisprudence"** is usually associated with the particular movement in legal thought of which Savigny is its famous exponent and Maine is its supporter.

The followings are the important characteristics of the Historical School of jurisprudence:

1. Law is found, not made. A pessimistic view of the power of human action. The growth of law is essentially unconscious and organic process; legislation is, therefore, of subordinate importance as compared with custom.
2. As law develops from a few easily grasped legal relations in primitive communities to the greater complexity of law in modern civilization, popular consciousness can no longer manifest itself directly, but comes to be represented by lawyers, who formulate the technical legal principles. Legislation follows as the last stage; the lawyer is, therefore, a relatively more important law making agency than the legislator.
3. Laws are not of universal validity or application. Each people develops its own legal habits, as it has its peculiar language, manners and Constitution.

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