

## **SCHOOLS OF JURISPRUDENCE**

There are four main divisions in schools of jurisprudence, namely (1) the Philosophical, (2) the Analytical (including the comparative), (3) the Historical, and (4) the Sociological. Besides we have the Realist School in the United States.

### **THE PHILOSOPHICAL SCHOOL OF JURISPRUDENCE**

#### **GROTIUS (1583-1645)**

Hugo Grotius was a Dutch national and a Republican philosopher. He is regarded as the father of philosophical school of jurisprudence. In his famous work 'The Law of War and Peace', Grotius stated that natural law springs from the social nature of man and the natural law as well as positive morality, both are based on the notion of righteousness. Natural justice is the justice indeed with truth. The rules of human conduct emerge from right reason and they receive public support of the coercive force of the state but the census of public disapprobation. The view of Grotius was that the agreement of mankind concerning certain rules of conduct is an indication that those rules originated in right reason.

In detaching the science of law from theology and religion, he prepared the ground for the secular, rationalistic version of modern natural law. Among the traits characteristic of man, he pointed out, was an impelling desire for society, that is, for the social life- "not of any and every sort, but peaceful, and organised according to the measure of his intelligence, with those who are of his own kind." He refuted the assumption of the Greek Skeptic Carneades that man was actuated by nature to seek only his own advantage, believing that there was an inborn sociability in human beings which enabled them to live peacefully together in society. Whatever conformed to this social impulse and to the nature of man as a rational social being was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust. Grotius defined natural law as "a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity." This law of nature would obtain "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."

Grotius thereby grounded the natural law on an eternal reason pervading the cosmos, although he admitted the alternative possibility of a theist foundation.

Grotius pointed out that two methods existed for proving whether something was or was not in accordance with the law of nature. "Proof a priori consists in demonstrating the necessary agreement or disagreement of anything with a rational or social nature; proof a posteriori, in concluding if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilisation." Grotius added that no conclusion unfavourable to human nature needed to be drawn from the practices of nations that were savage or inhuman. He agreed with Aristotle that in order to find out what was natural, we must look to those things which are in a sound condition, not to those that are corrupted.

Among the chief axioms of natural law enumerated by Grotius are the following: to abstain from that which belongs to other persons; to restore to another any goods of his which we may have; to abide by pacts and to fulfill promises made to other persons; to repay any damage done to another through fault; and to inflict punishment upon men who deserve it. Many of the more detailed and special rules of the law, in his opinion, represented merely necessary derivations from these general precepts.

The state was defined by Grotius as "a complete association of free men, joined together for the enjoyment of rights and for their common interest." It originated in a contract, but usually the people had transferred their sovereign power to a ruler who acquired it as his private right and whose actions were ordinarily not subject to legal control. The ruler is bound, however, to observe the principles of natural law and of the law of nations. If he misuses his power, his subjects, as a general rule, have no right to revolt against him. But in some clear cases of usurpation or flagrant abuse of power Grotius was willing to recognise a right of resistance.

#### **EMMANUEL KANT (1724-1804)**

Kant gave modern thinking a new basis which no subsequent philosophy could ignore. The 'Copernican Turn' which he gave to philosophy was to replace the psychological and empirical method by the critical method by an attempt to base the rational character of life and world not on the observation of facts and matter but on human consciousness itself.

Kant, in his Critique of Pure Reason tried to draw a distinction between form and matter. He observed that the impression of our senses is the matter of human experience which are brought into order and shaped by human mind. According to him "the freedom of man act according to his will and the ethical postulates are mutually co-relative because no ethical postulate is possible without man's freedom of self determination". Kant calls substance of ethical postulate as "Categorical Imperative" which is the basis of his moral and legal theory.

### **JOHANN GOTTLIEB FICHTE (1762-1814)**

Transcendental idealism presented itself in a pure and uncompromising form in the philosophy of Johann Gottlieb Fichte. To him, the starting point and center of all philosophical thinking is and must be the intelligent human ego. Not only the forms of our cognition, as Kant had taught, but also the content of our perceptions and sensations, were regarded by Fichte as the product of our consciousness. "All being, that of the ego as well as that of the non-ego, is a certain modality of consciousness; and without consciousness there is no being." The non-ego, that is, the world of objects, is in Fichte's view, nothing but a target for human action, a domain for the exertion of the human will which is able to shape and transform this world. Fichte's philosophy is one of the human activism without bounds, and it represents an enthusiastic affirmation of the sovereign power of human intelligence.

The rational human ego is viewed as free by Fichte in the sense that it sets its own goals and is capable of attaining them; in other words, the actions of human beings are determined solely by their own will. Since, however, human egos stand in relations of interaction with other human egos, their respective spheres of freedom must be adjusted and harmonised. Thus Fichte, like Kant, considered law as a device for securing the coexistence of free individuals. Every man must respect the freedom of every other man.

The legal philosophy of Fichte is deduced from the self consciousness of the reasonable being, no reasonable being can think himself without ascribing the activity to himself. Freedom is a necessity of mutual. The sphere of legal relation is that part of mutual personal relations which regulates the recognition and definitions of the respective spheres of liberty on the basis of free individuality as the relation between individual and the state. Fichte points out that it is regulated by three basic principles, namely:-

- An individual becomes a member of the state through fulfillment of civic duties.
- The law limits and assures the rights of the individuals.
- Outside his sphere of civic duties, an individual is free and honky responsible to himself.

## **DEL VECCHIO**

The Italian legal philosopher George Del Vecchio (1878-1970) distinguishes sharply between the concept of law and the ideal of law. The concept of law he maintains, is logically anterior to juridical experience, that is, constitutes a priori datum. The essential characteristics of law, according to him, are first, objective coordination of the actions of several individuals pursuant to an ethical principle, and sound of the actions of several individuals pursuant to an ethical principle, and second, bilateralness, imperativeness, and coercibility.

Del Vecchio developed independently of Stammler, a theory of law on essentially similar foundations. He was a jurist of much greater elegance and university than Stammler. His writings display a professing of philosophical, historical and juristic learning.

According to Del Vecchio, the concept of law must have reference only to its form, to the logical form of law is more comprehensive than the sum of judicial propositions. The concept of law is juridical neutral. It cannot distinguish between good and bad law and just and unjust law. Law is not only formal but has a special meaning and an implicit faculty of valuation. Law is a phenomenon of nature and collected by history. It is also an expression of human liberty which comprises and masters nature and directs it to a purpose. Law is the subject of a qualitative progress of phenomenon from mere formless matter to progressive organisation and individualization. The aim is perfect autonomy of the spirit.

The absolute value of the person, equal liberty of all men, the right of each of the associates to be an active, not just a passive, participant in legislation, liberty of conscience, and in general the principles in which is summed up, eve amid accidental fallacies, the true substance of the classical philosophy of law, *juris naturalis scientia*, have already received important confirmations in the positive juridical orders, and will receive others soon or in the course of time, whatever may be the resistance and the oppositions which they still encounter.

## **HEGEL (1770-1831)**

Hegel was the most influential thinker of the philosophical school. His system is a necrotic one. According to him "the state and law both are evolutionary."

The great contribution of Hegel to philosophical school is the development of the idea of evolution. According to him, the various manifestations of social life, including law are the product of an evolutionary, dynamic process. This process takes on a dialectical form, revealing itself in thesis, antithesis and synthesis. The human spirit sets a thesis which becomes current as the leading idea of a particular historical epoch.

In this historical process, law and the state plays a vital role, according to Hegel. The system of law, he asserted, is designed to realise the ideal of freedom in its external manifestations. It bears emphasis, however, that for Hegel freedom did not signify the right of a person to do as he pleased. A free person, in his view, is one whose mind is in control of his body, one who subordinates his natural passions, irrational desires, and purely material interests to the superior demands of his rational and spiritual self. Hegel admonished men to lead a life governed by reason and pointed out that one of the cardinal postulates of reason was to accord respect to the personality and rights of other human beings. The law was considered by him as one of the chief instruments to devise to reinforce and secure such respect.

## **HISTORICAL SCHOOL OF JURISPRUDENCE**

The historical school antedates the work of Kelsen, but the reason for postponing discussion of the historical thesis is that, in opposition to the doctrine of the pure science of law, the historical school considered law in direct relationship to the life of the community and thus laid the foundation on which the modern sociological school has built. The eighteenth century was an age of rationalism; it was believed possible by arm-chair deliberation to construct a universal and unchangeable body of laws that would be applicable to all countries, using as a premises the reasonable nature of man. The historical school in part was a result of the surge of nationalism that arose at the end of the eighteenth century. Instead of the individual, writers began to emphasis the spirit of the people, the Volksgesit. In 1814 a programme for the school was enunciated by Savigny. The central question was 'how did law come to be?' Law evolved, as did

language, by a slow process and, just as language is a peculiar product of a nation's genius, so is the law. The source of law is not the command of the sovereign, not even the habits of a community, but the instinctive sense of right possessed by every race. Custom may be evidence of law, but its real source lies deeper in the minds of men. 'The living of law' is the secret of its validity. In those matters with which he is directly concerned every member of the community has an instinctive sense as to what is right and proper, although naturally he will have no views on matters which are beyond his experience. Thus the mercantile community will have an intuitive appreciation of the rules that should govern bills of exchange, a peasant of the doctrines that should be applied to agriculture. Such is the approach of the historical school, and it naturally led to a distrust of any deliberate attempt to reform the law. Legislation can succeed only if it is in harmony with the internal convictions of the race to which it is addressed. If it goes farther, it is doomed to failure.

The contribution of the historical school to the problem of the boundaries of jurisprudence is that law cannot be understood without an appreciation of the social milieu in which it has developed. The slow evolution of law was stressed and its intimate connection with the particular characteristics of people. Ever since Savigny wrote, the values which jurisprudence can gain from a proper use of the historical method have been well recognised, and in England Maine and Vinogradoff have kept the interest in these problems alive. Writers of legal history such as Pollock and Maitland or Sir William Holdsworth have provided surveys whose value for the jurist lies in the clear demonstration of the close connection between the common law and the social and political history of England.

In particular the historical school destroyed forever the shibboleth of immutable rules of law, discovered by abstract reason; they demonstrated that just as in the case of the human body, transplants of legal systems or constitutions may be defeated by the immunological reaction of the receiving country

## **FRIEDRICH CARL VON SAVIGNY (1779-1861)**

Savigny was born in Frankfurt in 1779. His interest in Historical studies was kindled at the university of Marburg and Gottingen and greatly encouraged when he came into contact with great historians at the University of Berlin. He served university of Berlin as a teacher. He also acquired a lasting veneration for Roman law. His works, (i) The law of possession. (ii) The History of Roman law in the middle ages (iii) The system of modern roman law-testify his genius. He attacked the idea of codification in Germany as he knew the defects of the contemporary codes. According to him code was not a suitable instrument for the development of German law at that time. Law is a product of the people's life-it is a manifestation of its spirit. Law has its source in the general consciousness of the people.

Savigny's view of the law was first presented in his famous pamphlet "Of the Vocation of Our Age for Legislation and Jurisprudence" 1814. This pamphlet was an answer to a proposal made by a professor of civil law, A.F.J. Thibaut of Heidelberg University, to the effect that a codification of the laws and customs of the various German states be undertaken in a coherent arrangement, on the basis of Roman law and the Napoleonic code. Savigny vehemently attacked this suggestion. In his view, the law was not something that should be made arbitrarily and deliberately by a law maker. Law, he said, was a product of 'internal, silently-operating forces.' It was deeply rooted in the past of a nation, and its true sources were popular faith, custom, and "the common consciousness of the people." Like the language, the constitution, and the manners of a people, law was determined above all by the peculiar character of a nation, by its "national spirit" (Volkgeist). In every people, Savigny pointed out, certain traditions and customs grow up which by their continuous exercise evolve into legal rules. Only by a careful study of these traditions and customs can the true content of law be found. Law in its proper sense is identical with the opinion of the people in matter of right and justice. In the words of Savigny,

"In the earliest times to which authentic history extends the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomenons have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common

conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.

Thus, in the view of Savigny, law, like language, is a product not of an arbitrary and deliberate will but of a slow, gradual, and organic growth. The law has no separate existence, but is simply a function of the whole life of a nation. "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality."

### **LAW DEVELOPS LIKE LANGUAGE**

In all societies, it is found already established like their language, manners and political organisation. These all are stamped with a national character. They are the natural manifestations of popular life and by no means product of man's free will. Law, language, customs and government have no separate existence. The organic evolution of law with the life and character of the people develops with the ages and in this it resembles language. As in the latter, there can be no instance of rest; there is always movement and development of law governed by the same power of internal necessity as simple phenomenon. Law grows with nation, increases with it and dies at its dissolution and is a characteristic of it.

The following passage in his essay, 'Vom Beruf' states in nutshell the fundamental thought of the historical school;

*"These phenomena- law, language, custom, government have no separate existence, there is but one force and power in people bound together by its nature, and only our minds give them separate existence. What makes it a single whole is the common conviction of the people, the like feeling of inner necessity which all attributes a contingent and arbitrary origin.... The organic evolution of law with the life and character of people develops with the ages, and in this it resembles language. As in the latter, as in law, there can be no instant of rest, there is always movement, and development of law is governed by the same power of internal necessity as simple phenomena. Law grows with a nation, increases with it, and dies at its dissolution and is a characteristic of it."*

**EARLY DEVELOPMENT OF LAW IS SPONTANEOUS: LATER ON IT IS DEVELOPED BY JURISTS; -**

About the development of law, Savigny says that in the earlier stages law develops spontaneously according to the principle of internal necessity. After the society has reached a certain stage of civilization, the different sides of national activities, hitherto developing as a whole, divide in different branches and are taken up by specialists and jurists, linguists and scientists. In the hands of specialists, these subjects become richer in ideas, more complete and technical. Law, like other subjects now assumes a double existence, “on the one side a general national life, on the other the distant science of jurists. The relation of law to the general life of the people might be called its political elements, its connection with the juristic science, its technical element. The correlation of these two elements varies with the elements of life of people but both participate more or less in the development of law.”

**SAVIGNY WAS OPPOSED TO CODIFICATION OF GERMAN LAW:** Savigny’s contention is that codification is highly dangerous because it checks the natural and unconscious growth of law. Instead of the law being changed by a spirit operating silently and almost imperceptibly, we have the violent and capricious act of a law giver. He quotes with approval the hard saying of Bacon that codification should not be undertaken except in an age in which civilization and knowledge surpasses that in which the laws were made which it is now proposed to codify.

In the strength of this view he protested against codification, which would imprison the development of law in an iron cage, he protested against *naturrecht* and its entire works; he sought to secure free course for the flood of people’s thought, flowing “with pomp of waters unwithstood.”

In his tract on the vocation of the age for legislation and jurisprudence, which marks the beginning of the historical school of law, Savigny manifestly attacked the three phases of the 18<sup>th</sup> century legal thought, namely, the natural law philosophy, the identification of law with morals and finally the rise of centralized absolute governments in western Europe in the 17<sup>th</sup> and 18<sup>th</sup> centuries. But he attacked them as he saw them; particularly the results of the third in legal thinking as they have fused with the Byzantine conception of law, drawn from the *corpus juris* and handed down from the 12<sup>th</sup> century academic idea of the statutory authority of Roman law in the Western Europe of that time.

**LAW IS A CONTINUOUS AND UNBREAKABLE PROCESS:** Savigny sees a nation and its state as organism which takes birth, matures, declines and dies. Law is a vital part of that organism. Law grows with the growth and strengthens with the strength of the people. It dies away as the nation loses its nationality. Nations and their law go through three development stages. There are principles of law which are not found in legislation but are a part of “national conviction”. These principles are implicitly present in formal symbolic transactions which command the high respect of the population, form a grammar of the legal system of a young nation and constitute one of the system’s major characteristics.

**THE HISTORY OF ROMAN LAW AS EXAMPLE:** - As an example of this process he presents the history of Roman law, a comparison of its early simple foundations with the complex and technical law of the Pandects.

#### **PRINCIPAL DOCTRINES OF SAVIGNY'S THEORY**

The main proposition of the historical school, as expounded by Savigny and some of his followers may be summarized as here under;-

1. **LAW IS FOUND, NOT MADE:-** A pessimistic view has been taken of the power of human action. The growth of law is essentially an unconscious and organic process. Legislation, thus, is of subordinate significance as compared to custom, because the statute is always unyielding and takes less account of the circumstances of the individual cases.
2. Law develops from a few easily gasped 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 principal. But the lawyer remains an organ of popular consciousness, limited to the task of bringing into shape what he finds as raw material. Legislation appears at the last stage; the lawyer, therefore, is a more important law making agency.
3. **LAWS ARE NOT OF UNIVERSAL APPLICATION:-** Each person develops its own legal habits, as it has its own peculiar language, manners and constitution. Savigny here has insisted upon the parallel between language and law. Neither is capable of application to other

people and countries. The Volkgeist manifests itself in the law of the people; it is, therefore, essential to consider the evolution of Volkgeist by legal historical research.

4. As laws grow into complexity, the common consciousness is represented by lawyers who formulate legal principles. But the lawyers remain only the mouthpiece of popular consciousness and their work is to shape the law accordingly. Legislation is the last stage of law making and, therefore, the lawyers or the jurists are more important than the legislator.

### **SUMMARY:**

Savigny's theory can be summarized as follows;

- That law is a matter of unconscious and organic growth. Therefore, law is found and not made.
- Law is not universal in its nature. Like language, it varies with people and age.
- Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.
- As laws grow into complexity, the common consciousness is represented by lawyers who formulate legal principles. But the lawyers remain only the mouthpiece of popular consciousness and their work is to shape the law accordingly. Legislation is the last stage of law-making and, therefore the lawyers or the jurists are more important than the legislators.

### **CRITICISM AGAINST SAVIGNY'S THEORY**

Savigny while advocating the role of evolution and growth in the development of law his approach towards law was vitiated in the following manner;

1. He laid excessive emphasis upon the unconscious forces which determine the law of a nation and ignored the efficacy of legislation as an instrument of deliberate, conscious and planned social change. In modern developing societies like India legislation is being created, enacted and used as an important instrument of social change and social reform. As he underestimated the importance of legislation and took a pessimistic view of human

power for creation of law to bring about social change so he is criticised for his juristic pessimism.

2. Savigny emphasised the national character of law. While advocating national character of law he entirely rejected the study of German law and took inspiration from Roman law.
3. Volkgeist itself is an abstract idea as indeterminable and vague as the natural law itself.
4. He did not encourage law reform including codification of law.
5. His theory of law and society postponed the emergence of modern sociological school because most of the sociologists like Durkheim, Ehrlich, Kohler, Weber, etc. were confounded by the spell of Savigny's Volkgeist which postponed the study of scientific appraisal of society in terms of its ends and goals.

### **SAVIGNY AND AUSTIN- COMPARISON**

It is interesting to note that the two great jurists expounded two different legal theories in England and Germany somewhat contemporaneously. Besides striking differences there are some common features in their legal theories: these are;-

1. Both Austin and Savigny are against the rationalism and universalism of the natural law philosophy.
2. Austin and Savigny's legal philosophy is a reaction and protest against the priori method of the natural law. Both of them consider law as a scientific or factual reality based on a posteriori method.
3. Both of them are comparative jurists-Austin basing his law on the study of Roman law and English law and Savigny propounding his thesis too on the basis of German law and old Roman law which had been to Germany in sixth century A.D.
4. Both are concerned with the nature of law rather than its functions.

## **GEORGE FREDRICK PUCHTA**

**1798-1856**

Puchta was not only a disciple of Savigny but also a great jurist of the Historical School. His work is considered to be more valuable as he made improvements upon the theory of Savigny by making it more logical. He started from the evolution of human beings and traced the development of law since that period. According to him, the idea of law came due to the conflict of interests between the individual will and general will. That automatically forms the state which delimits the sphere of the individual and develops into a tangible and workable system.

Puchta agreed with his teacher that the genesis and unfolding of law out of the spirit of the people was an invisible process. "What is visible to us is only the product, law, as it has emerged from the dark laboratory in which it was prepared and by which it became real." His investigation on the popular origin of law convinced him that customary law was the most genuine expression of the common conviction of the people, and for this reason, far superior to legislation. He considered explicit legislation useful only insofar as it embodied the prevailing national customs and usages.

The contribution of Puchta lies in the fact that he gave twofold aspects of human will and origin of the state. It is true that there are some points of distinction between Puchta and Savigny but mostly they are similar. On some points, Puchta improved upon the views of Savigny and made them more logical.

## **JOSEPH KOHLER**

**(1849-1919)**

A theory of law which contains components of a sociological character but which may also be explained as an attempt to revive some of the ideas of Hegel was advanced by the German jurist Joseph Kohler. Kohler taught that human activity was cultural activity, and that man's task was "to create and develop a new abundance of forms which shall be as a second creation, in juxtaposition to divine creation." The law, he pointed out, plays an important part in the evolution of the cultural life of mankind by taking care that existing values are protected and new ones furthered. Each form of civilisation, Kohler said, must find the law which best suits its purposes and aims. There exists no eternal law; the law that is adequate for one period is not so

for another. Law must adapt itself to the constantly changing conditions of civilisation, and is the duty of society, from time to time, to shape the law in conformity to new conditions.

Kohler is neo Hegelian. He was much influenced by the Hegelian legal theory. He conceded to the Hegel's idea of universal civilisation but did not agree with the view that there is an eternal law of universal body of legal institutions uniformly suited to all the societies. He emphasized that human society is ever changing and progressing and law is a means to respond favourably to these changes. He says that there is no eternal law. Pound observes that Kohler's formation of the jural postulates of the time and place is one of the most important achievements of recent legal science.

Kohler advocated a synthesis and reconciliation of individualism and collectivism in legal control. Egoism, he maintained, "stimulates human activity, urges man on to constant effort, sharpens his wit, and causes him to be unremitting in his search for new resources." An attempt by the legal order to uproot or combat egoism would therefore be foolish. He pointed out, on the other hand, that social cohesion is also necessary, in order that humanity may not fall apart, and turning into a collection of individuals and the community lose control over its members. Nothing great can be accomplished, in his view, except by devoted cooperative effort. "the individual should develop independently but the tremendous advantage of collectivism should not therefore be lost."

An eminent American jurist, Dean Pound, considers that Kohler's "formation of the jural postulates of the time and place is one of the most important achievements of recent legal science". The natural law of the most philosophical school loses its rigidity and becomes charged with a charging or growing content being conceived as something relative and not as something that shall stand forever.

## ANALYTICAL SCHOOL OF JURISPRUDENCE

### Positivism

The French mathematician and philosopher Auguste Comte (1798-1857), who may be regarded as the philosophical founder of modern positivism, distinguished three stages in the evolution of human thinking. The first stage, in his system, is the theological stage, in which all phenomena are explained by reference to supernatural causes and the intervention of a divine being. The second is the metaphysical stage, in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things and as constituting the real moving forces in the evolution of mankind. The third and last stage is the positivistic stage, which rejects all hypothetical constructions in philosophy, history, and science and confines itself to the empirical observation and connection of facts under the guidance of methods used in the natural sciences.

The emergence of the modern state as the more and more exclusive repository of political and legal power not only produced class of civil servants, intellectuals and others, but it also demanded more and more organisation of the legal system, a hierarchical structure of legal authority and the systematization of the increasing mass of legal material. The task of organizing and systematizing legal system can nonetheless be attributed to one of the vital school of jurisprudence, namely, analytical' which set for itself a task of separating the law as 'it is' and the law as it 'ought to be'.

The separation of law as 'it is' and the law as 'it ought to be' is the most fundamental philosophical assumption of legal positivism. It represents a radical departure both from the scholastic hierarchy of values in which positive law is only an emanation of a higher natural law, and from the fusion of the philosophy of law and the science of law. Separation of 'is' and 'ought' does not imply any contempt from the importance of values in law, as is manifest from the work of Austin, Kelsen and others.

The mission throughout of the analytical jurisprudence has been to isolate from the great mass of available legal material, the enduring elements which recur endlessly in the concrete legal phenomenon and to analyse and arrange these elements into an abstract system or classification.

While the chief function of analytical jurisprudence has been, as the name suggests, analysis or decomposition of the subject matter of law into irreducible elements, that is not its only function.

The other purpose of formal or analytical jurisprudence is to ascertain the exact relation and points of contact between the larger parts of our jural system, for example, law and equity. A quite similar object under consideration is, of course, to understand, to explain and to improve, if necessary, the leading sub-divisions of the whole field of law considered as an integral, harmonious and symmetrical body of doctrines. This sort of study is of great value if we are to bring order out of chaos and develop something like a real system out of the present conglomerate of judicial precedents and piecemeal statutes, partly with the immediate purpose of making new legislation fit in more harmoniously and partly with a view to what has been called 'tacit codification' and finally, perhaps 'legislative codification'.

The chief exponents of the positivist or Analytical School in England are Bentham, Austin, Sir William Markby, Sheldon Amos, Holland, Salmond and Professor H.L.A Hart.

In the United States, John Chipman Gray, Wesley N. Hohfeld, and Albert Kocourek made contributions to analytical jurisprudence. Gray, in an influential work, modified the Austinian theory by shifting the seat of sovereignty in lawmaking from the legislative assemblies to the members of the judiciary. "The law of the state or of any organised body of men," he maintained, "is composed of the rules which the courts, that is the judicial organ of that body, lay down for the determination of legal rights and duties". It was his opinion that the body of rules the judge lay down was not the expression of pre existing law but the law itself, that the judges were creators rather than the discoverers of the law, and that the fact must be faced that they are constantly making law ex post facto. Even the statutory law laid down by a legislature gains meaning and precision, in his view, only after it has been interpreted by a court and applied in a concrete case. Although the judges, according to Gray, seek the rules laid down by them not in their own whims, but derive them from sources of a general character (such as statutes, judicial precedents, opinions of expert, customs, public policies and principles of morality), the law becomes concrete and positive only in the pronouncements of

the courts. Judge-made law thus was to Gray the final and most authoritative form of law, and this conviction led him to the sweeping declaration that "it is true, in the civil as well as in the

common law, that the rules laid down by the courts of a country state the present law correctively.”

## **JEREMY BENTHAM**

**1748-1832**

Jeremy Bentham heralded a new era in the history of legal thought in England. He is considered to be the founder of positivism in the modern sense of the term. It has been rightly said that Austin owes much to Bentham and on many points his propositions are merely the “Para-phrasing of Bentham’s theory”. Bentham’s classic work reveals that truly speaking he should be considered to be the father of analytical positivism and not John Austin as it is commonly believed.

Bentham was the son of a wealthy London Attorney. His gene was of rarest quality. He was a talented person having the capacity and acumen of a jurist and a logician. Dicey in his book, “law and Public opinion in 19<sup>th</sup> century”, has sketched Bentham’s ideas about individualism, law and legal reforms which have affected the growth of English law in the positive direction. The contribution of Bentham, to the English law reforms can be summarized thus-

“He determined in the first place, the principles on which reforms should be based.

Secondly, he determined the method, i.e., the mode of legislation by which reforms should be carried out in England.”

He defined law as;

“A law may be defined as an assemblage of signs declarative of a violation 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 subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.”

Individualism; Utilitarianism.- Bentham’s legal philosophy is called ‘utilitarian individualism’. He was an individualist. He said that the function of law is to emancipate the individual from the bondage and restraint upon his freedom. Once the individual was made free, he himself shall be

looking after his welfare. In this way, he was a supporter of 'laissez faire' principle of economics. He pleaded for codification and condemned judge-made law and customs etc. he was a utilitarian also. According to him, the end of legislation is the 'greatest happiness of the greatest number.' He defined utility as the property or tendency of a thing to prevent some evil or to procure some good. The consequences of good and evil are respectively pleasure and pain. His philosophy may be summed up, in his own words, as follows;-

"Nature has placed man under the empire of pleasure and pain. We owe to them all our ideas; we refer to them all our judgments, and all the determination of our life. He who pretends to withdraw himself from his subjection knows not what he says. His only object is to seek pleasure and to shun pain... These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives."

The purpose of law is to bring pleasure and avoid pain. Pleasure and pain are the ultimate standards on which a law should be judged. All consideration of justice and morality disappear from this approach. For Bentham the right relationship between positive law and morality or moral criticism was expressed in the maxim: "Obey punctuality, censure freely".

Bentham was a realist and his activities were many sided. His keen desire for law reform based on the doctrine of utility, his ambition for codification based on complete dislike for judge-made law filled his work with a sense of mission. "His work was intended to provide the indispensable introduction to a civil code. He criticised the method of law making, corruption and inefficiency of the administration of justice and restraints on the individuals liberty.

Bentham despite his occasional naivetes, was a profound thinker, an acute social critic, and untiring campaigner for the reform of antiquated law, and he became, and had indeed remained, one of the cardinal influences on modern society. By rejecting both natural law and subjective values and replacing these by standards based on human advantages, pleasures and satisfactions, he provided what may be, as many think, an insufficient substitute for ethics of aesthetics, but was at least a valuable sign post by which men in society might direct the external welfare of the society. Bentham himself was a believer in Laissez faire once the antiquated legal system had been renovated, but ironically, his emphasis on reform and social welfare has made him one of the creators of the modern collectivist welfare state.

## **BENTHAM'S CONTRIBUTION**

Bentham's contribution to legal theory is epoch making. "The transition from the peculiar brand of natural law doctrine in the work of Blackstone to the rigorous positivism of Bentham represents one of the major developments in the history of modern legal theory." He gave new directions for law making and legal research.

"With Bentham came the advent of legal positivism and with it, the establishment of legal theory as a science of investigation as distinct from the art of rational conjecture. Bentham laid the foundations of this new approach, but, far from containing the solution to problems involving the nature of positive law, his work was only the beginning of a very long and varied series of debates, which are still going on today."

Commenting on the Bentham's philosophy, Sir Henry Maine, observed;

"Bentham was in truth neither jurist nor a moralist in the proper sense of the word. The theories are not on law but on legislation. When carefully examined, he may be seen to be a legislator even in morals. No doubt his language seems sometimes to imply that he is explaining moral phenomenon, but in reality he wishes to alter or rearrange them according to a working rule gathered from his reflection on legislation."

Bentham proceeded from the axiom that nature has placed mankind under the governance of two sovereign masters, pleasure and pain. They alone point out to us what we ought to do, and what we should refrain from doing. The good or evil of an action, according to him, should be measured by the quantity of pain or pleasure resulting from it.

The business of the government, according to Bentham, was to promote the happiness of the society by furthering the enjoyment of pleasure and affording security against pain. "It is the greatest happiness of the greatest number that is the measure of right and wrong." He was convinced that if the individuals composing the society were happy and contented, the whole body politic would enjoy happiness and prosperity.

Bentham never questioned the desirability of economic individualism and private property. A state, he said, can become rich in no other wise than by maintaining an inviolable respect for the rights of property. Society should encourage private initiative and private enterprise. The laws of

the state, he argued, can do nothing to provide directly for the subsistence of the citizens; all they can do is to create motives, that is, punishments and rewards, by whose force men may be led to provide subsistence for them. Nor should the laws direct individuals to seek abundance; all they are capable of doing is to create conditions that will stimulate and reward man's efforts towards making new acquisitions.

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 related 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.

### **CRITICISM AGAINST BENTHAM**

Bentham's theory has its weaknesses. "The main weakness of Bentham's work" says Friedmann, "derive from two shortcomings- one is Bentham's abstract and doctrinaire rationalism which prevents him from seeing man in all his complexity, in his blend of materialism and idealism, of nobility and baseness, of egoism and altruism. Bentham underestimates the need for individual discretion and flexibility in the application of law over estimating the power of the legislator. Secondly, his theory fails to balance individual interests with the interests of the community. Bentham's theory suggested that interests of an unlimited number of individuals shall be conducive to the interest of the community. This means that freedom of enterprise will automatically lead to greater equality. Bentham advocated that law should be made exclusively by legislation which was supposed to remove inroad to individual's freedom and provide him opportunities for development of the self. Bentham's view that the law should be made exclusively by legislation has been adopted in most of the countries in the world but it has not remained confined only to the sphere proposed by Bentham. According to him, the aim of the legislation was only to remove the shackles from the individual's freedom and provide him opportunity for his self-progress. But the legislation, in later times, was used restrict the

individual's freedom in economic matters and Dicey correctly puts the paradox that the apostle of individualism was destined to become the founder of state socialism.

Whatever may be the shortcomings of Bentham's theory, which every theory is bound to have, his constructive thinking and zeal for legal reform heralded a new era of legal reforms in England. Legislation has become the most important method of law-making in modern times. In the field of jurisprudence, his definition of law and analysis of legal terms inspired many jurists who improved upon it and laid down the foundations of new schools. A book written by Bentham, "The Limits of Jurisprudence Defined" (though written in 1782, was published in 1945) makes it clear.

### JOHN AUSTIN

Born in 1790 John Austin served as an army officer for five years until 1812, when he was called to the bar by the Inner temple in 1818. But ill health and inability to work efficiently and promptly prevented him from succeeding at the bar. He was elevated to the chair of jurisprudence in the University of London in 1826. Thereafter he went to Germany to study Roman law in Heidelberg and Bonn universities. He was much inspired by the scientific treatment of Roman law and drew inspiration to introduce the same method to the legal exposition of law in England. He, however, avoided metaphysical approach to law which was a peculiar character of law in Germany. His lectures delivered in London University were published under the title of "*The province of Jurisprudence determined*". In his lectures he deals with the nature of law and its proper bonds. He wrote another book "*A Plea for the Constitution*", it was rather an answer to an essay by Gray "on Parliamentary Government". But his main contribution to jurisprudence is his first book and on it rests his personality.

J.S. Mill, who heard his lectures, writes that his lectures left "an indelible impression on those who heard them.

The method which Austin applied is called analytical method and he confined his field of study only to the positive law. Therefore the school founded by him is called by various names- Analytical; positivism, analytical positivism. Some have objected to all the three terms. They say

that the word 'positivism' was started by Auguste Comte to indicate a particular method of study. Though this positivism, later on, prepared the way for the 19<sup>th</sup> century, legal though, it does not convey exactly the same sense at both the places. Therefore, the word positivism alone will not give a complete idea of Austin's school. In the same way 'analysis' also did not remain confined only to the school, therefore, it alone cannot give a separate identity to the school. Analytical positivism too may create confusion. The Vienna School in its 'pure theory of law' also applies analytical positive although in many respects they vitally differ from Austin's school. To avoid confusion and to give clarity which is the aim of classification, Professor Allen thinks it proper to call the Austin's school as 'imperative school'. This name he gave on the basis of Austin's conception of law 'law is command'.

### **AUSTIN'S CONCEPTION OF LAW**

Austin's most important contribution to the legal theory was the substitution of the command of the sovereign i.e., the state, for any ideal of justice in the definition of law.

Law in the common use means and includes things which can't be properly called 'law'. Austin defined law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.

The substitution of the command of the sovereign by Austin led him to write at a time when England was actually in dire need of vast legislative reforms. There was no school of jurisprudence which could share in the handiwork, whereas full confidence was reposed in the power and wisdom of parliament as a legislative assembly. In these circumstances, it was not strange that he should have adopted sovereignty as his principle to build on this a science of jurisprudence sufficient to subserve the requirements of the people.

Law is thus, strictly divorced from justice and instead of being based on the ideas of good and bad, is based on the power of a superior. This inevitably associates Austin with Hobbes and other theorists of sovereignty, but it was left to Austin to follow up this conception into the ramifications of a modern legal system.

## AUSTIN'S CLASSIFICATION OF LAW

Austin's classification of law falls under two heads, namely, laws set by God, and Laws set by men to men (human laws).

**LAWS SET BY GOD:** This category of laws is of no real juristic significance in Austin's system, compared, for example, with the scholastic teachings which establish an organic relation between divine and human law.

**HUMAN LAWS:** Human laws may be divided into two classes-

- I. **Positive law (laws properly so called):-** These are the laws set by political superior as such or by men not acting as political superior but acting in pursuance of legal rights conferred by political superiors. Only these laws are the proper subject-matter of jurisprudence.
- II. **Other laws:** These laws which are not set by political superior or by men in pursuance of a legal right. In this category are multiple types of rules such as, rules of clubs, law of fashion, laws of natural science, and the rules of international law. Austin names all these 'positive morality'.

Contrary to the above, laws properly so called are a species of commands. But being a command, every law properly so-called flows from a determinate source. Whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear; and the later is obnoxious to an evil which the former intends to inflict in case the wish be disregarded. Every sanction properly so called is an eventual evil annexed to a command. Every duty properly so called supposes a command by which it is created....and duty properly so called is obnoxious to evils of the kind.

The laws properly so-called, with laws improperly so called, may be aptly divided into the following four kinds-

- The divine laws, or the laws of God; that is to say, the laws which are set by God to his human creatures.
- Positive laws, or the laws which are simply and strictly so called, and which from the appropriate matter of general and particular jurisprudence.

- Positive morality, rules of positive morality or positive moral rules.
- Laws metaphorical or figurative, or merely metaphorical or figurative.

The science of jurisprudence, according to Austin, is concerned with positive laws or with laws as considered without regard to their goodness or badness. All positive law is deduced from a clearly determinable law-giver as sovereign. In other words, every positive law, or every law simply and strictly so-called, is set by a sovereign or a sovereign body of persons to a member or members of the independent political society wherein that person or body of persons is sovereign or supreme.

### **LAW EMANATES FROM SOVEREIGN**

Austin's most important contribution to legal theory according to Friedmann was his substitution of the command of sovereign for any ideal justice in the definition of law. The first jurist to make jurisprudence as a 'science' was John Austin who is often described as Father of jurisprudence.

Sovereign defined and analyzed:- While defining a sovereign Austin said, "if a determinate human superior, not in a habit of obedience to alike superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society (including the superior) is a society political and independent.

According to Austin, the superior may be either an individual or a body or aggregate of individuals. Thus, English sovereign for him is merely the 'person' who has the last word in a particular connection. His conception of sovereignty asserts that in every human society where there is law, there is to be found latent beneath the variety of political forms, in a democracy as well as in an absolute monarchy, a relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to none. Involved in this are two main points of special importance viz., the idea of obedience and due position occupied by the sovereign above the law. The expression obedience often suggests deference to authority and not merely compliance with orders backed by threats. The idea of obedience in-fact fails in two different though related ways, to account for the continuity to be observed in every normal legal system when one legislator succeeds another. An illustration of this kind is the change in law of incest made in Rome by the then emperor Claudius for his own private purposes. Desiring to marry Agrippina, the daughter of his brother, he procured a change in the law which permitted a

marriage between a niece and her parental uncle, leaving the law unaltered as to other marriages between uncles and nieces or aunts and nephews, so that these remained incestuous. secondly, habitual obedience to the old law giver cannot by itself render probable, or find any presumption, that the new legislator's orders will be obeyed. If there is to be this right and this presumption at the movement of succession during the reign of the earlier legislators, there must have been the acceptance of the rule under which the new legislator is entitled to succeed.

The dictum, therefore, that English sovereign is merely the person who has the last word is not in the least true to any federation, where the legislatures are bound by the constitution and in most cases a court has the power to decide whether a particular statute is constitutional or not.

### **LAW AS A COMMAND**

Austin defines command as "if you express or intimate a wish that I shall do or forbear from some act and if you will visit me with an evil, in case I comply with your wish-it is a command". A command is different from other significations of desire, not by the style in which the desire is signified but by the power and the purpose of the partly commanding to inflict an evil or pain in case the desire be disregarded. Thus, a command is significance of desire. But a command is distinguished from other significations of desire by this peculiarity that the party to whom it is directed is liable to evil from other, in case he complies not with the desire.

According to Austin law, therefore, signifies a command which obliges a person or persons to a course of conduct. The person who receives the command must realise that there is a possibility of incurring some evil in the event of disobedience. For Austin, every command does not create a law. A law determines acts of a class, a particular command determines merely a specific act. Austin, therefore suggests that a statute issued by Parliament that corn then shipped and import should not be a law, since it relates merely to a specific case but he hares that in popular speech it would be called a law. Generality is a normal mark of law because of the impossibility and undesirability of issuing particular commands for each specific act.

Now, if we regard a law as a command, then every act done must either be permitted or forbidden. Further, if we consider law as a command or an order, it must also be seen in the first sight to be orders given to the judges to do or abstain from doing anything and there should, of course, be no choice why the law should not by special rules prohibit a judge under penalty from

exceeding his jurisdiction or trying a case in which he has some financial interest. These rules imposing such legal duties would be conducive to those conferring judicial powers on him and defining his jurisdiction.

## **SANCTION**

Austin said, “Sanction operate upon the desires and that men are obliged to do or forbear through the desires. For, he is necessarily averse from every evil whatsoever. That every sanction operates upon the will of the obliged is not true. If the duty be positive, and if he fulfills the duty out of regard to the sanction, it may be said with propriety that the sanction operates upon his will. For his desire of avoiding the evil which impends from the law, makes him do and therefore, will the act which is the object of the command and duty. But if the duty be negative and if he fulfills the duty out of regard to the sanction, it can scarcely be said with propriety that the sanction operates upon his will. His desire of avoiding the evil which impends from the law makes him forbear from the act which the law prohibits. But though he intends the forbearance, he does not will the act forborne, or he remains in a state of inaction which equally excludes it. In the former case he does not will the forbearance. In the later case he wills nothing.”

### **Only General Commands are law:**

However, all the commands are not law, it is only the general commands, which obliges to a course of conduct, is law.

### **Exceptions:**

The general commands are the proper subject of study of jurisprudence. But according to Austin, there are three kinds of laws which though not commands, are still within the province of jurisprudence. They are.-

- Declaratory or Explanatory Laws: - Austin does not regard them as commands, because they are passed only to explain laws already in force.
- Laws to repeal laws: - These too are not commands but are rather the revocation of a command.
- Laws of imperfect obligation: - These laws have no sanction attached to them.

## **CRITICISM AGAINST AUSTIN'S THEORY**

Austin's theory has been criticised by a number of jurists and by some of them very bitterly. Bryce went to the extent of saying that 'his contributions to juristic science are so scanty and so much entangled in error that his nook ought no longer to find a place among those prescribed for student.' However, this is an extreme view. The main points of criticism against Austin's theory are as follows;

- a) **CUSTOMS OVERLOOKED:-** 'Law is the command of sovereign', as Austin says, is not warranted by historical facts. In the early times, not the command of any superior, but customs regulated the conduct of the people. Even after the coming of the state into existence, customs continue to regulate the conduct. Therefore, customs should also be included in the study of jurisprudence, but Austin ignored them.
- b) **LAW CONFERRING PRIVILEGES:-** The law which is purely of a permissive character and confers only privileges, as the Wills Act, which lays down the method of drawing a testamentary document so that it may have legal effect is not covered by Austin's definition of law.
- c) **NO PLACE FOR JUDGE MADE LAW:-** Austin ignored them. In Austin's theory there is no place for judge-made law. In the course of their duty judges make law. though an Austinian would say that judges act under the powers delegated to them by the sovereign, therefore, their acts are the commands of the sovereign, nobody, in modern times, will deny that judges perform a creative function and Austin's definition of law does not include it.
- d) **CONVENTIONS:-** Conventions of the constitution, which operate imperatively, though not enforceable by court, shall not be called law, according to Austin's definition, although they are law and are subject matter of a study in jurisprudence. Austin does not treat international law as law because it lacks sanction. Instead, he regards international law as mere positive morality.
- e) **RULES SET BY PRIVATE PERSONS:-** Austin's view that 'positive law' includes within itself rules set by private persons in pursuance of legal rights is an undue extension because their nature is very vague and indefinite.

- f) **SANCTION IS NOT THE ONLY MEANS TO INDUCE OBEDIENCE:-** According to Austin's view, it is the sanction alone which induces the man to obey law. It is submitted that it is not a correct view. Lord Bryce has summed up the motives as indolence, deference, sympathy, fear and reason that induces a man to obey law. The power of the state is *ratio ultima*-the force which is the last resort to secure obedience.
- g) **COMMAND OVER EMPHASIZED:-** The Swedish jurist Olivercrone has denounced Austin's theory of law because of its over-emphasis on command as an inevitable constituent of law. In modern progressive democracies law is nothing but an expression of the general will of the people. Therefore, a command aspect of law has lost its significance in the present democratic setup.

### **SALIENT POINTS OF AUSTIN'S THEORY**

Austin's theory prominently brings out the following four points;

- That every law is a species of command;
- That all positive laws are command of the sovereign either directly or indirectly;
- That every law prescribes a course of conduct; and
- That every law has for its sanction the physical force of the state.

### **H. L. HART**

Professor Hart is regarded as the leading contemporary representative of British positivism. His identical book "the concept of law" was published in 1961 and that shows that he is a linguistic, philosopher, barrister and a jurist.

Professor Hart has criticised the Austinian conception of law by linking it with his own original concept of law viewed from the positivists standpoint. He has rejected any system of law based simply on coercive orders on the ground that this view is patterned on criminal law when to a large extent the modern legal system confers both public and private legal powers, for instance, in the case of the law relating to wills, contracts, marriage etc. According to him many laws do not have sanction attached to them for instance customary laws, enabling laws and laws imposing duties on public authorities.

Hart instead pleads for a dual system consisting of two types of rules, viz., primary and secondary rules.

The primary rules which impose duty upon individuals are binding because of the popular acceptance such as rule of kinship, family sentiments etc. These being unofficial rules, they suffer from three major defects namely-

- Uncertainty
- Static character
- Insufficiency

Primary rules lay down standards of behaviour and are rules of obligation, that is, rules that impose duties.

The secondary rules which are power conferring enable the legislators to modify their policies according to the needs of the society. In fact they seek to remedy the defects of primary rules, primary rules are ancillary to and concern the primary rules in various ways; for instance; they specify the ways in which primary rules may be ascertained, introduced, eliminated or varied and the mode in which their violation may be conclusively determined.

Hart takes the view that a society which is so legally undeveloped as to have no secondary rules but only primary rules of obligation, would not really possess a legal system at all but a mere 'set' of rules. For Hart, therefore it is the union of primary rules and secondary rules which constitute the core of a legal system.

For a legal system to exist there must be general obedience by the citizens to possess 'an internal point of view'. In such a case, according to Hart, the importance of the internal point of view relates not to a body of citizens but to the officials of the system. These officials must not merely 'obey' the secondary rules but must take on 'inner view' of these rules, and this is a necessary condition for the existence of a legal system. Official compliance with the secondary rules must therefore, involve, both a conscious acceptance of these rules as standards of official behaviour, and a conscious desire to comply with these standards.

Hart refers to the internal aspects or "inner point of view" that human beings take towards the rules of a legal system. According to him, law depends not only on the external social pressure

which are brought to bear on human beings to prevent them from deviating from the rules but also on the inner point of view that human beings take towards a rule imposing an obligation.

#### **RULE OF RECOGNITION**

It appears from the above that Professor Hart has subscribed to the theory of the union of primary and secondary rules. The primary rules lay down standard of behavior (duties), while the secondary rules relate to the identification, creation, change, and application of the powers. He has dealt with law as equivalent to 'legal system'. Dias observes that Professor Hart distinguishes between rules imposing duties and rules creating powers. A very large part of law consist of prescriptive patterns of conduct, and they are accordingly assigned pride of place as 'primary rules.' i.e., those imposing duties. The means by which these are created, extinguished and modified are 'secondary rules' i.e., those conferring powers. Included in this category is the important 'rule of recognition' which is used 'for the identification of primary rules of obligation.' It refers only to formal criteria and thus excludes morality. Only with the union of these two sorts of rules can there be a legal system as a self-propagating thing."

Dias, while commenting on the above view of Professor Hart, observes that a club may prescribe patterns of behavior for its members and may also possess machinery whereby such prescriptions are added to, modified applied and identified as the rules of that club. There is no reason why the structure of the system, which respectively prevails in the club and in the state, should not exhibit analogous characteristics by way of patterns of conduct, sanctions and provision for development. What is needed, therefore, is some means of identifying the one as 'the law f the club' and the other as the 'law of the land.' For this purpose some references to the courts as parts of the means of identification would appear to be unavoidable. Secondly, the 'rule of identification' does not appear to be a power so much as the acceptance of a power (or powers) to invest primary rules with the quality of 'laws'. Hence it does not fit quite snugly into a category containing powers. Thirdly, acceptance of a rule of recognition, i.e., criterion of validity rests on social facts. If Professor Hart is talking, as he purports to do in terms of a system, which is a continuing thing, then all factors that bring about each and every part of it and keep them going enter into account. In this way social and moral considerations may well set limits on the rule of recognition at the time of its acceptance precisely in order to provide certain fundamental safeguard. If so, the rule will have built-in limitations that prevent it from validating certain

forms of abuse of power. So Professor Hart's exclusion of morality from his 'rule of recognition' is open to question. But, with reference to a continuum, morality is an indispensable factor, not only in the genesis, but also in the continuation of laws. The fourth criticism is that there is a basic confusion in his frames of reference. The result is that for the limited purpose of identifying 'laws' his concept seeks to accomplish more than is necessary for the purpose of portraying law, it is inadequate. Fifthly, he distinguishes between rules creating duties and rules creating powers, and bases a legal system on their union. But it is questionable whether so sharp distinction can be drawn. For example, it has been pointed out that the same rule may create a power plus a duty to exercise it, or a power plus a duty not to exercise it. Finally, Professor Dworkin has pointed to the importance of 'legal doctrines' (principles, standards and policies), e.g., unjust enrichment, presumption of innocence, etc., which do not derive their quality of law from the criterion of validity. To regulate them to 'discretion' is inconsistent with the judicial acceptance of them as 'legal'. Professor Hart's concept is applicable only to rules, not to everything that is contained in a legal order. Professor Hart's picture of law is thus incomplete in certain respects. It is certainly less definite and suggestive than that unfolded by Kelsen's conception.

**POINTS OF DIFFERENCE BETWEEN ANALYTICAL SCHOOL AND HISTORICAL SCHOOL OF JURISPRUDENCE:**

	<b>Analytical School</b>	<b>Historical School</b>
<b>1</b>	Law is the creation of state.	Law is found and not made. Law is self-existent.
<b>2</b>	Without a sovereign, there can be no law.	Law is an antecedent to the state and exists even before a state organisation comes into being.
<b>3</b>	The hall-mark of law is enforcement by the sovereign.	Law is independent of political authority and enforcement. It is enforced by the sovereign because it is already law; it does not become law because of enforcement by the sovereign.
<b>4</b>	The typical law is statute.	The typical law is custom.
<b>5</b>	Judges should confine themselves to a purely syllogistic method.	In constructing a statute judges should consider the history of the legislation in question.
<b>6</b>	Law rests upon the force of politically organised society.	Law rests on the social pressure behind the rules of conduct which it enjoins.
<b>7</b>	Emphasis is on empirical a priori method.	Emphasis is no comparative method.
<b>8</b>	Law is the command of the sovereign.	Law is the rule whereby the invisible border
<b>9</b>		

## **SIR HENRY MAINE**

**1822-1888**

Maine made a comparative study of legal institution of various communities and laid down a theory of evolution of law. His method was a great improvement upon historical school and yielded fruitful results.

Maine made every valuable contribution to legal philosophy by way of historic comparative method. He was an erudite scholar of law. He started his career as Regis Professor of civil law in the University of Cambridge at an early age of twenty five. He was law member in the council of the Governor General of India between 1861 and 1869. This provided him an opportunity for the study of Indian legal system. From 1869 to 1877 he occupied the chair of historical and comparative jurisprudence in Corpus Christi College, Oxford. After that he held the distinguished post of the master of Trinity Hall, Cambridge.

The founder of English historical school of jurisprudence was Maine. His important works are Ancient Law 1861, Village Communities in the East and West 1871, Lectures on the Early History of Institution, 1874, and Dissertation on Early law and Custom, 1883. Maine made a significant contribution to law by indicating that there has been a parallel and alike growth and development of legal institution and law in the societies of the east and west up to a certain stage.

### **DEVELOPMENT OF SOCIETIES**

Sir Henry Maine through his comparative study came to a conclusion that the development of law and other social institution has been more or less as an identical path in almost all the ancient societies belonging to Hindu, Roman, Anglo-Saxon, Hebrew and Germanic communities. Most of these communities are founded on Patriarchal pattern wherein the eldest male parent called the Pater familias dominated the entire family. There were some communities which followed matriarchal pattern in which the eldest female of the family was the central authority to manage the family affairs.

According to Maine, Pater familias constituted the lowest unit of primitive communities. A few families together formed the family group. An aggregation of families constituted gens which in

turn led to the formation of tribes and collection of tribe formed the community. The individual member of the family had no individual existence then his status.

Maine arrived at his often quoted conclusion that “the movement of the progressive societies has hitherto been a movement from Status to Contract.” Status is a fixed condition in which an individual finds himself without reference to his will and from which he cannot divest himself by his own efforts. It is indicative of a social order in which the group, not the individual, is the primary unit of social life; every individual is enmeshed in a network of a family and group ties. With the progress of civilisation this condition gradually gives away to a social system based on contract. This system is characterized by individual freedom, in that “the rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will.” A progressive civilisation, in the view of Maine, is manifested by the emergence of the independent, free, and self-determining individual as the primary unit of social life.

Maine’s “status to contract” doctrine is by no means his only outstanding contribution to jurisprudence. He has enriched our knowledge and understanding of legal history in several aspects. Very interesting, for example, is his theory of law and lawmaking. He believed that in the earliest period law was created by the personal commands of patriarchal rulers, who were considered by their subjects to at under divine inspiration. Then followed a period of customary law, expounded and applied by an aristocracy or small privileged class which claimed a monopoly of legal knowledge. The third stage was marked by a codification of these customs as the result of social conflicts. The fourth stage, according to Maine, consists in the codification of strict archaic law by the help of fiction, equity and legislation; these instrumentalities are designed to bring the law into harmony with a progressing society. Finally, scientific jurisprudence weaves all these various forms of law into a consistent and systematic whole. Not all societies, said Maine, succeed in passing through all these stages, and their legal development in its particular aspects does not show a uniform line. Maine merely wished to indicate certain general directions and trends of development in the evolution of law. Modern research has shown that, on the whole, he has succeeded remarkably well in tracing some of the fundamental lines of a natural history” of the law.

Maine’s comparative analysis of legal evolution was supplemented in the early twentieth century by the historical studies of Sir Paul Vinogradoff. English historical research also produced such

ripe fruits as Pollock and Maitland's *History of English Law* before the time of Edward I and Holdsworth's *History of English Law*, as well as a host of specialized treatises and monographs. What is lacking up to this day is a history of English law which closely correlates legal developments with the general political, social and cultural history of England.

## **DEVELOPMENT OF LAW**

**LAW MADE BY THE RULER UNDER DIVINE INSPIRATION OR DIVINE LAW OR DOOMS OR THEMESTERS:** In the beginning, law originated from themes which meant the Goddess of justice. It was generally believed that while pronouncing justice the king was acting under the divine inspiration of Goddess of justice to be executed by the king as custodian of justice under divine inspiration.

Themesters are the awards pronounced by judges as divinely dictated to him. Themesters are not laws but judgments or dooms. The king happened to be the administrator of judgments -of course he was not the maker of law as the themester were divinely inspired by Goddess of justice.

**CUSTOMARY LAW:** The next stage was reached when the office of the king or judge was inspired by the councils of chiefs. The priest became the depositories of law who circumscribed the king's power and claimed the sole monopoly of knowledge. Therefore, the priestly class attempted to preserve the customs of the race or caste intact. Since the art of writing had not been invented so customs of the community became law for the people who were united by blood relationship. Thus we notice a particular important phenomenon. Maine's theory of legal development conception of customs emerging posterior to that themester or judgments.

**KNOWLEDGE OF LAW IN THE HANDS OF PRIEST:** In the next stage of development of law, the authority of the king to enforce and execute law inspired by the priestly class claimed themselves to be learned in law as well as religion. The priestly class claimed that they memorized the rules of customary law because the art of writing had not developed till then.

**ERA OF CODES (CODIFICATION):** The era of codification marks the fourth and perhaps the final stage of development of law. With the discovery of the art of writing, a class of learned men and jurists came forward to denounce the authority of priests as law givers. They advocated codification of law to make it accessible and easily knowable. This broke the monopoly of priest

class in matters of administration of law. most important codes of the era were Twelve Tables of Rome, Manu's code which were mixture of moral, religion and civil laws, Twelve Tables in Rome, Solon's Attic code, Hebrew Code, the Codes of Hammurabi etc.

### **TYPES OF SOCIETIES**

According to Maine, there are two types of societies, Progressive Societies and Static societies

According to Henry Maine, when the primitive law has been embodied in a code, there is an end to its spontaneous development and such communities or societies which do not progress or go beyond the fourth stage are called static societies.

Those societies which go beyond the fourth stage as developing their laws, by new methods are called progressive societies. There are three methods by which progressive societies develop their laws. They are;

**LEGAL FICTION:** According to this method, legal fictions, changes the law according to the changing needs of the society without aiming any change in the letter of law.

Maine defines legal fiction as any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. Legal fiction satisfies the desire for improvement but at the same time they do not offend the superstition, fear and dislike of change. At a particular stage of social development they are invaluable expedients of social progress for overcoming the rigidity of law.

**EQUITY:** Equity consists of principles which are considered to be invested with a higher sacredness than those of the positive law.

Equity belongs to a more advanced stage than fictions. The interference with the law is open and avowed. It is a body of law existing by the side of the original civil law, founded on distinct principles claiming incidentally to supersede the civil law by virtue of a superior sanctity inherent in these principles.

**LEGISLATION:** Legislation is the most effective method of law making, it is considered to be the most systematic and direct method of introducing reform through new laws. The power of the

legislature to make laws has been widely accepted by the courts and the people all over the world.

### **THE SOCIOLOGICAL SCHOOL OF JURISPRUDENCE**

Sociology of law is defined in many ways, but its main difference from functional jurisprudence is that it attempts to create a science of social life as a whole and to cover a great part of general sociology and political science. The emphasis of the study is on society and law as a mere manifestation, whereas Pound rather concentrates on law and considers society in relation to it.

Huntington Cairns also attempt to create a legal science with a dominant emphasis on sociology. He considers that modern jurisprudence is a meaningless and fruitless pursuit of a goal incapable of achievement.’ Jurisprudence is really an applied science, and no technology has ever succeeded unless it was based on the findings of a pure science. No universal propositions can be laid down concerning legal concepts or rules because they differ from race to race. If jurisprudence wishes to become scientific, it must create a science of society. The basis must be human behaviour as influenced by, and in relation to, disorder. It is impossible to discover how law operates unless we have greater knowledge of the factors that cause change in society and govern its evolution. When this is understood, jurisprudence as a technology can apply these rules to reach useful results. At present jurists are attempting to build a house before the foundations have been laid. Montesquieu laid the seeds of the sociological method in jurisprudence. In his “*Esprit des Lois*” (Spirit of the laws), published in 1748, Montesquieu used the historical method. Montesquieu researched into the laws and institutions of all kinds of human society. He considered that law should be based on historical observations, and not merely on reason or belief.

## **LEON DUGIT**

The French jurist Leon Dugit was a professor of constitution law in the University of Bordeaux in France. He made substantial contribution to the sociological jurisprudence in early twentieth century. Dugit carried forward the belief that scientific progress can be accelerated by individual behavior in order to satisfy common social needs and interests. Dugit was inspired by Durkheim who himself had taken inspiration from Comte. Durkheim's main point, on which Dugit built upon, was that he made a distinction between two kinds of needs of men in society. Firstly, there are common needs of individuals which are satisfied by mutual assistance and secondly, there are diverse needs of individuals which are satisfied by the exchange of services. Therefore, the division of labour was pre-eminent factor of social cohesion as an indisputable fact beyond ideology, beyond religious or metaphysical speculation.... The constant realisation of social fact which is simply inter-dependence of individuals could at least replace ideological quarrels by observable facts.

Dugit attacked traditional concepts of state, sovereignty and law and sought to fashion a new approach to these matters from the angle of society. Dugit was much influenced by Auguste Comte's 'Theory of law as a fact' which denounced individual rights of man and subordinated them to social interest. Completed that "the only right which man can possess is the right always to do his duty." This formed the basis of Dugit's legal theory.

## **SOCIAL SOLIDARITY**

Dugit built his theory on social solidarity. He insisted on the necessity of viewing social life as it is actually lived. The most important fact of the society is the interdependence of men. In the present day society, man exists by his membership of the society. Each man cannot manufacture and pronounce the necessities of life himself. Functions are so specialized that each in his turn depends on other for his necessities. The end of all human activities and organisations should be to ensure the interdependence of men. This is Dugit's theory of social solidarity.

Dugit puts forth in definite and clear term that law arises of the fact of social existence. Therefore, if man wishes to live and act in society he must act in conformity with the social law of solidarity. Solidarity is not a rule of conduct; it is a fact- the fundamental fact of all human society. In other words solidarity is neither a charity nor fraternity. These are moral duties. It is a fact. It means that in fact men are 'solidarity' with one another that is they have common needs which they can only satisfy in common. That they have different capabilities and different needs which they can satisfy by exchange of needs and division of labour. This solidarity is mutual interdependence is the product of social reality of social life. As such it is the duty of one and all to conform his conduct according to fact of social solidarity. It is a coincidence of purposes and facts- the unhappiness of one affect all, the happiness of one profits all. He says, man must so act that he does nothing which may injure social solidarity upon which he depends, and more positively, he must do all which naturally tends to promote social solidarity.

Dugit's principle of social solidarity is however not free from criticism. Aware of the growing complexity of modern social life, Dugit attacks individualism as reflected in the conception of inalienable individual rights. He also rejects the alternative of strengthening the central power of the state. Instead he advocates decentralized group environment and the link between the different groups is to be an objective rule of law, the principle of social solidarity. This savors of natural law although Dugit emphatically rejects any such metaphysical conception as incompatible with scientific positivism, yet his idea of social solidarity is as strong a natural law ideal as any ever conceived.

As Allen puts it, "although Dugit disregards the ethical element in law, he is considered to be really postulating a content of ideal law "the natural law with valuable content".

Again the meaning of the term 'social solidarity' is not clear from the analysis of Dugit. We may admit that the mutual interdependence of men in society and the need to collaborate for the functioning of social life is a scientific fact. But as many of these who have examined the comparative precision of facts in the social and natural sciences have observed, social facts are much less clearly determined than natural facts and Dugit's solid facts are, as one critic has observed, facts of a highly metaphysical order.

Dugit launched a vigorous attack on the myth of state sovereignty. The social solidarity is the touch stone of judging the activities of individuals and all organisations. State is also a human organisation and it is no way different from other organisations. The state stands in no special position or privilege and it can be justified only so long as it fulfills its duty. Dugit has no faith in all powerful illimitable authority-‘sovereign’. He strongly pleads for the check on the state power. His plea is for the decentralization and ultimately he develops an idea of syndicalism.

Dugit denies the distinction between public and private law. Both are to serve the same end i.e., social solidarity. So there is no difference in their nature.

### **EUGEN EHRLICH**

**1862-1922**

While Kohler’s philosophy of law moved on the borderline between sociological jurisprudence and legal idealism, a thoroughly sociological type of legal theory was propounded by the Austrian thinker Eugen Ehrlich. Ehrlich was a professor of Roman law at the University of Czernowits in Austria. Like Savigny, he believed in spontaneous evolution of law but he did not hang on the past but conceived law in the context of existing society and thus evolved his theory of living law. According to him, the institution of marriage, domestic life, inheritance, possession, contract etc., govern the society through living law which dominates the human life. By living law he meant extra legal controls which regulate social realities of me.

Genuine sociological jurisprudence teaches, in the words of Northrop, that the “positive law cannot be understood apart from the social norms of the living law.”

The central point of Ehrlich’s thesis is that the law of a community is to be found in social facts and not in formal sources of law. He says “at present as well as at any other time, the centre of gravity of legal development lies not in legislation nor in juristic science, nor in judicial decisions, but in society itself.” Thus living law is the fact which governs life and a proper study of law requires the study of all the social conditions in which the law functions in the society. A statute which is habitually disregarded is no part of living.

According to Ehrlich there is no substantial difference between formal legal norms and the norms of customs or usages, because the sanction behind them is the same (that is social pressure). If a statute is not observed in practice, it is not a part of living law.

Ehrlich meets the facts of growing increasing state activity and a parallel increase of state norms by distinguishing three types of legal norms. All legal norms regulate in some way the relation between command and prohibition and the underlying facts of law". They do so in different ways;

- The protection may simply be given to legal norms purely based on facts of law such as by laws of association or corporations, or contracts. Closely connected are norms directly derived from social facts, such as the remedies for damages, unjust enrichment etc.
- Legal commands or prohibitions (imposed by the state) may create or deny social facts in the case of expropriation or multiplication of contracts.
- Norms may be entirely detached from social facts, such as imposition of taxes or the granting of trade concessions and privileges.

His use of the term 'sociological jurisprudence' means that law in a society should be made and administered with the utmost regard to its requirements. To achieve this end, a very close study of the social conditions of the society, in which the law is to function, is, indispensable.

In view of the Ehrlich, a court trial is an exceptional occurrence in comparison with the innumerable contracts and transactions which are consummated in the daily life of the community. Only small morsels of real life come before the officials charged with the adjudication of disputes. To study the living body of law, one must turn to marriage contracts, leases, contracts of purchase, wills, and the actual order of succession, partnership articles and the bylaws of corporations.

## **AUGUST COMTE (1798-1857)**

The honour of being the founder of the science of sociology belongs to another French philosopher August Comte. The legitimate object of scientific study, according to Comte, is society itself and not any particular institution of government. He stressed the fact that men have ever been associated in groups and that it was in the social group and not in isolated individuals that the impulses originated which culminated in the establishment of law and government. He defiantly rejected the view that society rests upon an individualistic basis and that the individual is the focal point of law. His philosophy is thus in sharp contrast to the mechanistic philosophy current before his time.

## **THE**

### **THE VIENNA SCHOOL OF JURISPRUDENCE**

Analytical positivism has been restated, developed and put on a theoretical philosophical basis in our own time by the very potential theory of the 'Vienna School'. Legal theory of this school is indeed dynamic and pluralistic. The school regards it as a mark of error to think of the law as completed within the stage of statute and to bar the door of the law which is made in the judicial and administrative process. It regards it also as a mark of error to think of the law as completed at the stage of judicial decisions and to neglect the legal material which is already present as the product of the legislative process. "To attempt to view the law as a whole from one or the other category is equally arbitrary. Both are passive objects of cognition for legal science, although taken together they only make possible a partial knowledge of law as a whole, as it is presented to legal science."

Viennese school, in fact, has had a powerful intellectual influence and its chief exponent is Professor Hans Kelsen.

## **HANS KELSEN**

Kelson was born at Prague in Austria in 1881 and was a Professor of law at the Vienna University. He was also the judge of the supreme constitutional court of Austria for ten years during 1920-1930. Thereafter, he shifted to England. He came to United States and worked as professor of law in several American universities and authored many books. He was emeritus Professor of Political science in the California University when expounded his 'Pure theory of law' which is considered to be Kelsen's unique contribution to legal theory.

Kelsen's pure theory of law is akin to that of Austin's theory of law, although Kelsen, when he began to develop his theory was quite unaware of Austin's work. He nevertheless recognised the essential identity of his own objectives with Austin's, namely, to base a theory of law on a positive legal order or on a comparison of the contents of several legal orders and thus by confining jurisprudence to a structural analysis of positive law to separate legal science from philosophy of justice and sociology of law. He wished to free the law from the metaphysical mist with which it has been covered all times by the speculations on justice or by the doctrine of 'jus naturale'. In this sense Kelsen's theory is called the 'pure theory of law'. As a theory, thus, it is exclusively concerned with the accurate definition of its subject matter. It endeavors to answer the question, what is the law? But not the question, what it ought to be? It is a science and not a politics of law.

The theory of Kelson says Dias has represented a development in two different directions. On one hand, it makes the highest development to date of analytical positivism. On the other hand, characterised the close of 19<sup>th</sup> century and the beginning of 20<sup>th</sup> century. This is not to suggest that Kelsen reverted to ideology. For Kelsen and his followers any such legal idealism is unscientific.

Nearly a century separates the work of Hans Kelson from that of Austin. If Austin was driven to make his jurisprudence rigid because of the confusion of previous writers, Kelsen represents a reaction against the modern schools which have so far widened the boundaries of jurisprudence that they seem almost conterminous with those of social science. But while Austin did not consciously formulate a detailed philosophy, Kelsen admittedly builds on the doctrine of Kant. Most philosophers emphasize that jurisprudence must study the relationship between law and

justice, but Kelsen wishes to free the law from metaphysical mist with which it has been covered at all times by the speculations on justice or by the doctrine of *ius naturae*. He is thus a philosopher in revolt from the tendencies to which philosophy had led so many writers. He desires to create a pure science of law, stripped of all irrelevant material, and to separate jurisprudence from the social sciences as rigorously as did the analysts. The mathematician is not interested in the way in which men think nor is he directly concerned whether his work is to be used to build a bridge or to work out a new system to break the bank at Monte Carlo: so the jurist, if he is to be scientific, must study the legal rules abstracted from all social conditions. Kelsen refuses to define law as a command, for that introduces subjective and political considerations and he wishes his science to be truly objective.

An interesting example by which to test Kelsen's theory is the Unilateral Declaration of Independence by Rhodesia. The Privy Council, as part of the English legal order, naturally decided against the validity of the Rhodesian emergency powers which had not been laid down in accordance with the Grundnorm the court accepted. The Rhodesian courts looked at the problem in the light of the new legal order created by the declaration of independence and relied partly on the theory of necessity and of the actualities of politics. In other words, these courts in effect accepted a new Grundnorm for Rhodesia.

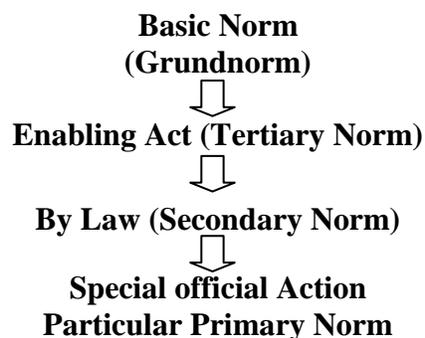
#### **LAW IS A NORMATIVE SCIENCE**

Law norms are 'ought norms'. According to Kelsen, law is a normative science. But law norms have a distinctive feature. They may be distinguished from science norms on the ground that norms of science are norms of being of is' (sein), while the law norms are 'ought' (sollen) norms. Law does not attempt to describe what actually occurs but only prescribe certain rules. It says, if one breaks the laws, then he ought to be punished.' These legal 'ought' norms differ from morality norms in this respect that the former are backed by physical compulsions which the latter lack, but Kelsen does not admit the command theory of Austin as it introduces a psychological element into the definition of law which Kelsen avoids.

## **HIERARCHY OF NORMATIVE RELATIONS**

The science of law to Kelsen is the knowledge of hierarchy of normative relations. He builds on Kant's theory of knowledge and extends this theoretical knowledge to law also. He does not want to include in his theory 'what the law ought to be' and speaks of theory of law as a structural analysis, as exact as possible, of the positive law, an analysis free of all ethical or Practical judgment of value.

According to Kelsen, a legal order is comprised of norms placed in a hierarchical manner, one norm placed above another norm and every norm deriving its validity from the norm above it. The hierarchy takes a pyramid shape and symbolizes the legal order. In this way there comes a final stage of highest norm which serve basis for all infertile norms, that is known as the basic norm or Grund Norm. The Grund norm is the basic point of the philosophy of Kelsen. The legality or validity of all the norms can be tested against the Grund norm. The validity of Grund norm can't be objectively tested. The Grund norm is the common source for the validity to the positive legal order or all norms that belong to the legal order. The Grund norm must be efficacious i.e., it must be obeyed by the people at large. Efficacy is the validity of the Grund norm.



## **GRUND NORM**

The Grund norm is the starting point in a legal system. From this base, a legal system broadens down in gradation becoming more and more detailed and specific as it progresses. Kelsen calls it 'general concentration' of 'Grund norm' or the basic norm thus focusing the law to specific situations.

Kelsen's pure theory of law is based on pyramidal structure of hierarchy of norms which derive their validity from the basic norm which he termed as Grund norm. Thus, Grund norm as basic norm determines the content and gives validity to other norms derived from it. Kelsen has no answer to the question as to whereupon the basic norm derives its validity. He considers it to be a meta-legal question in which jurist need not to intrude.

The task of legal theory is only to clarify the relation between Grund norm and all other inferior norms and not to enter into other questions as goodness or badness of Grund norm. This is the task of political science, or ethics or of religion.

Jullius Stone rightly comments that as Austin's sovereign in a particular society is a mere starting point for his legal theory, so also basic norm has to be accepted as a hypothetical starting point or fiction which gives a legal system countenance and a systematic form.

Thus, while all norms derive their validity from the basic norm, the validity of basic norm cannot be objectively tested, instead, it has got to be presumed or pre-supposed. Kelsen however considers Grund norm as a fiction rather than a hypothesis.

Kelsen recognised the Grund norm need not to be the same in every legal order, but a Grund norm of same kind there will always be, whether in the form, e.g., of a written constitution or the will of a dictator. There appears no reason why there need not to be one Grundnorm. For example, in England, the whole legal system is traceable to the propositions that the enactments of the Crown in Parliament and Judicial precedents ought to be treated as 'law' with immemorial custom as a possible third. This is not in contradiction of Kelsen's theory of law. Kelsen has firmly said that a system of law cannot be grounded on two conflicting Grundnorm. In England, obviously, there is no conflict between the authority of the King in Parliament and of judicial precedents, as the former precedes the latter. The pure theory of law thus operates with this basic

norm as with a hypothesis, but where no such explicit formulation exists, Kelsen is by no means clear in guiding our search. For him the only task of legal theory is to clarify the relation between the fundamental and all lower norms, but not to say if this fundamental norm is good or bad. This is the task of Political science or ethics or of religion.

## **NORM**

To Kelsen, a norm is the meaning of an act of willing by which a certain behaviour is commanded or permitted or authorized. The meaning of such act of will cannot be described by the sentiment that the other individual will behave in that way only but he ought to behave in that way.

## **ESSENTIALS OF KELSEN'S SYSTEM**

The essential foundations of Kelsen's system maybe enumerated as follows;

- The object of a theory of law, as of any science, is to reduce chaos and multiplicity to unity.
- Legal theory is a science and not volition. It is knowledge of what the law is and not of what it ought to be.'
- The law is normative and not a natural science.
- Legal theory is a theory of norms, and is not concerned with the effectiveness of legal norms.
- A theory of law is formal, a theory of the ordering, changing contents in a specific way.
- The relation of legal theory to a particular system of positive law is that of possible to actual law.

## **FEATURES OF KELSEN'S THEORY**

- The theory of law must be ideal with the law as it is and not with the law as it ought to be. i.e., it must concern with the existing law.
- The theory of law is different from the law itself. Law is a mass of heterogeneous rules. The function of the theory is to distinguish between the different types of the law.

- A theory of law must be pure. It must be free from all ambiguities. A theory must explain all the aspects of law without reference with other subjects like sociology, political science, economics, history etc., because they are subject to variation from one place to another and from one time to another. The pure theory which would have the ingredient of only one discipline, i.e., law.
- Law is a norm, which is a prescription norm, the function of which is to prescribe.
- Law is the hierarchy of the norms, and each norm derives its validity from the superior norm.
- Finally there comes the highest norm to which all inferior norms derive their validity i.e., known as Grund norm.
- Kelsen's approach is much wider than that of Austin, as Kelsen includes; policy, rule, doctrine and standards in addition to the commands within the purview of the norm.

#### **IMPLICATIONS OF THE KELSEN'S THEORY**

The implications of Kelsen's theory are wide and many. It covers concepts of state, sovereignty, private and public law, legal personality, right and duty and international law.

**LAW AND STATE NOT TWO DIFFERENT THINGS:** The most significant feature of Kelsen's doctrine is that both the law and state are identical; for him the state is nothing but a system of human behaviour, an order of social compulsion. This compulsive order is different from the legal order, for the reason that within one community only one and not two compulsive orders can be valid at the same time. It is therefore, redundant to distinguish between law and state, because every act of state is a legal act. A human act is only designated act of state by virtue of a legal norm which qualifies it as such; on the basis of the norm the act is imputed to the state, is related to the unity of the legal order.

The state as person is simply the personification of the law. Kelsen, thus, rejects any dualism by saying that dualism of state and law is one of those tautologies which double the object of knowledge. Legal dualism, for him, is nothing but a reflection of and substitute for theology, with which it has substantial identities.

The reality of state is that it is a system regulating the social behaviour in a normative order. But such a working can be discovered only in a legal system. Really speaking, law and state are the

same and the difference between them appears because we look at them from two different points.

**NO DIFFERENCE BETWEEN PUBLIC AND PRIVATE LAW:** Another very significant feature that comes out of the hierarchal structure of law is Kelsen's attack upon the traditional distinction between public and private law. Behind the division of public and private law Kelsen suspects, not without a reason, a political ideology which wishes this sphere of private law to appear as being beyond politics, whereas in reality private law institutions consist of a political ideology as strongly as public law institutions and relations.

According to Kelsen, there is no difference between public and private law when all law derives its force from the same Grund norm. No distinction between them can be made on the ground that they protect interests of different nature. Private interests are protected in public interest. He traces a political ideology behind this distinction- a motive to elevate public law and justice authoritarianism'. On this point, though from different premises, Kelsen reaches the same conclusion as Dugit and Renner.

**NO DIFFERENCE BETWEEN NATURAL AND JURISTIC PERSON:** Kelsen does not admit any legal distinction between physical and juristic person. Since, state is nothing but a legal construction; this leads us to the next part of Kelsen's theory, the denial of any distinction between physical and juristic persons. As law is a system of normative relations and uses personifications merely as a technical device to constitute points of unification of legal norms, so the distinction between natural and juristic persons is irrelevant, while all legal personality is artificial and deduces its validity from superior norm. To Kelsen, the concept of person is merely a step in the process of concretization, e.g., totality of claims, etc., and nothing else.

**NO INDIVIDUAL RIGHTS:** As law is a system of norm relations, so Kelsen and his followers recognise no individual right, except as a technical device which the law may or may not recognise in order to carry out legal transactions. Legal duties are the essence of law, for law is a system of 'oughts', whereas legal rights are by an incident. This necessarily severs law from any associations with political theory of the law, for example, from those which affirm certain inalienable rights of the individual.

## CRITICISM AGAINST Kelsen's THEORY

- **NO PRACTICAL SIGNIFICANCE:** Sociological jurists criticize it on the ground that it lacks practical significance. Professor Laski, says, 'Granted its postulates, I believe the pure theory to be unanswerable but I believe also that its substance is an exercise in logic and not in life'. Some see Kelsen as "beating his luminous wings in vain within his ivory tower."
- **PURITY OF NORMS CANNOT BE MAINTAINED:** Although Kelsen's theory has warmly been recognised, yet most writers point out that it provides no guidance whatever to a person in the actual application of the law. The quality of purity claimed by Professor Kelsen for all norms dependent on the basic norm had always been subject of serious attack. In the most enchanting language of Julius Stone: "...Since that basic norm itself is obviously most impure, the very 'purity' of the subsequent operations must reproduce that original impurity in the inferior norms, we are invited to forget the illegitimacy of the ancestor in admiration of the pure blue-blood of the progeny. Yet the genes are at work down to the lowliest progeny."

As absolute purity of any theory of law is a far cry, so Kelsen had to admit his defeat when it comes to the question of conflicting fundamental norms. The question which is the valid fundamental norm, his pure theory cannot avoid, for without it the whole structure would collapse. Similarly, the "minimum of effectiveness" formulae which Kelsen chose for him is at bottom nothing else but Jellink's normative *Kraft des Faktischen*. How can the minimum of effectiveness be proved except by an inquiry into socio-political facts? Writing as late as 1942, he himself suspected if his pure theory of law is a foundation without which the sociological and evaluative inquiries cannot proceed. Sociological jurisprudence according to him, presupposes normative jurisprudence, since until the latter has determined what are legal norms, sociological jurisprudence has no definite province. The truth is, however, something else. It is his pure theory of law which is important as an instrument until the other approaches to law provide the hypothesis of the basic norm.

- **HIS GRUND NORM VAGUE AND CONFUSING:** The first point in Kelsen's theory which is greatly criticised is his conception of Grund norm. Though Kelsen has given its characteristics as possessing 'minimum effectiveness' it is very vague and confusing and

it is difficult to trace it out in every legal system. But its discovery is a condition precedent for a successful application of Kelsen's theory to a legal system. Kelsen seems to have given his thesis on the basis of the written constitutions as Austin created his 'sovereign' on the basis of the English system of government but even in written constitutions. 'Grund norm' is made up of many elements and any one of these elements alone cannot have the title of Grund norm. Another criticism against the conception of Grundnorm is from the point of view of the Historical school. It says that the origin of law is in customs and Volkgeist and not in any other source, such as 'Grund norm'. But on this point Kelsen finds in Professor Friedmann and Stone very strong advocates of his view. Friedmann says, "The fact that the ultimate authority in any given legal order may be a composite one, as in the United States of America, or Great Britain, does not alter the fact that such an ultimate authority must exist". So far as the criticism by the jurists of the Historical School is concerned, Kelsen is decidedly a positivist and therefore, this criticism does not hold good against him.

- **NATURAL LAW IGNORED:** Lauterpacht, an ardent follower of Kelsen, has also from a different side questioned if the theory of hierarchy of legal norms does not imply a recognition of natural law principles, despite Kelsen's blatant warning of natural law ideology. Many natural law theories do not establish absolute ideals but affirm the principle of higher norm superior to the positive law. As mankind becomes legally organized, natural law rules would become positive norms of a higher order, and the difference between Kelsen's theory and those of modern law theories would disappear. Hagerstorm, too, appears to have unfolded the natural law philosophy concealed in Kelsen's assumption of the unconditional authority of the supreme power, or, in Verdross, "constitution of the law of nations" as the formulation on which the principle of international law (*Pacta Sunt Servanda*) is supposed to ground.

## **THE REALIST MOVEMENT-LEGAL REALISM**

Legal realism implies that judicial decisions must conform to socio-economic factors and questions of policy and values. In America we have the Realist School of jurisprudence. This school fortifies sociological jurisprudence and recognises law as the result of social influences and conditions, and regards it as judicial decisions.

### **OLIVER HOMES**

**1841-1935**

Oliver Holmes is, in a sense, an exponent of the realist school. "Law is what the courts do; it is not merely what the courts say." Emphasis is on action. As Holmes would have it, "The life of the law has not been logic; it has been experience."

### **K. N LLEWELLYN**

Karl Llewellyn, in his earlier writings was a spokesman for orthodox realist theory. He argued that the rules of substantive law are for less importance in the actual practice of law than had hitherto been assumed. "The theory that rules decide cases seems for a century to have fooled, not only library-ridden recluses, but judges." He proposed that the focal point of legal research should be shifted from the study of rules to the observance of the real behaviour of the law officials, particularly the judges. "What these officials do about disputes is, to my mind, the law itself."

This last statement, however, was withdrawn by Llewellyn in 1950. In his more recent writings, he has placed a somewhat greater stress on the importance of normative generalization in law, pointing out that the rule part of law is "one hugely developed part" of the institution, but not the whole of it. He has also, in keeping with the postulates of sociological jurisprudence, sought to explore the relations and contacts between the law and the other social sciences, coming to the conclusion that the lawyers as well as the social scientists have thus failed to make an "effective effort at neighborliness."

K. N Llewellyn concentrated rather on the uncertainty in the actual operation of the rules in appellate courts- he wished to make a sustained and realistic examination of the best practice and art of the best judges and their judging and he had, in a major work attempted just such a study.

In America, sociological jurisprudence has developed an extreme wing under the name of the Realist School. The sociological method has brought legal science into intimate relation with the facts of social life and made jurists recognise law a product of social forces.

Llewellyn, one of the exponents of the realist movement, has set forth the following points as the cardinal features of American realism;

- Realism is not so much a new school of jurisprudence as a new methodology in jurisprudence.
- Realists regard law as dynamic and not as static. They regard law as serving certain social ends and study any given cross-section of it to ascertain to what extent these ends are being served.
- Realists, for the purpose of observation of the functioning of any part of the legal system accept a ‘divorce of is from ought’. This means that the ethical purposes which, according to the observer, should underlie the law, are ignored and are not allowed to blur the vision of the observer.
- Realism emphasises the social effects of laws and of legal decisions.

Another leading realist was Frank (1889-1957) who was known as a “constructive legal sceptic.” Mr. Justice Cardozo, in his “The Nature of the Judicial Process”, points out that law never is, but is only about to be. Even existing decisions may be overruled. Law is not something certain- not what the judges have said, but what they will do.