JURISPRUDENCE - I

(Legal Theory)

1. Introduction: Definition, Nature and Scope of Jurisprudence, Importance of the Study of Jurisprudence. Pg. 2

2. Natural Law School: Classical Natural Law, Revival of Natural Law: Rudolf Stammler and Kohler. Pg. 8

3. Analytical School: John Austin, Hans Kelsen, And H.L.A. Hart. Pg. 11

4. Historical School: Frederick Karl Von Savigny, Sir Henry Sumner Maine. Pg. 30

5. Sociological School: Background and Characteristics, Roscoe Pound, Leon Dugit. Pg. 34

6. American Modern Realis

UNIT 1

INTRODUCTION: DEFINITION, NATURE AND SCOPE OF JURISPRUDENCE, IMPORTANCE OF THE STUDY OF JURISPRUDENCE.

1.1 What is Jurisprudence?

There is no universal or uniform definition of Jurisprudence since people have different ideologies and notions throughout the world. It is a very vast subject.

When an author talks about political conditions of his society, it reflects that condition of law prevailing at that time in that particular society. It is believed that Romans were the first who started to study what is law.

⇒ Jurisprudence- Latin word ‘Jurisprudentia’, which means, Knowledge of Law or Skill in Law.
⇒ Most of our law has been taken from Common Law System.
⇒ Bentham is known as Father of Jurisprudence. Austin took his work further.

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

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

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

J. Stone also tried to define Jurisprudence. He said that it is a lawyer’s extraversion. He further said that it is a lawyer’s examination of the percept, ideas and techniques of law in the light derived from present knowledge in disciplines other than the law.

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

1.2 DEFINITIONS BY:

1. Austin
2. Holland
3. Salmond
4. Keeton
5. Pound
6. Dias and Hughes
1.2.1. **AUSTIN:**

He said that “Science of Jurisprudence is concerned with Positive Laws that is laws strictly so called. It has nothing to do with the goodness or badness of law.

This has two aspects attached to it:

1. **General Jurisprudence** - It includes such subjects or ends of law as are common to all system.
2. **Particular Jurisprudence** - It is the science of any actual system of law or any portion of it.

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

1.2.1.1 **Salmond’s Criticism of Austin**

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

1.2.1.2 **Holland’s Criticism of Austin**

He said that it is only the material which is particular and not the science itself.

1.2.2 **HOLLAND:**

Jurisprudence means **the formal science of positive laws.** It is an analytical science rather than a material science.

1. He defined the term positive law. He said that Positive Law means **the general rule of external human action enforced by a sovereign political authority.**
2. We can see that, he simply added the word ‘formal’ in Austin’s definition. Formal here means that **we study only the form and not the essence.** We study only the external features and do not go into the intricacies of the subject. According to him, how positive law is applied and how it is particular is not the concern of Jurisprudence.
3. The reason for using the word ‘**Formal Science**’ is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. **Therefore, Jurisprudence is a Formal Science.**
4. This definition has been criticized by Gray and Dr. Jenks. According to them, Jurisprudence is a formal science because it is concerned with the form, conditions, social life, human relations that have grown up in the society and to which society attaches legal significance.
5. Holland said that Jurisprudence is a science because **it is a systematized and properly co-ordinated knowledge of the subject of intellectual enquiry.** The term positive law confines the enquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.
6. Formal as a prefix indicates that the science deals only with the **purposes, methods and ideas** on the basis of the legal system as distinct from material science which deals **only with the concrete details of law**.

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

### 1.2.3 SALMOND:

He said that **Jurisprudence is Science of Law**. By law he meant **law of the land or civil law**. He divided Jurisprudence into two parts:

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

‘**Specific**’ is further divided into three parts:

1. **Analytical, Expository or Systematic**- It deals with the contents of an actual legal system existing at any time, past or the present.
2. **Historical**- It is concerned with the legal history and its development.
3. **Ethical**- According to him, the purpose of any legislation is to set forth laws as it ought to be. It deals with the ‘ideal’ of the legal system and the purpose for which it exists.

### 1.2.3.1 Criticism of Salmond

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

### 1.2.4 KEETON

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

### 1.2.5 ROSCOE POUND

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

### 1.2.6 DIAS AND HUGHES

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

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

### 1.3 NATURE OF JURISPRUDENCE

1. It is concerned with rules of external conduct of human beings, that is, rules that human beings are required to observe and obey. And by virtue of this, it is related to other sciences that study human nature and society like economics, ethics, sociology, anthropology, Psychology and political science.

2. It proceeds from the assumption of *ubi societas, ibi jus*—once there is a society or community at a certain level of development, there is law. It studies methods by which societal pressures and problems are solved rather than the particular solution. It seeks to construct a science which will explain the relationship between law, and its concepts or the life of the community.

3. It dwells on the nature of the law and its purposes, on questions of legal validity and efficacy and their interrelationship, the interaction between law, justice and morality and the institutional and theoretical apparatus for creation, adjudication, enforcement and modification of law.

### 1.3 SCOPE

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

There is no unanimity of opinion regarding the scope of jurisprudence. Different authorities attribute different meanings and varying premises to law and that causes difference opinions with regard to the exact limit of the field covered by jurisprudence. Jurisprudence has been so defined as to cover moral and religious precepts also and that has created confusion. It goes to the credit to Austin that he distinguished law from morality and theology and restricted the term to the body of the rules set and enforced by the sovereign or supreme law making authority within the realm. Thus the scope of jurisprudence was limited to the study of the concepts of positive law and ethics and theology fall outside the province of jurisprudence.

There is tendency to widen the scope of jurisprudence and at the present we include what was previously considered to be beyond the provinces of jurisprudence. The present view is that scope of jurisprudence cannot be circumcised or regimented. It includes all concepts of human order and human conduct in state and society. Anything that concerns order in the state and society falls under the domain jurisprudence. P.B. Mukharji writes that new jurisprudence is "both intellectual and idealistic abstraction as well as behavioristic study of man in society. It includes political, social, economic and cultural ideas. It covers the study of man in relation to the state and society."

However, the study of jurisprudence cannot be circumscribed because it includes all human conduct in the State and the Society.
Karl Llewellyn observes - "Jurisprudence as big as law-and bigger".

Approaches to the study of Jurisprudence- There are two ways

1. Empirical- Facts to Generalization.
2. A Priori- Start with Generalization in light of which the facts are examined.

1.4 SIGNIFICANCE AND UTILITY OF THE STUDY OF JURISPRUDENCE

1. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.
2. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer’s occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.
3. The study of jurisprudence helps to put law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.
4. Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.
5. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual rule of law. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.
6. It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.
7. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.
8. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.
9. Professor Dias said that ‘the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence’.

An NGO working in the field of Human Rights and Legal Education.
Relationship of Jurisprudence with other Social Sciences

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

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

3. **Jurisprudence and Ethics** - Ethics has been defined as the science of Human Conduct. It strives for ideal Human behavior. This is how Ethics and Jurisprudence are interconnected:
   a. **Ideal Moral Code** - This could be found in relation to Natural Law.
   b. **Positive Moral Code** - This could be found in relation to Law as the Command of the Sovereign.
   c. Ethics is concerned with good human conduct in the light of public opinion.
   d. Jurisprudence is related with Positive Morality in so far as law is the instrument to assert positive ethics.
   e. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.
   f. Ethics believes that No law is good unless it is based on sound principles of human value.
   g. A Jurist should be adept in this science because unless he studies ethics, he won’t be able to criticize the law.
   h. However, Austin disagreed with this relationship.

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

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

6. **Jurisprudence and Politics** - In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connected between politics and Jurisprudence.
UNIT 2

NATURAL SCHOOL OF LAW

Natural Law was the result of a perpetual quest for absolute justice. It played the role of harmonizing and promoting peace & justice in different periods and protected public against injustice, tyranny and misrule.

Natural law is one of the confused and different subjects in jurisprudence because it uses various concepts like divinity, morality, religion and rationality.

The natural law has the following main 4 claims:-

1. There are unchanging principles of law that exist in nature and define for men what is right, just and good and which ought to govern his actions.
2. These principles of law are accessible to all men and are discovered by the right use of reason.
3. These principles of law apply to all men at all times and in all circumstances.
4. Men-made laws are just in authoritative only in so far as they are derivable from the principles of natural law.

The natural law jurisprudence has taken throughout reduction. The taken began with ancient Greek conception of a Universe which is governed by an eternal immutable law in every particular and what is just by nature & just by convention was distinguished by them.

Aristotle notes that aside from the particular law that each individual had created for himself, there is a common law which is according to nature governs the Universe.

Cicero:

He said natural law is the creation of reason of an intelligent man who stands highest in creation by virtue of his faculty of reasoning.

Stoics:

They developed the concept of natural law to include natural justice and they were indifferent to the divine source or natural source of law. Stoics asserted the existence of a rational and purposeful order to the Universe & the mains by which a rational being linked in accordance with this order on the basis of virtue

Roman Legal System:

Roman Legal System was also based on the concept of reason & they apply stoics theory and divided law into three categories:
1. Jus Naturale:- which is the fundamental basis of every legal system and beyond the power of man or conventional law.
2. Jus Civile:- Law applicable to human citizens.
3. Jus Gentium:- that is a common practice of mankind.

Roman believed that Jus Gentium is presumably reasonable in accordance with natural law, creating a link between natural law and common practice of mankind.

Reason according to Romans was drawn from the human nature itself.

**Dark Ages:**

The early Christian faith explained natural law from a theological prospective. They consider union with divine is the end of law. To attain this end the physical instincts of the body should be suppressed, overcome and destroy. Institutions of man such as government, property etc. are products of sin. If human laws are against divine law, they should be disregarded.

**Middle Ages:**

St. Thomas Acquinas, he also adopted stoics natural law concept and identify natural law with law of God. For Acquinas, natural law is a part of external law of God. [The reason of divine wisdom] which is derived by human beings by their powers of reasons. Human law is the application of natural law to particular social circumstances. For him, a positive law which violate natural law is not a true law. This concept promoted the view that law is rational and reasonable.

Natural law proposes that laws are logical progression from morals. He believed in two concepts:

1. Unity- derived from God & included one faith, one church and one empire.
2. Supremacy of law- because it is a part of Universe.

Acquinas stated that law was nothing else than an ordinance of reason for the common good made by him who has the care of the community and promulgated it.

He divided law into four:

2. Natural law – which is revealed through the reason of man.
3. Divine law or the law of scriptures.
4. Man-made laws.

Natural law is a part of eternal law identified by human reason and applied in a particular social situation making it a man-made or positive law. A positive law which is against natural law is invalid.

**Kohler [1849-1919]**
Kohler defined law as “the standard of conduct which in consequence of the inner impulse that urges man towards a reasonable form of life, emanates from the whole, and is forced upon the individual”.

In his book *Philosophy of Law*, Kohler postulates the promotion and vitalizing of culture as the end achieved through the instrumentality of law. By culture he means the totality of the achievements of humanity. The assumption of a Law of Nature, a permanent law suitable to all times, is not correct as it involves the notion that the world has already attained the final aim of culture. The actual fact is that civilization is changing and progressing and law has to adopt itself to the constantly advancing culture. Every culture should have its own postulates of law to be utilized by society according to requirements. There is no eternal law or universal body of legal institutions, suitable for all civilizations. What is good or one stage of culture may be ruinous to another.

Dean Pound writes that Kohler’s “formation of the jural postulates of the time and place is one of the most important achievements of recent legal science”.

**Stammler**

Stammler is a Neo-Kantian and his philosophical position is summed up in *The Theory of Justice*. According to him: “There is not a single rule of law the positive content of which can be fixed *a priori*”. However, he emphasizes the need for development of a theory of just law in addition to the investigation of positive law. The content of a given law can be tested with reference to the theory of “just law”.

A law is just if it conforms to the social ideal of bringing about a harmony between the purposes of the individual and society. The social Ideal is “a community of men willing freely.” It represents the union of individual purposes. It requires the maintenance of the proper interests of every associate and the maintenance of social cooperation. The first requirement leads to two principles:

1. The content of volition must not be left to the arbitrary control of another.
2. Juristic claim must not subsist except on the condition that the one bound may still remain his own neighbor.

These formulae prevent a juristic percept from sacrificing an associate to the subjective purposes of another and being treated as a means to the accomplishment of the other party. The second requirement of social cooperation leads to two principles:

1. He who is juristically united with others cannot be arbitrarily excluded from the community.
2. A power of disposition juristically granted cannot be exclusive except in the sense that the one excluded may still remain his own neighbor.
UNIT 3

ANALYTICAL SCHOOL OF LAW

The word positivism is related to the English word ‘posit’ which means put something firmly, or imposing something on somebody. The idea is that since positivists believe that law is made by an authority and imposed on the people for obedience, the name positivism stems from this root word. Positivism is also known in two other names: Imperative, and Analytical Jurisprudence.

The chief exponents of Analytical school of Jurisprudence were Bentham and Austin. It is also called positivist school of jurisprudence because it considers law as it is and not as it ought to be. In fact it was Sir Henry Maine who coined the word ‘analytical’. This school is also called imperative school because it treats law as a command of sovereign. Bentham introduced legal positivism and treated legal theory as a science of investigation which should be approached through scientific method of experimenting and reasoning.

John Austin is the father of Analytical School. Austin said that only positive law is the subject matter of jurisprudence. He separated both the morals and the religion from the definition of the law. Prior to Austin the law was based upon customs and morals but Austin reduced all things from the definition of law.

This viewpoint is based on two principles.

1. Law is the command of the sovereign.
2. Force is the essence of law. (i.e. what cannot be enforced is not a law)

Analytical school of jurisprudence deals with the following matter:-

1. An Analysis of the conception of civil law.
2. The study of various relations between civil law and other forms of law.
3. An inquiry into the scientific arrangement of law.
4. An account of legal sources from which the law proceeds.
5. The study of the theory of liability.
6. The study of the conception of legal rights and duties.
7. To investigate such legal concepts as property, contracts, persons, acts and intention etc.

This theory was bitterly criticized in the 19th century by the Pluralists and the sociological jurists. Despite its shortcoming this theory has explained a lot about law. The analytical school of jurisprudence provides that law must be made by the state in the interest of general welfare. It favors codification of law and regards law as a command with legal sanction behind it.

JEREMY BENTHAM [English Utilitarian philosopher and Jurist, 1748-1832]

His attack on the Common Law that was guided by natural law, custom etc
The beginning of the decline of natural law theory can be dated quite precisely from the time of Bentham’s scathing attack on Blackstone’s (1723-80) Commentaries on the Laws of England. With hindsight, this can be seen as the historical turning point, the successful launching of modern legal positivism. Bentham had many specific complaints about common law theory and its practice. He regarded much of what happened in the English courts as ‘dog-law’: that is, as the practice of waiting for one’s dog to do something wrong, and then beating it. His low opinion of the doctrine and practice of judicial precedent was illustrated by his likening of the doctrine to a magic vessel from which red or white wine could be poured, according to taste. This ‘double fountain effect’, whereby the decisions of judges are seen as capricious selection of whichever precedent suits their prejudice, was regarded by Bentham as the inevitable outcome of a legal system which is not controlled by universal rational legislation.

Bentham’s overriding passion for legal reform required the kind of clarification which would mercilessly expose the shortcomings, the corruption and obfuscation which he found in the common law as it existed at the turn of the nineteenth century. This clarity, Bentham believed, could only be achieved with a rigorous separation of law and morality. As we have seen, the exact meaning of this ‘separation thesis’ has become deeply controversial. What Bentham himself meant by it was reasonably clear. If the law was to be subjected to systematic criticism in the cause of reform, it was essential that its workings should first be described in accurate detail. This was a matter of dispassionate factual reporting of the nature and workings of law, which he termed ‘expository’ jurisprudence. What he found obstructing this project of clarification was the blurring of the boundary between legal reality and value judgment.

This was precisely what Bentham accused traditional legal writers of doing. Blackstone, as one of the most eminent of these writers, was singled out by Bentham as a prime example of one who clothed moral preaching in the language of law. When law is analyzed in such a way that each law is represented as the embodiment of a Christian moral principle, the result is the kind of vagueness and indeterminacy which is inherently resistant to radical reform on the basis of the utility of the laws. When, by contrast, law is analyzed according to Bentham’s expository principles, the way is prepared for a clear-headed ‘censorial’ jurisprudence, subjecting the law to moral criticism, based on the principles of utility.

Remember that Bentham is the leading authority in the utilitarian school of thought that teaches the greater happiness for the greater part of the society. Utility, hence, requires that law-making and legal institutions be designed to promote the greatest happiness of the greatest number of people. Utility would replace traditional, self-serving or subjectively moral evaluation with a rational evaluation of the worth of particular practices, institutions and policies. These would be judged in terms of how far they served the common good, measured in terms of maximization of satisfaction of the actual desires of the greatest possible number of the population.

3.2 JOHN AUSTIN (1790–1859)

John Austin was another English jurist who for the first time boldly criticized natural law and gave direct and clear definition of law. Before giving his definition of law, Austin identified what kind of law
it is he is seeking to define. In this part of his theory we shall see what he called positive law and positive morality and his command theory. His idea was given in a series of lectures.

Law is a command of the sovereign enforced by sanction. Austin

### 3.2.1 Positive Law and Positive Morality

From one viewpoint, the most valuable contribution of Austin’s legal theory is its attempt to distinguish clearly law from other phenomena (for example, moral rules, social customs) with which it could be confused. Strongly influenced by Hume and Bentham, Austin wrote that the starting point for the science of law must be clear analytical separation of law and morality. Such a strategy would in no way imply that moral questions were unimportant. Indeed, the separation would make clear the independent character of legal and moral arguments and the special validity and importance of each.

So Austin's lecture begins by asserting that the subject-matter of jurisprudence, as he understands it, is positive law, ‘law, simply and strictly so called: or law set by political superiors to political inferiors’. Immediately, law is defined as expression of power. In its wider proper sense, a law is ‘a rule laid down for the guidance of an intelligent being by an intelligent being having power over him’. Austin’s view of law recognizes it not as something evolved or immanent in community life, as in the implicit common law conception, but as an imposition of power.

The lectures then embark on a rather tedious classification of law, some of which, however, is of the greatest importance in understanding key points of Austin’s legal theory. Austin distinguishes laws ‘properly so called’ from phenomena improperly labeled as law. There are two classes of laws properly so called: divine law (set by God for human kind) and human laws (others called them man-made) which are set by human beings for other human beings. The most significant category of human laws comprises what Austin calls Positive law. These are laws set by superior acting as such or by people acting in pursuance of legal rights conferred on them by political superiors (that is acting as delegates of political superiors in making laws). The term ‘positive’ refers to the idea of law placed or laid down in some specific way and, as such, could apply to divine law, which Austin conceives as God’s command. But he wants to reserve the term positive law for human laws laid down by, or on the authority of, political superiors – the true subject of legal science. So the word ‘positive’ indicates a positing or setting of rules by human creators.

The other category of human law consists of rules laid down by persons having power over others but not as political superiors or in pursuance of legal right. This seems to cover many rules which lawyers would not usually regard as law, although Austin has no doubt that the term ‘law’ can be used here ‘with absolute precision or propriety’. Since he uses the word ‘power’ in a general sense, it seems to include the capacity of any authority figures – for example, priests or religious leaders, employers, teachers, parents, guardians or political orators – to control or influence the actions of followers, dependants or those in their charge. Austin clearly regards rule-making in such cases as significant in shaping the attitudes, opinions or moral sentiments of individuals or groups. Indeed, it forms part of what he calls positive morality. As morality it is distinguished from positive law; and it is positive because it is laid down by human beings for human beings. Positive morality also contains another category of rules: those
without particular creators but set by the opinion or sentiment of an indeterminate body of people – that is, by public opinion or community opinion. Austin calls these authorless rules laws ‘by analogical extension’; they are not laws ‘properly so called’ even though we sometimes talk of laws of fashion, etiquette or honor.

Finally, for completeness, he mentions one other category of laws ‘improperly so called.’ Scientific laws are not laws in the jurisprudential sense. They are the regularities of nature which science discovers but which are not laid down as laws. Austin calls them ‘metaphorical laws.’ We can say, therefore, that for Austin:

i. The term ‘law’ is often improperly applied to rules or regularities that are in no strict sense ‘legal’; but
ii. The concept of law can properly embrace more than most lawyers would accept. Like many social scientists writing long after him, Austin considers that some rules created ‘privately’ outside the particular provisions or procedures of the legal system of the state can usefully be recognized as law.
iii. On the other hand, only positive law is the appropriate concern of jurisprudence, which as we shall see in the next sections is backed and enforced by the state.

3.2.2 Austin’s Concept of law

If you look back once again into the discussion made so far, you can see the definition of law given by Austin, law is a command of the sovereign enforced by sanction. But remember again this is positive law. From this definition we can identify three essential elements: sovereign, command, and sanction.

A. Sovereignty

To amplify his definition of law Austin goes on to examine the nature of sovereignty. Sovereignty exists, Austin says, where the bulk of a given political society are in the habit of obedience to a determinate common superior, and that common superior is not habitually obedient to a determinate superior. He amplifies certain aspect of this concept.

According to Hobbeasian philosophy, the sovereign is subject to no one. It is supreme beyond any law. The same idea is advocated by Austin.

i. **Sovereign may be a king or a parliament:** The common superior must be ‘determinate’. A body of persons is ‘determinate’ if ‘all the persons who compose it are determined and assigned’. Determinate bodies are of two kinds.
   a) In one kind the ‘body is composed of persons determined specifically or individually, or determined by characters or descriptions respectively appropriate to themselves’. (In this category would be placed a sovereign such as the king.)
b) In the other kind the body ‘comprises all the persons who belong to a given class…. In other words, every person who answers to a given generic description…. is…. a member of the determinate body.’ (In this category could be placed a sovereign such as a supreme legislative assembly.)

ii. **Society must obey the sovereign:** The society must be in ‘the habit of obedience’. If obedience is ‘rare or transient and not habitual or permanent’ the relationship of sovereignty and subjection is not created and no sovereign exists. (But isolated acts of disobedience will not preclude the exercise of sovereignty.)

iii. **Obedience only to Sovereign:** ‘…habitual obedience must be rendered by the generality or bulk of the members of a society to…one and the same determinate person (king) or determinate body of persons (parliament).’ For example, if a part of society gives obedience to one body/king and another part to another body, and if each society is in the habit of obeying only its own king, then the given society is simply or absolutely in a state of nature or anarchy.

iv. **Sovereign must be determinate:** in order that a given society may form a political society, ‘the generality or bulk of its members must habitually obey a superior determinate as well as common… for… no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment.’ In other words, the sovereign must be defined, best known by all the society. How? Maybe someone who came to the throne through blood from the former king, or someone elected by the people.

v. **Sovereign obeys no one else:** the common determinate superior to whom the bulk of the society renders obedience must not himself be habitually obedient to a determinate human superior. For example, a regional prince may be superior to the people he governs. But he is yet not really superior within his province, nor is he and his society an independent society. Thus, in the strictest sense of Austin’s sovereignty the prince is not a sovereign for he obeys another human superior, e.g. the king.

vi. **Supreme in power:** the power of the sovereign is incapable of legal limitation. Austin says: ‘Supreme power limited by positive law is a flat contradiction in terms.’ One may ask what about his position in relation to the constitution? May a body be sovereign yet subject to the constitutional law? Austin answers, no. A sovereign is subject to no legal limitation. He explains that whenever there is a conflict between the principles of the constitution and the act of the sovereign, the latter must thwart the former.

From the above explanation you can easily conclude that in Austin’s theory of law the sovereign is an absolute supreme, one similar to the Hobbesian sovereign. This is because it is the sovereign who creates and gives laws to his subjects. He is above and beyond any laws and fellow men. He is the ultimate author of laws, executor and decision maker.

**B. Command**

According to Austin, law is a command given by a determinate common superior to whom the bulk of a society is in the habit of obedience and who is not in the habit of obedience to a determinate human superior, enforced by sanction. It is the element of command that is crucial to Austin’s thinking, and the
concept of law expressed by Austin is described as ‘the command theory’ or ‘the imperative theory’ of law.

Like Hobbes, Austin defines a law as a kind of command. Power is again made central to law. Austin states: ‘a command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded’. Thus, the power to inflict punishment (sanction) in case of non-compliance is what makes an expression a command. Remember again that moral commands are not laws or commands in the Austinian sense of the word.

This is one aspect of his legal theory, which indicates that his view of law is very different from that of many liberal theories. The latter tend to see law as a set of rules whose purpose should be to mark out a general sphere of liberty of the individual guaranteed against the risk of arbitrary state power. Austin, by contrast, sees law as a technical instrument of government or administration, which should, however, be efficient and aimed at the common good as determined by utility.

C. Sanction

Austin’s view of law is also reflected clearly in the emphasis he attaches to punitive sanctions in the structure of a law. Since sanctions are essential for the existence of commands, they are, for Austin, essential to the existence of laws. There must be, he said, ‘a power to inflict an evil to the party’ in case of non-compliance. There is here an important difference from Bentham’s legal theory, which also treats sanctions as essential to laws. Bentham (and other writers) saw no reason why legal sanction could not include rewards as well as penalties. Austin, after considering this, rejects it. A reward held out for compliance would indicate a promise or inducement but not a command, on the basis of ordinary usage of the word which specifies non-optional conduct.

Laws, by their nature, provide for sanctions, he said. Sanctions are analytically essential to laws, whether or not they are sociologically necessary. Thus, any disadvantage formally specified directly or indirectly by a law as to be imposed in case of non-compliance can serve as that law’s sanction. Mere inconvenience or the fact that a transaction or document is rendered null and void by law would count as sufficient sanction. A sanction can also be a further legal obligation. Thus, breach of one law (say, a traffic offence) might lead to a further obligation (to appear in court to answer charges). A chain of legal obligation is possible. At the end of the chain, however, there must be a sanction. ‘Imperative laws’, lacking sanctions completely, are not laws in the Austinian sense. Neither are declaratory nor repealing ‘laws’, since they command nothing. For example, most of the rules in the civil code are without sanction and hence, according to Austin, they are no laws. Now as we shall see in the next parts, this is one of the reasons for his criticism.

3.2.3 The Separation Thesis

“The existence of law is one thing, its merit or demerit is another”... Austin
Austin is the first serious thinker in the positivism school of jurisprudence. Actually, as we have seen before, he was strongly influenced by Hume and Bentham. Now, in this section we shall see his version of positivism and his stand on natural law theory.

Since ancient Greece all the way up to early Christian times, it had been widely considered that a relationship existed between the validity of a law and its moral content. For example, as we have discussed before, in the Middle Ages the view took a form of a belief that if a man-made law conflicted with the law of God then the law was not a valid law. The doctrine that a man-made law is valid only if it does not conflict with a higher law – religious or secular- constitutes a key element of the natural law theory.

This notion is totally rejected by Austin. For Austin, a law is valid law if it is set by a sovereign. It is valid if it exists, regardless of its moral content. If it is commanded by the sovereign, if the law is decreed, placed in position, posited, then it is valid law. Thus, what he called as ‘positive law’ is a law whatever its source or contents. A positivist is, hence, one who regards a law as being valid not by reference to some higher law or moral code, but by reason of no more than its existence. Austin clearly declares:

\[\text{The existence of law is one thing, its merit or demerit is another. Whether it be or be not [i.e. whether law exists or does not exist] is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry.}\]

Austin has no problem with making the enquiries. But it should not go beyond that; simple comparison. This means, when we say that human law is good or bad, or is what it ought to be or what it ought not to be, we mean that the law agrees with or differs from something (E.g. Morality) to which we tacitly refer it to measure or test. He makes a clear separation between the question and what the law ought to be (it is possible one can make reference to higher laws) and the determination of what the law is. ‘Is’ and ‘Ought’ must be kept separate. For Austin, the fact that the law, according to some higher principle, is not what it ought to be is no reason for saying that it is not. In other words, ought can be identified (to simplify) with criteria for distinguishing between good and bad law. A law might be bad, but it is still law and must be obeyed by the subjects so long as it is made by the sovereign.

Just to make it clearer, take, for example, the issue of abortion or homosexuality. Both are contrary to morality and God’s laws since in most religious scriptures (at least the Bible and the Koran) these acts are sins. When you think of an ‘Ought’, you must think as a natural law theorist. If you are to obey the law it ought to be in conformity with the higher laws, such as morality or divine laws (the Bible or the Koran.) As a positivist, however, what comes to your mind first is whether the law is (means actually exists). You will not consider whether it should have been conforming to a higher law or not. Thus, if a government legalizes abortion or homosexuality, the natural law believer will not recognize it, as the new law doesn’t conform to his ideals (for him what the law ought to be was prohibiting these acts). But for a positivist, the problem is simple. If the sovereign says so, then let it be.
Therefore, for a positivist, the subject matter of jurisprudence is positive law. The scientific investigation and analysis of law must revolve around or concentrate on the positive law, law created by sovereign power.

3.2.4 Criticism on Austin

HLA Hart is himself another positivist who approaches the concept of law from different vantage point. He made a critical criticism on Austin’s concept of law and his criticisms fall under three main heads.

A. Laws as we know them are not like orders backed by threats

There are three reasons why this so.

i. The content of law is not like a series of orders backed by a threat. Some laws, Hart concedes, do resemble orders backed by threats, for example criminal laws. But there are many types of laws that do not resemble orders backed by threats, For example, laws that prescribe the way in which valid contracts, wills or marriages are made do not compel people to behave in a certain way (as do laws that, for example, require the wearing of seat belt in a car). The function of such laws is different. They provide individuals with facilities for realizing their wishes by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties…’ Thus, such laws are laws which simply provide rights. E.g. Every man has the right to marry or not to marry. In the eye of Austin this is not law. But that is his default.

Again, laws of public nature, in the field of constitutional and administrative law, and in the field of procedure, jurisdiction and judicial process, are not comparable with orders backed by threats. Such laws are better regarded as power-conferring rules.

ii. The range of application of law is not the same as the range of application of an order backed by a threat. In Austin’s scheme the law-maker (sovereign) is not bound by the command he gives: the order is directed to others, not to himself. It is true, Hart concedes, that in some systems of government this is what may occur. But in many systems of law legislation has a force that is binding on the body that makes it. So, as a law-maker can be bound by his own law, the Austinian concept of sovereign – command – obedience – sanction can not be of universal application and so fails. In modern democracies, for example, the power of the law maker (parliament) is limited by the constitution which precedes it and defines its power. If the lawmaker violates these limits, the law might be nullified.

iii. The mode of origin of law is different from the mode of origin of an order backed by a threat. This means, Austin assumes the sovereign as the only source of law. But in reality, laws can be created by other bodies outside the law maker. For example, most customary laws that are usually enforced by courts (in common law) can be good examples. Laws can also be created by an administrative body.

B. Austin’s notion of the habit of obedience is deficient
To explain the ways in which he finds the notion of the habit of obedience to be deficient Hart tells a story. Suppose, he says, there is a country in which an absolute monarch has ruled for a long time. The population has generally obeyed the orders of the king, Rex (his name), and are likely to continue to do so. Rex dies leaving a son Rex II. There is no knowing, on Rex II’s accession, whether the people will obey the orders he begins to give when he succeeds to the throne. Only after we find that Rex II’s orders have been obeyed for some time can we say that the people are in a habit of obedience to him. Yet, in practice, if Rex II was Rex I’s legal successor we would regard Rex II’s orders as laws from the start. So the notion of the habit of obedience fails to account for what our experience tells us in fact happens: it fails to account for the continuity to be seen in every normal legal systems when one ruler succeeds another.

What Hart in short means is that law should not be based on one particular body. It rather must be a system that gives uninterrupted continuity. What is in fact found in any legal system is the existence of rules which secure the uninterrupted transition of power from one law-maker to the next. These rules regulate the succession in advance, naming or specifying in general terms the qualifications of and mode of determining the law giver. In short, Austinian laws lack institutional strength. Look for example at the Ethiopian civil code, which even after 40 years still continues to be obeyed. Change of the sovereign doesn’t change its applicability.

C. Austin’s notion of sovereignty is deficient

In Austin’s theory of law, there is no legal limit on a sovereign’s power, since, if he is sovereign, he does not obey any other legislator. Thus, according to Austin, if law exists within a state, there must exist a sovereign with unlimited power. But when we examine states in which no one would deny that law exists we find supreme legislatures, the powers of which are far from unlimited. For example, the competence of a legislature may be limited by a written constitution under which certain matters are excluded from the scope of its competence to legislate upon. If the legislature acts beyond that competence/power given by the constitution, then usually courts declare it as invalid. We can also add another point at this juncture that Austin’s theory on sovereignty doesn’t conform to the well accepted principle of separation of power.
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3.3 HANS KELSON

Kelsen is most famous for his studies on law and especially for his idea known as the pure theory of law. It is said his theory of law is the most complex one. He declares that law must be studied as a pure science independent of other incidents, like morality and justice, which makes him part of the positive school of jurisprudence.

3.3.1 Pure Theory of Law

As we tried to see above, Kelsen found out that natural law has flaws and it contaminates law with other standards, which makes it imposible for scientific study of the subject matter. Hence, instead, Kelsen suggested a ‘pure’ theory of law which would avoid contamination of any kind. Jurisprudence, Kelsen propounded, “characterizes itself as a ‘pure’ theory of law because it aims at cognition focused on the law alone” and this purity serves as its “basic methodological principle.”

A. The Basic Norm (Grundnorm)

The law, according to Kelsen, is a system of norms. Norms are ‘ought’ statements, prescribing certain modes of conduct. Unlike moral norms, however, Kelsen maintained that legal norms are created by acts of will. They are products of deliberate human action. For instance, some people gather in a hall, speak, raise their hands, count them, and promulgate a string of words. These are actions and events taking place at a specific time and space. To say that what we have described here is the enactment of a law, is to interpret these actions and events by ascribing a normative significance to them. Kelsen, however, firmly believed in Hume's distinction between ‘is’ and ‘ought’, and in the impossibility of deriving ‘ought’ conclusions from factual premises alone. Thus Kelsen believed that the law, which is comprised of norms or ‘ought’ statements, cannot be reduced to those natural actions and events which give rise to it. The gathering, speaking and raising of hands, in itself, is not the law; legal norms are essentially ‘ought’ statements, and as such, cannot be deduced from factual premises alone.

How is it possible, then, to ascribe an ‘ought’ to those actions and events which purport to create legal norms? Kelsen's reply is enchantingly simple: we ascribe a legal ought to such norm-creating acts by, ultimately, presupposing it. Since ‘ought’ cannot be derived from ‘is’, and since legal norms are essentially ‘ought’ statements, there must be some kind of an ‘ought’ presupposition at the background, rendering the normativity of law intelligible.

As opposed to moral norms which, according to Kelsen, are typically deduced from other moral norms by syllogism (e.g., from general principles to more particular ones), legal norms are always created by acts of will. Such an act can only create law, however, if it is in accord with another ‘higher’ legal norm that authorizes its creation in that way. And the ‘higher’ legal norm, in turn, is valid only if it has been created in accordance with yet another, even ‘higher’ legal norm that authorizes its enactment. Ultimately, Kelsen argued, one must reach a point where the authorizing norm is no longer the product of an act of will, but is simply presupposed, and this is, what Kelsen called, the Basic Norm or Grundnorm. More concretely, Kelsen maintained that in tracing back such a ‘chain of validity’ (to use Raz's terminology), one would reach a point where a ‘first’ historical constitution is the basic authorizing norm
of the rest of the legal system, and the Basic Norm is the presupposition of the validity of that first constitution. It is like constructing a pyramid, starting from wider bases to reach the pick, the apex, i.e. the Grundnorm.

Kelsen wants to identify a basic legal principle which will ultimately include or define the legal structures of all cultures. The Grundnorm or Basic Norm is a statement against which all other duty statements can, ultimately, be validated. The Basic Norm is ultimately a sort of act of faith--it is the belief in a principle beyond which one cannot go and which ends up being the foundational principle for all subsequent legal statements. You cannot "go beyond" the Grundnorm because it is an improvable first step. Ultimately it appears that the Grundnorm for Kelsen is a belief that one's respective legal system ought to be complied with. Lots of other principles can then flow from this basic realization.

The basic norm, then, is the most general norm which is hypothesized as the norm behind the final authority to which all particular valid norms can be traced back. This is the only norm which cannot itself be questioned or validated. It is in this sense that its validity is presupposed or tacitly assumed in any legal activity - for example, the relevant actions of a court official, a police officer, a solicitor, a gaoler - which acknowledges the validity of particular norms. It should be noticed especially that the basic norm is not the actual constitution - of the USA, UK, Germany or wherever - which would be the empirical object of political science.

Kelsen attributed two main explanatory functions to the Basic Norm: it explains both the unity of a legal system and the reasons for the legal validity of norms. Apparently, Kelsen believed that these two ideas are very closely related, since he seems to have maintained that the legal validity of a norm and its membership in a given legal system are basically the same thing. Furthermore, Kelsen argued that every two norms which derive their validity from a single Basic Norm necessarily belong to the same legal system and, *vice versa*, so that all legal norms of a given legal system derive their validity from one Basic Norm. It is widely acknowledged that Kelsen erred in these assumptions about the unity of legal systems. Generally speaking, in spite of the considerable interest in Kelsen's theory of legal systems and their unity that derives from a single Basic Norm, critics have shown that this aspect of Kelsen's theory is refutable. Although it is certainly true that the law always comes in systems, the unity of the system and its separation from other systems is almost never as neat as Kelsen assumed.

Kelsen’s Grundnorm as the top of the Pyramid  

**B. Hart and Kelsen**

There are, of course, clear parallels between Hart’s rule of recognition as the source of legal validity and Kelsen’s basic norm. They both serve the same vital function in grounding the positivist interpretation of the idea of a legal system. The rule of recognition, like the basic norm, is the linchpin which gives the system unity, and every other rule must be referred to it. The differences, however, are as great as the
similarities. Hart’s basic rule is a (secondary) rule of law, not a Kelsen-style norm, or ‘ought-statement’. As such, it is a social fact, rather than a hypothetical norm which is presupposed by all legal activity. As a social fact and a rule of law, it is itself a part of the legal system, whereas the Kelsenian basic norm lies outside of the system. There is also a different reason for its validity being unchallengeable. For Hart, it is a meaningless question to ask whether or not the rule of recognition is valid. The demand for a demonstration of its validity, he says, is equivalent to demanding that the standard metre bar in Paris is correct.

Legal validity is measured against this basic rule of law; it cannot be measured against itself.

3.4 H.L.A. HART [1907-1992]

Hart was a Barrister, a professor and well known legal philosopher in England and in the world. The Concept of Law by H L A Hart was published in 1961. Hart is said to be the leading philosopher in the positivist camp who extensively wrote about the nature of law. His approach is grouped as soft positivism in which he rejects Austin's command theory but holds on to the separability of law and moral thesis.

3.4.1 Hart’s Concept of Rules

Having rejected the command theory of Austin, as discussed in the Austin’s part, Hart develops and rebuilds his own positivist theory of legal validity. Arguing that what is missing from Austin’s analysis is the concept of an accepted rule, as shall be discussed below again, Hart unfolds his own analysis which aims at a more sophisticated understanding of the social practice of following a rule. He distinguishes first between social rules which constitute mere regularity from social habits. These and the other kind of rules will be treated in the following pages.

**A. Social Habits vs. Social Rules**

An example of a social habit might be the habit of a group to go to the cinema on Saturday evening. Habits are not rules. If some people in the group do not go to the cinema on Saturday evenings, this will not be regarded as a fault, nor render them liable to criticism. When a group have a particular habit, although this may be observable by an outsider, no member of the group may be conscious of the habit – either that he is in the habit of going to the cinema on Saturday evening, or that others in the group do not in any way consciously strive to see that the habit is maintained.

An example of social rule might be a rule that a man should take his hat off in church. If someone breaks the rule, this is regarded as a fault, and renders the offender liable to criticism. Such criticism is generally regarded as warranted, not only by those who make it but also by the person who is criticized. Further, for a social rule to exist, at least some members of the group must be aware of the existence of the rule, and must strive to see that it is followed, as a standard, by the group as a whole.

**The internal and external aspects of rules**
This awareness of, and support for, a social rule Hart calls the *internal aspect* of rule. The fact that something is a social rule will be observable by anyone looking at the group from outside. The fact that the rule can be observed to exist by an outsider is referred to by Hare as the *external aspect* of the rule.

A statement about a rule made by an outside observer may be said to be made from an external *point of view*; a statement made by a member of the group who accepts and uses the rules as a guide to conduct may be said to be made from an internal *point of view*. Suppose that an observer watches the behavior of a certain group, for example, suppose that he watches traffic approaching traffic lights, and records everything that happens. After a while he concluded that red sign is for stop. But he may not know the reasons immediately. But this way of looking at the matter is very different from that of the people in the cars approaching the lights. For them it is a simple rule. Whenever it turns red they stop. The observer was looking at the rule from an external point of view. The person in the car looks at the rule from an internal point of view. Since social habits are observable by an outsider, but the group is not aware of them, they have an external aspect, but not an internal one. Social rules have both an external and internal aspect. Remember, for example, the rule of the taking off of the hat inside a church. It can not only be observable by outsiders but also felt by the members.

Hence internal point of view signifies that the law would be taken as a standard by the citizen to evaluate his own conduct and that it would be taken as a sufficient reason/justification for an action or omission, and the external point of view emphasizes that the law will be used not only to guide one’s own conduct but also to evaluate the conduct of others. This is manifested by the conduct of members of society towards an illegal act…social protest…reprimand or disapproval.

**B. Social Rules**

If something is a social rule, then we would find that such words as ‘ought’, ‘must’, ‘should’ are used in connection with it. Social rules are of two kinds.

i. Those which are no more than social conventions, for example, rules of etiquette or rules of correct speech. These are more than habits, as a group strives to see that the rules are observed, and those who break them are criticized.

ii. Rules which constitute obligations. A rule falls into this second category when there is an insistent demand that members of the group conform, and when there is great pressure brought to bear on those who break the rule, or threaten to do so.

Rules of this second kind are regarded as important because they are believed to be necessary to maintain the very life of the society, or some highly prized aspect of it. Examples are rules which restrict violence or which require promise to be kept. Rules of this kind often involve some kind of sacrifice on the part of the person who has to comply with the rule – a sacrifice for the benefit of the others in the society.

**C. Obligations**

Rules which constitute obligations may be sub-divided into two categories:
i. Rules which form part of the moral code of the society concerned: these rules are therefore moral obligations. Such obligations may be wholly customary in origin. There may be no central body responsible for punishing breaches of such rules, the only form of pressure for conformity being a hostile reaction (stopping short of physical action) towards a person who breaks the rule. The pressure for conformity may take the form of words of disapproval, or appeals to the individual’s respect for the rule broken. The pressure may rely heavily on inducing feelings of shame, remorse or guilt in the offender.

ii. Rules which take the form of law – even if a rudimentary or primitive kind of law. A rule will come into this category if the pressure for conformity includes physical sanctions against a person who breaks the rule – even if the sanctions are applied, not by officials, but by the community at large.

In the case of both (i) and (ii), there is serious social pressure to conform to the rule, and it is this which makes the rule an obligation (as opposed to mere social convention, or even a habit).

**D. Primary and Secondary rules**

Third, the crucial distinction is drawn between different types of legal rules, which Hart calls primary and secondary. Primary rules of law are said to be those which are essential for any kind of social existence, those which prescribe, prevent or regulate behavior in every area with which the law is concerned. These are all the rules constraining anti-social behavior; rules against theft, cheating, violence and so on. As such, they constitute the great bulk of the positive laws which the legal system consists of. In simple words, primary rules define the rights and duties of citizens and that the bulk of law including criminal and civil law…or what we call substantive law falls under this category). These are standards of conduct set for citizens.

Basically primary rules are rules that govern primitive society. These rules are not legislated or made rather they evolve through the process of practice and acceptance. Their validity is to be verified by checking whether they are accepted substantially by all members of the community. However, such rules serve only a small number of people and one that has close tribal relations. In other words, for reasons mentioned below, primary rules no longer serve a modern society. A modern legal system must comprise more than this; it must also include what Hart called secondary rules, the function of which is exclusively addressed to the status of the primary rules. The secondary rules are fundamentally different in kind from the primary rules. They bring primary rules into being, they revise them, they uphold them, or they change them completely. In other words, secondary rules are those that stipulate how, and by whom, such primary rules may be formed, recognized, modified or extinguished. The rules that stipulate how parliament is composed, and how it enacts legislation, are examples of secondary rules. Rules about forming contracts and executing wills are also secondary rules because they stipulate how very particular rules governing particular legal obligations (i.e., the terms of a contract or the provisions of a will) come into existence and are changed. Hart argues that the creation of secondary rules marks the transition from a pre-legal society to a legal system. Why? How? Let’s look at Hart in detail.

**The function of secondary rules**
It is possible to imagine a society which does not have a legislature, courts or officials of any kind. Many societies of this kind have in fact existed, and have been described in detail. In this kind of society, the only means of social control is the attitude of the group towards behavior that it will accept as permissible. Such society is one that lives by primary rules of obligations alone. For such society to exist, certain conditions must be satisfied. They are as follows:

1. In view of human nature, the primary rules must include rules which contain restrictions on violence, theft, and deception.
2. Although there may be a minority who reject the rules, the majority must accept them.
3. The society must be a small one, with close ties of kinship, common sentiments and beliefs.
4. The society must live in a stable environment.

If either of the last two conditions were not satisfied, the society could not continue to exist by means of such a simple system of social control. In other words, if the society was large and there was no relative stability, then, the primary rules would not continue to exist. Specifically, the following defects would show themselves.

1) If doubts arose as to what the primary rules were, there would be no means of resolving the uncertainty. There would be no procedure for determining what the rules were (e.g. by referring to some authoritative text, or asking guidance from an official whose function it was to decide such matters).
2) There would be no means of altering the rules according to changing circumstances. The rules would be static.
3) There would be no means of settling a dispute as to whether a rule has been broken. (This is the most serious defect of all.)
4) There would be no one with authority to impose punishments for breaches of the rules. Conformity with the rules would only be secured by defuse social pressure, or by punishments meted out by the group as a whole. This would be an inefficient way of ensuring that the rules were observed. Unorganized efforts by the group to catch and punish offenders would waste time: punishment inflicted by individuals might lead to vendettas.

All these defects can be rectified by supplementing primary rules by other rules of different kind, rules already referred to as secondary rules.

Secondary rules have something in common with primary rules and are connected with them. Primary rules are concerned with what people must do or must not do. Secondary rules are concerned with the primary rules in that they lay down the ways in which primary rules may be introduced, varied, and abandoned; the way in which primary rules may be ascertained; and the way in which it can be decided whether a primary rule has been broken.

Thus, in effect, secondary rules can provide remedies for the defects listed above. Following are these remedies.
1) The defect of uncertainty as to what the primary rules are, can be remedied by having secondary rules which provide a way of knowing whether a suggested rule is or is not in fact a rule of the group. There are many ways in which this can be achieved. For example it may become accepted that the rules are as written in some text (e.g. statute). Or the secondary rule may be that a primary rule is to become a rule of group if it is enacted by a certain body (e.g. parliament) or it is decreed by a judge.

There may be more than one way of deciding what the primary rules are. And if there is more than one way, there may be a means of resolving possible conflicts by having an order of superiority (e.g. a proclamation overriding judicial decisions). A secondary rule which enables one to know what the primary rules are is referred to by Hart as a ‘rule of recognition’. If a society has a ‘rule of recognition’ then it has a way of determining whether a law is valid or not.

2) The other defect (in society having only primary rules) that the rules are static can be remedied by having secondary rules that provide for ways in which the primary rules can be changed. Secondary rules of this kind, which are known as ‘rules of change’ may specify the persons who are to have power to alter the law, and lay down the procedure to be followed in order to do so.

There may be a closed relation between rules of recognition and rules of change. For example, it may be a rule of change that the king can change the law. It may be a rule of recognition that what is enacted by the king is the law.

3) The third defect mentioned above under (3) can be remedied by having secondary rules which enable any individual to find out whether or not a primary rule has been broken. Such rules can lay down who is to decide this (e.g. a judge) and any procedure which must be followed. These rules will be concerned with judges, courts, jurisdiction and judgments. These are rules of adjudication. But what you shall remember is that rules that confer power to a judge are rules of recognition.

4) The defect which we set out under (4) above can be remedied by having secondary rules which prohibit individuals from taking into their own hands the punishment of others for breach of primary rules, and instead provide for an official system of penalties, with maximum penalties, administered by officials (e.g. a judge). These rules provide the sanctions of the system.

The structure made up of the combination of primary rules and secondary rules of recognition, change and adjudication, and sanction imposing rules make up the heart of a legal system.

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The Rule of Recognition

The most fundamental of these secondary rules is what Hart calls ‘the rule of recognition’. This is the rule to which the authority of all the primary rules is referred.

E. Hart and legal positivism

We have to be clear about the sense in which Hart was a legal positivist. His concept of law was certainly a radical revision of what had previously been known as positivism.

This was due largely to its association with the command theory. Hart firmly believed, as we have seen, that there was continuity as well as discontinuity between himself and the Austinian tradition. What he objected to in the command theory was that it concealed the real structure of law as the interplay between different types of rules, as revealed by his own analysis. He did not, however, regard the command theory as a complete distortion. Hart agrees with Austin that valid rules of law may be created through the acts of officials and public institutions. But Austin thought that the authority of these institutions lay only in their monopoly of power. Hart finds their authority in the background of constitutional standards against which they act, constitutional standards that have been accepted, in the form of a fundamental rule of recognition, by the community which they govern. This background legitimates the decisions of government and gives them the cast and call of obligation that the naked commands of Austin’s sovereign lacks. Thus Hart’s criterion for the unity of a legal system is more general than Austin’s.

3.5 SUMMARY
In this chapter we tried to discuss legal positivism based on the works of writers such as Hume, Bentham, Austin, Hart, and Kelsen. All of them insist on the analytical separation of law from morality. In no case, however, does this imply that morality is unimportant. But it does entail the claim that clear thinking about the nature of law necessitates treating it as a distinct phenomenon capable of being analyzed without invoking moral judgment. Hence, as Austin explains in a famous passage: ‘the existence of law is one thing; its merit or demerit is another.’ A law, which actually exists is a law, though we happen to dislike it. It is this kind of law that a positivist takes as a law and applies for study.
UNIT 4

HISTORICAL SCHOOL OF LAW

The historical school of the nineteenth century, led by the different theories of von Savigny and Henry Maine, shows us that law cannot be fully understood until its historical and social context is studied and appreciated. The present unit will give a concise survey of the legal theories of the historical school of the German Savigny and English jurist Maine. The sociological school of jurisprudence is largely a product of the 20th century. Its approach to the analysis of law differs from that of the other schools in that it is concerned less with the nature and origin of law than with its actual functions and end results. The proponents of sociological jurisprudence seek to view law within a broad social context rather than as an isolated phenomenon distinct from and independent of other means of social control. The sociological questions in jurisprudence are concerned with the actual effects of the law upon the complex of attitudes, behaviour, organization, environment, skills, and powers involved in the maintenance of a particular society. They are also concerned with practical improvement of the legal system and feel that this can be achieved only if legislation and court adjudications take into account the findings of other branches of learning, particularly the social sciences. The main propagators of this school of jurisprudence are Eugen Ehrlich and Roscoe Pound.

FREDERICK KARL VON SAVIGNY

The Spirit of the People

The German historical school of jurisprudence was launched on its way by Savigny’s little published book. A scholar of the Roman law, he was a professor and energy to the new jurisprudential school. His arguments on the nature and source of law as well as his view of historical development of law is presented as follows:

1. Law originates in custom which expresses national uniqueness. The principles of law derive from the beliefs of the people.
2. At the next stage, juristic skills are added, including codification which does no more than articulate the Volkgeist but adds technical and detailed expression to it.
3. Decay and sets in.

The first is that the law of a nation, like its language, originates in the popular spirit, the common conviction of right, and has already attained a fixed character, peculiar to that people, before the earliest time to which authentic history extends. In this prehistoric period the laws, language, manners and political constitution of a people are inseparably united and they are the particular faculties and tendencies of an individual people bound together by their kindred consciousness of inward necessity. This popular spirit (Volkgeist) is the foundation of all of a nation’s subsequent legal development. Custom is its manifestation. The popular spirit is shown, for example, in the various symbolic acts by which legal transactions are solemnized. The origin of the popular spirit is veiled in mysticism, and its crude beginnings are colored with romanticism.
But Savigny knew that the popular spirit did not create the complex system of rights in land in Roman law or in any other advanced culture. Accordingly, he supplemented his ‘popular spirit’ origin with the theory that the jurists (legal scholars including professors and judges), who become legal specialists with the advance of civilization, are the representatives of the community spirit and are thus authorized to carry on the law in its technical aspects. Then after, law has a twofold existence: First, as part of the aggregate life of the community, and, secondly, as a distinct branch of knowledge in the hands of the jurists. Thus legal history has the ‘holy duty’ of maintaining a lively connection between a nation’s present and its primitive state; to lose this connection will deprive the people of the best part of their spiritual life.

In short, his three stage developmental process is that first he sees principles of law deriving from the conviction of the people; second, law reaches its pinnacle, with juristic skills which he calls the “political element in law” added to these conceptions. It is at his stage that codification is desirable, to retain the perfection of the system. The third stage is one of decay.

What idea in Savigny’s theory still have value for our times jurisprudence? His distinction between the ‘political’ and ‘technical’ elements in law is essentially the same to the modern time thinkers like Cardozo. The principle also provides greater latitude to Law professors in assisting technically the development and improvement of law, which is common in today’s world. It seems in today’s Ethiopia law faculties are given such a chance in drafting and improving existing laws.

**Evaluation**

The whole concept of Savigny’s discussion of the *Volksgeist* is said to be obscure. The whole concept of the work, the spirit of the people, is difficult to accept for any less than homogenous, or pluralistic, society. Nineteenth century Germany may have fitted the concept, but it is relatively rare to find societies of which the same can be said. Some fundamentalist Muslim societies might fit his model.

**SIR HENRY SUMNER MAINE.**

**The Changing process of Ancient Law**

The German historical school had a profound influence upon jurisprudence and legal scholarship, and even some influence on legal practice, in England and in the United States. England already had its own historical jurists in Coke, who glorified the English common law as at once the common custom of the realm and the embodiment of reason. Moreover, Blackstone, whose theory that judges only find in? The law is akin to the popular-spirit idea of Savigny.

The chief representative of the historical school in England was Sir Henry Maine who was for many years professor of civil law at Cambridge. Maine partly accepted Savigny’s view of the importance of primitive legal institutions when he said that the rudimentary ideas of early law are to the jurist what the primary crusts of the earth are to the geologist. “They contain,” he said, “potentially all the forms in which law has subsequently exhibited itself.” While this may seem to be the *Volksgeist* garbed in a scientific analogy, Maine departed from Savigny in two important respects: he believed in stages of legal
evolution, in which the primitive ideas might be discarded; and he sought to discover by comparative studies of different systems of law the ideas which they had in common.

With regard to jurisprudence Maine’s chief contribution is his analysis of legal change. After due study of laws of the ancient world, Maine comes to the conclusion that the development of legal systems followed a pattern of six stages. Static societies passed through the first three stages; progressive societies then moved through at least some of the latter three. Maine stated that the origins of legal development can be traced to religion and ritual. This can be seen in societies that never developed literacy, at least so far as the majority of their population are concerned. Their ritual is used as a means of education in circumstances where it would be futile to reduce instructions into writings. Examples of ritual washing may demonstrate this point. From this initial pool of ritual and religion flowed the stream of the development of the law. The pattern of development that Maine was so concerned to identify was as follows.

A. Royal Judgments

Royal judgments, divinely inspired, were the first stage. This was a primitive stage which should not be confused with the command of a sovereign as it was not a law making process, but dispute settlement. An example is the story of King Solomon and the two mothers, proposing to divide the live baby in two as the mothers could not agree on who was the real mother. There was no rule or principle that King Solomon was applying. Within the context of Maine’s theory it can be observed firstly that it was to King Solomon that the parties turned for resolution of the dispute and secondly that the was divinely inspired in order to draw out the real mother who could rather have her child live but away from her than die.

B. Custom

Custom and the dominion of aristocracies follow royal judgments; the prerogative of the king passes to different types of aristocracies (in the east religious; in the west, civil or political), which were universally the depositaries and administrators of law. What the juristical oligarchy now claims is to monopolize the knowledge of the laws, to have exclusive possession of the principles by which quarrels are decided. Customs or observances now exist as a substantive aggregate, and are assumed to be precisely known to an aristocratic order or caste (interestingly in England it was judges). This is the stage of unwritten law; knowledge of the principles is retained by being kept by a limited number.

C. Codes

The third stage is the period of codes. This is when written and published laws replace usages deposited with the recollection of a privileged oligarchy. This is not an era of change, but rather a period at which, because of the invention of writings, the usage are written down as a better method of storage. In Roman law, the Twelve Tables, and in England the gradual move to written law reports, represent the code stage.

Static societies stop here and progressive societies move on. The major difference of the next three stages from the first three is that they are stages of deliberate change. Most of the changes in the content of law
in those first stages were the result of spontaneous development. But to move to the next step it needed a deliberate act which according to Maine consists of the following three stages.

D. Legal fictions

That is 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. Examples would be false allegations in writs to give a court jurisdiction.

E. Equity

The development of a separate body of rules, existing alongside the original law and claiming superiority over it by virtue of an inherent sanctity, is a second mode of progress and change. Such a body grew up under the Roman praetors, and the English chancellors.

F. Legislation

This is the final stage of the development sequence. It is the enactment of a legislature in the form of either an autocrat prince, or a sovereign assembly (parliament). These encasements are authoritative because of the authority of the body and not, as with equity, because of something inherent in the content of the principles.

With this background in mind, the following could be said of the historical approach to law as canvassed by Savigny:

a) The concept of received law is anathema;
b) Law is inferior to the custom of the people. Therefore, custom of the people must be their laws;
c) Law personifies the people, and signifies a paradigm of their values;
d) There is no universal law. The universality of law is limited by geography and culture;
e) Law is not static. It is amenable to development;
f) There is no law giver. Law comes from the people.

Criticism

In a single sentence, we may evaluate Maine’s contribution to jurisprudence by saying that while his conclusions have not been proved, his scientific and empirical method was the forerunner of much modern jurisprudence and sociology.

Some doubt the sequential development of a legal system of which Maine wrote. They argue that considerable latitude is inherent in the content of primitive people’s customary practice. It is not clear that primitive societies move through the first three stages, nor that they are static. Some studies of primitive tribes show use of legislation, for example. Nor is it clear that the Anglo-Roman experience of fictions and equity as the first two progressive stages is universally experienced. An evolution along the six-stage pattern should not be expected for every legal system.
UNIT 5

SOCIOLOGICAL SCHOOL OF LAW

The Sociological approach to the study of law is the most important characteristic of our age. Jurists belonging to this school of thought are concerned more with the working of law rather than its abstract content. Their principal premises are that the law must be studied in action and not in textbooks. They have been at work upon jurisprudence with reference to the adjustment of relations and ordering of human conduct which is involved in group life. They are concerned with the study of law in relation to society. They concentrate on actual social circumstances which gives rise to legal institutions. Sociological jurists…insist on the unity of the social sciences and the impossibility of the wholly detached self – centered, self – sufficing science of law. They insist that the legal order is a phase of social control and that it, cannot be understood unless taken in its whole setting among social phenomena.

Sociological school of jurisprudence has emerged as a result of synthesis of various juristic thought. The exponent of this school considered law as a social phenomenon. They are chiefly concerned with the relationship of law to other contemporary social institutions. They emphasize that the jurist should focus their attention on social purposes and interest served by law rather than on individuals and their rights. According to the school the essential characteristic of law should be to represent common interaction of men in social groups, whether past or present ancient or modern.

The main concern of sociological jurists is to study the effect of law and society on each other. They treat law as an instrument of social progress. The relation between positive law and ideals of justice also affects the sociology of law.

It would therefore be seen that sociological jurisprudence is a multifaceted approach to resolve immediate problems of society with tools which may be legal or extra – legal and techniques which promote harmony and balance of interests of society.

Sociological Approach – Nature and Meaning

Sociological approach towards study of law was a reaction and revolt against the analytical and historical school both of which regarded law as self – contained system – the former deriving validity of law from the sovereign – the law giver and the latter from the slow and silently flowing historical and cultural processes and forces. The sociological approach considers law as a social fact or reality to shape, mould and change society to sub-serve its needs, expectations and goals through law. The interrelationship between law and society and the study of community and of social phenomena, of group or individual interests and their realization ans fulfillment through law is the paramount concern of law. Of – course! The Sociological approach to the study of law is of recent origin. The other Schools have been more concerned with the nature of law and its source rather than its actual working, functioning and social ends which law strives to subserve. All the jurists who define law in relation to society in terms of ends which law serves and the interests which the law satisfies and the common good which the law seeks to achieve
Characteristics of Sociological Jurisprudence

The chief characteristics of Sociological Jurisprudence are as follows:

1. Sociological jurists are concerned more with the working of law rather than with the nature of law. They regarded law as a body of authoritative guides to decision and of the judicial and administrative processes rather than abstract content of authoritative precepts.
2. It considers law as a social institution which can be consciously made and also changed, modified or retained on the basis of experience. In other words, it synthesizes both the analytical and historical approach to the study of law.
3. Sociological Jurists lay emphasis upon social purposes and social goals and expectations which are the law subserves rather upon sanctions and coercive character of law.
4. Sociological jurists look on legal institutions, doctrines and precepts functionally and consider the form of legal precepts as a matter of means only to satisfy greatest good of the greatest number.

Background

Sociological approach to the study of law towards the end of the 19th century did not emerge in isolation. It was a reaction against the formal and barren approach of the analytical jurists and the pessimistic approach of the historical jurists. There was a dire need to study law not in mere abstraction, but in its functional and practical aspects. Further, on account of economic and social conflicts towards the beginning of 20th century led to growing disbelief in the eternal principles of natural law which had hitherto placed an idea of harmony before the individual. These various approaches appeared as a clog in the way of legal reform, social change and economic justice. The theory of inalienable natural rights was now being considered as an expression of outmoded laissez – faire philosophy. This led the States to expand the dimension of their activities to such matters as health, insurance, education, old age security and other form of social and economic aspects of welfare. Hence a new approach towards the study of law in relation to its ends, purposes and functions for ordering and regulating relationship between individuals and groups of individuals emerge which is described as the sociological jurisprudence.

Among the foremost writers who made an attempt to apply scientific methods to social phenomenon was Auguste Comte (1798 – 1851). He is known as the founder of sociology as a science. He laid stress upon empirical methods such as observation and experiment for the study of society. It is the task of sociology to provide methods, tools and a basis for purposeful and realistic appraisal of social phenomena which interact in society.

It is well known that the relations between individual, society and State are never static, they have always been changing with the exigencies of time and needs of the society. Therefore, various theories regarding
their relationship have also changing. For instance, the early society societies were governed by customs which were only a social sanction. Then came the period of the supremacy of the Church i.e., the priestly class. To counter the growing influence of the Church, the secular State emerged powerful dominating all other institutions. The omnipotence of the State gave rise to the period of renaissance and the legal philosophers began to think in terms of freedom of individuals and their rights and liberties. This resulted into political upheavals giving rise to despotic rule i.e., Nazism in Germany and Fascism in Italy. As a result of this, there was need to review the legal theory for maintaining a balance between the State, welfare of the society and the individual interests. Finally, it was realized that socialization of law and legal institutions would perhaps best sub – serve the common good and interests of the society. Consequently, a synthetic approach to jurisprudence by evolving a new legal philosophy called the sociological school emerged out of the synthesis of historical and philosophical movement and the comparative study of legal system.

**ROSCOE POUND**

Pound was the principal advocate of the sociological based study of the law in the United States. His concern was to examine law in action as opposed to the topic of law in books. In a series of law review articles published between 1905 and 1923, Roscoe Pound of the Harvard Law School discusses different issues pertaining to the sociological concept of law. All his philosophy (Programs of Sociological Jurisprudence) is included and classified in to six main points:

1. The first is the study of the actual social effects of legal institutions and legal doctrines.

2. The second is sociological study in preparation for law making. It is not enough to study other legislation analytically. It is much more important, says this school, to study its social operation and the effects it produces when put into action.

3. The third point is study of the means of making legal rules effective. This has been neglected almost entirely in the past. But the life of the law is in its enforcement, and accordingly Pound considers it part of the jurist’s work to study the question of how best to bring about effective enforcement of law.

4. The fourth point is sociological legal history, that is, a study not only of how legal rules have evolved and developed, but also of how they have worked in practice and of the social effects they have produced and of the manner in which they have produced them.

5. The fifth point is the importance of reasonable and just decisions in individual cases. In general this school conceives of the legal rules as guide to the judge, leading him toward the just result, but insists that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties.

6. Finally, the sociological jurists stress the point that the end of juristic study is to make effort more effective in achieving the purposes of law.
If we compare sociological jurisprudence with the concept of the three other (Natural, Analytical, and Historical) schools the following characteristics may be emphasized:

- It is concerned more with the working of the law than its abstract content.
- It regards the law as a social institution capable of improvement by intelligent human effort, and it considers that it is the sociologist jurist’s duty to discover the best means of aiding and directing such effort.
- It emphasizes the social purposes which law subserves rather than its sanction.
- It looks upon legal doctrines, rules and standards functionally and regard the form as a matter of means only.

**Legal Education**

Roscoe Pound, who ranks in America as the founder of “sociological Jurisprudence” was the first to turn Holmes’ criticisms into complete new program. Pound and his school saw a legal system as being a phenomenon which intimately interacts with the prevalent political, economic, and social circumstances in a given society and which constantly alters with them in a living process of development. They are not interested in the abstract content of rules or in the logical and analytical connections which may exist between them in a particular system. What they want to discover about legal rules is what concrete effects in social reality they aim to produce as soon as they become “law in action” by the behaviour of judges or administrative authorities.

Thus for Pound, law is in the first place a means for the ordering of social interests, and the judge in balancing out these interests should be a “social engineer” who can only perform his task properly if he has an accurate knowledge of the actual circumstances on which his decision will have an effect.

Pound in his first works attacked the existing legal education which depended more on theoretical concepts and only inward looking. He insisted that teachers of law should have a wider knowledge.

**The Theory of Interests**

In the effort to accomplish the program of sociological jurisprudence, Pound believes that the first problem confronting society is the establishment of his theory of interests as a functioning part of the legal order. The development of this theory occurred in two steps: the formulation of the jural postulates, in 1919, followed by the announcement of a classification or scheme of interests two years later. Pound claims this to be his most valuable contribution to jurisprudence. While recognizing certain valid criticisms, he has defended it vigorously as the most workable means yet devised for sound "social engineering."
The jural postulates consist of five generalized propositions about the law which are supposed to serve as major premises under which all valid principles of positive law, both civil and criminal, may be comprehended or subsumed. They are grounded in human nature and conduct as expressed in Pound's interpretation of American judicial decisions on the appellate court level and represent his conception of the jural ideals of our society.

LEON DUGIT

Leon Duguit was a respected French jurist, dean of the law school at Bordeaux, and author of a series of works which criticize traditional juristic opinions and ideas. The first work in which he began to develop the basis of his doctrine was written as a response to The System of Subjective Public Laws by the noted German jurist George Jellinek. In this and in later works Duguit criticizes the juridical conception of the state; he also criticizes the very notion of subjective law, rejecting it as an individualist, metaphysical construction inherited from Roman jurists and medieval scholastics and received through the French Revolution. This construction is outdated, according to Duguit, and is incapable of incorporating the complex and diverse relationships currently existing between individuals and a collective group. Subjective law leads only to fruitless and endless arguments.

Having distinguished between subjective law and the realm of jurisprudence, Duguit identifies the only undisputed norms of objective law as those positive and negative obligations which are imposed on people who belong to the same social group. Duguit follows the views of the French sociologist Emile Durkheim and considers that norms of objective law are based on a law of social solidarity. Social solidarity occurs when people have common needs which can be satisfied jointly, and when people have different needs and different abilities which can be satisfied through the exchange of mutual services.

Proceeding from these propositions, Duguit, à la Kant, tries to replace laws with obligations: There is no law other than the law to fulfil ones duty. Even private property ± the most characteristic institution of individualist, bourgeois society ± is presented as a social function by Duguit: The law of property should be understood only as the power of individuals who are in a specific economic position to fulfil the obligation of the social purpose required of their social status.

Rejecting the notion of the state and the juridical doctrine of sovereignty as a special trait of 3state will , Duguit considers the state as the person or group of persons who actually possess power (the rulers):

The state is simply the product of the natural differentiation of people who belong to the same social group ... the will of the rulers has no more juridical value than the will of the ruled ... In every human society, to a greater or lesser extent, one can say that a state exists when one group of people has coercive power.

Duguit does not object to the figurative assertion that the state is 3the executioners axe and the gendarmes sabre . But having exposed the state as naked power, and having tarnished its mystical cloak of sovereignty, Duguit quickly opens the doors of juridical ideology. This ideology appears in the form of 3self-imposed legal norms , predicated by the state and standing above the state. Both the rulers and the ruled are in the same degree under the command of a supreme legal norm produced by social solidarity.
Only that which is lawful (and legal), in the relationships between the rulers and the ruled, corresponds with this supreme norm.

The rulers possess the most power in any given society; consequently, the legal norm requires them to use their power for the attainment of social solidarity. Duguit proceeds with the idea that solidarity occurs through the division of labour and that it assigns each person a social obligation. He thus welcomes all types of corporations, associations, professional syndicates; various business organizations, clerical and mercantile unions etc., and see in them the phenomenon of social integration: this is how the amorphous mass of the nation acquires a definite juridic structure, which is composed of people united by their common needs and professional interests. Duguit even dreamed of a special professional representation which would supplement and counterbalance a parliamentary representation that only reflects the power of political parties.

Duguit repeatedly declared himself to be an opponent of socialism but, nevertheless, his theories have often been classified as socialist. After the October Revolution even our jurists attempted to depict Duguit's doctrine as a practico-juridic basis for socialist revolution. Duguit's sympathies for corporate and estate representation convinced some of his opponents that the practical conclusion of his conception was the system of soviets. In this respect, of course, Duguit subjectively exhibits great hatred and utter incomprehension for the October Revolution and the Soviet Republic as he demonstrates in the second edition of his Constitutional Law. Objectively, also, his theories are an attempt to conceal and disguise the contradictions of capitalism. He depicts capitalism, driven by the craving for profit and the vicious class struggle, as a collectively founded for the basis of social solidarity. He presents capitalist property as the fulfilment of a social function, and the imperialist and militarist state as an institution that is transformed from an authoritarian power to a participant group.

Duguit's scholarship is a, sure sign, on the one hand, that individualist doctrines have lost their ideological pathos and yet are still incapable of fascinating anyone. And this is despite their dogmatic advantages: the dogmas of law and sovereignty and subjective law remain fashionable notions, and criticism here would not produce any radical change. On the other hand, Duguit incarnates the period of finance capital this has made free private property a problematic notion, and it is overtly apparent on the political scene in the form of the real power of large capitalist corporations. These corporations collaborate with opportunist union leaders, when the need arises, and ignore the outdated fiction of classless state sovereignty.

⇒ Doctrine of Social Solidarity

Duguit’s theory of social solidarity was based on the fact that interdependence of man is the essence of the society. Every individual has his existence owing to his membership of the society. Each individual cannot procure the necessities of life himself. Therefore, each in his turn has to depend on other for his needs. The ultimate end of all human activities is to ensure the interdependence of men. Duguit further stated that law also serves the same end. He pointed out that law is a rule which men obey not by virtue of any higher principle but because they have to live as members of society.
He rejected the traditional notions of rights, sovereign, state, public and private law, legal personality as fiction and unreal because they were not based on social reality. His entire thrust was on mutual cooperation and mutual interdependence between individuals, groups and societies according to the principle of division of labour for the purpose of social cohesion.

⇒ **Law to secure and serve Social Solidarity:**

According to Duguit, the essence of law is to serve and secure social solidarity which is duty oriented as it expects individual to perform their obligations as a member of the community. There is therefore, no scope for natural or private rights. Thus Duguit stated that law consists of duty which is the basis of cooperation and rejects the abstract concept of right which is the source of conflict. In other words, Duguit exhorts everyone to perform his duties to the society which would help development of co-operation and social solidarity. For Duguit, law is not a body of rights. The only real right of man in society is to do his duty. Law is essentially an objective social fact concerned with the relation between man and man on one hand, and man and state on the other.

⇒ **Theory of Justice:**

Duguit defines justice in terms of fulfilment of social needs and obligations. According to him, law must seek to promote social solidarity so as to attain maximum good of the society as a whole. State regulations should be directed towards achieving the ends of social and economic justice for common good. He considers justice as a social reality its roots being in the society itself and not in the will of the sovereign.

⇒ **Duguits views about the State and its Functions:**

Duguit rejected hypothetical notions about the state and sovereignty and built his own theory which was pragmatic and scientific in character. He attacked state sovereignty and held that state is in no way different from other human organisations and therefore, its activities should be judged from the point of view of social solidarity and common good of the society. He favoured minimisation of State functions and decentralisation of the state power. He contended that legislators do not make law but merely give expression to judicial norms formulated by the consciousness of the social group. Duguit firmly believed that the state exists for performing the functions which promote social solidarity and note for the exercise of sovereignty.

⇒ **Duguits Contribution to the Sociological school of Jurisprudence:**

The substantial contribution of Duguit to juristic thought is that he denounced the omnipotence of the state which led to despotism and totalitarian rule. He also rejected the notion of natural rights of men which made individual hostile to larger interests of the society. His over-emphasis on duties rather than rights was directed towards greater inter co-operation between individuals of a society. Duguit used law as an instrument to promote justice. By rejecting the notion of State sovereignty, he subordinated the state to the social needs and asserted that all State actions are to be tested by the courts with reference to social solidarity.
Thus he acknowledged the superior role of the judiciary in adjudicating vires of State actions or laws. The impact of Duguit's legal theory was so great that the later jurists were inspired to propound their own theories relating to law and jurisprudence.
UNIT 6

LEGAL REALISM

Legal realism had its origins in the twentieth century. The term realism is used in many ways to characterize intellectual and philosophical movements. In the art of painting, ‘realism’ refers to portraying a picture exactly as what the painter saw without idealizing it, choosing his subject from what was the ugly and commonplace of everyday life. In literature ‘realism’ designates an approach that attempts to describe life without idealizing or romantic subjectivity.

Similarly, legal realism attempts to describe the law without idealizing it, to portray the law as it is – not how it should be or how it was depicted in traditional theories that ignored the law’s actual day-to-day operation – and to reform it. American legal realists were concerned with portraying actual practice: the centrality of the court and the unimportance of rules in statute books for predicting what courts do. They sought to make law an empirical science. Scandinavian legal realists wanted to expose and eliminate the hidden basis of the law – the metaphysical assumptions of orthodox legal thought – and to base law on sociological and psychological facts. The difference is that the Scandinavian realists were interested in the legal system as a whole rather than the narrow area of interest of the courts adopted by the Americans.

The relation of legal realism to natural law theory is straightforward: Americans reject appeals to natural law. Legal realists are not legal positivists in the classical sense of Bentham and Austin, since they do not embrace the idea of command theory.

6.1 AMERICAN REALISTS

6.1.1 Pragmatist approach

Oliver Wendell Holmes and John Chipman Gray are greatly considered as the two mental fathers of the American Legal Realism. Prominent are also other writers in this class of philosophy. In this discussion, besides the two giants, we shall in particular investigate the philosophical approaches of Karl Llewellyn and Jerome Frank.

As with many new attitudes and schools of thought, the American brand of realism was a reaction to an earlier school. Especially, it was against school of formalism, which concentrated on logical and a priori reasoning, and was thus thought to be only theoretical and not practical or pragmatic. Formalism, so the realist thought, had no regard to the facts of life experience. Realism attempted to be both practical and pragmatic, rejecting theoretical and analytical approaches to jurisprudential questions, and attempting to look at what it perceived to be the reality in the question: how does law work in practice?

At this juncture, it seems practical and relevant to raise briefly the idea of pragmatism. It is always considered that the American legal realism found its source in the pragmatism of William James. The pragmatism of William James, the general philosophy in the second and third decades of the twentieth century, was decidedly similar to realism in its approach.
In applying the doctrine to law, James anticipated the realist skepticism of legal rules as controlling factors in judicial decisions.

Pragmatism has, thus, stimulated a new approach to law, that “of looking towards last things, fruits, consequences or results. Generally speaking, how the rule of law works, not what they are on paper, is the theme of pragmatic approach to legal problems.

6.1.2 Law as prophesy of the court: Oliver W. Holmes

Oliver Wendell Holmes said,

- The prophesies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.
- The life of the law has not been logic, it has been experience

A. On the Nature of Law

It was the remark of Oliver Wendell Holmes, a US Supreme Court Judge. His predictive view of the law has greatest influence on American legal realism. Concerning his contribution, Patterson has (in his book, Jurisprudence, Men and Idea of Law) remarked that the aggregation of ideas which came in time to be known as American Legal Realism contained many which were either genuinely derived from Holmes or were inspired by his ripped-out aphorism. For legal realism the two most influential Holmes’ ideas were his prediction concept of law and his view that policies and prejudices have more to do with judicial decisions than the logical application of rules.

Holmes was a pragmatist in that he recognized the relevance of extra-legal factors. As early as his publication in 1881 of The Common Law Holmes in a famous passage attacked the view that the Common Law was an entirely valid manifestation of higher reason hovering over the troubled waters of the present, which could be concretized for the individual case by an act of perception on the part of an intellectually detached judge operating on logical and deductive principles:

\[
\text{The actual life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.}
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In speaking of the ‘bad man’ it is clear that Holmes was intending to include any person who is having to contemplate legal proceedings, whether (as a bad man) as an accused in criminal proceedings or a litigant, whether plaintiff or defendant, in a civil action. When the bad man hires a lawyer, all he wants is to know the practical consequences of doing a certain act (which might be considered illegal). The bad man is pragmatic in that he wants to know the consequences not because he is a moralist, but because he knows there is what one may call the law, a force he cannot challenge as applied by courts.
B. On morality

Legal positivists, such as Austin argued that without the distinction between law and morality, legal thinking became confused. Holmes agreed with the legal positivists on this point. Indeed, it was Holmes’s belief that if all words with moral connotation were eliminated from the law, the law would gain in precision.

C. Criticism

The limitation of this notion that the essence of law consists of predictions have been well explored. It has been pointed out for, example, that:

i. This approach disregards the rules and laws that establish the judiciary itself.

ii. It also left out multitude rules particularly in the field of public administrative law that are properly described as law but which do not lie in the field of litigation and therefore are not a matter of prediction.

6.1.3 Centrality of the judge: John Chipman Gray

A. The Centrality of the Role of the Judge

Another strand in American realism, linked with the first but distinct from it, is that which emphasizes the significance of the role of the courts in any consideration of the nature of law. It is the role of the judge that is central to a proper understanding.

This view was carried to its limit by J. C. Gray, who regarded all law as judge-made law. Statutes (legislations made by parliament) are not laws by virtue of their enactment. They only become law when applied by a decision of the courts. Only then does a legislative enactment spring to life and acquire actual force.

In his book, *The Nature and Source of the Law*, Gray defines law as follows:

*The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.*

Legislation is therefore no more than a source of law. According to his view, it is not a law until it had been interpreted by the courts, for “the courts put life into the dead words of the statutes.” Hence by relegating statutory legislation from the center of the law and putting it as one form of source of the law, he puts the judge in the center, instead.

Gray distinguishes ‘the law’ from ‘a law’. ‘A law’ ordinarily means a statute passed by the legislature of a state. ‘The law’ is the whole system of rules applied by the courts. Thus, Gray considered ‘a law’, that is, a statute passed by the legislature (as well as precedents, custom, and morality) as source of the law not the law itself. Thus, statute, precedent, custom, and morality are on Gray’s view, the basis for the
rules that the courts lay down for making their decision. This means all of them are not binding. The judge’s choice is what matters.

Accordingly, one may conclude that the Austinian sovereign lies in the person of the judge. In his book he cited Bishop Hoadley’s words which say: “Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the person who first wrote and spoke them.” Carrying his definition to its full logical extent, Gray concluded, “The law of a great nation means the opinions of half-a dozen old gentlemen,” for “if those half-a-dozen old gentlemen form the highest judicial tribunal of a country, then no rule or principle which they refuse to follow is Law in the country.”

Gray offers two lines of evidence in support of this argument. First, he points to the common circumstances where a situation before the court is entirely novel. In the absence of statutes, precedents, or custom on the issue, there is absolutely no doubt but that the court will still come to a conclusion and state ‘the law’ governing the matter. Second, Gray points to the mutability of law itself through judicial decision making. Both through review of trial court decisions at the appellate level, and through appellate reconsideration of its own prior decisions, the ‘law’ becomes very much a product of judicial function.

B. On analytical Jurisprudence

Irrespective of the difference on centrality of the sovereign on Austin’s concept of law, and the centrality of the judge in Gray’s philosophy, Gray warmly accepts the sharp distinction of science of law and other forms of ideologies.

Criticism

As discussed above, Gray suggests that until a statute had been enforced by a court, it was not a rule at all, but only a source of law. Likewise, the power of an appellate court to overrule its precedents, and the power of any court to interpret precedents, led Gray to a similar conclusion that precedents are not law but merely sources of law. Yet he defines law as “the rules that the courts……lay down for the determination of legal rights and duties.” Thus he was led to the curious position that the rules laid down by a court in deciding a case are “the law” for the case but are only sources of the law for the “next case.”

Another criticism observed by Patterson goes as follows. By making precedents (and statutes for that matter) as sources of the law, rather than the law itself, Gray did not classify or differentiate them from other lesser sources of law such as, opinions of legal experts and principle of morality. To place these latter on the same plane with the case law of the highest court of the jurisdiction in which the “next” case is to be decided, is misleading.

A third criticism provided by Michael Doherty is that Gray’s definition of the law denies the facilitative function of certain statutes, such as, for example, the Companies Act (any law that incorporates a company). One does not go to a court in order to incorporate a company, and yet the procedures and requirements for doing that are prescribed in statute.
6.1.4 Rule Skepticism: Karl Llewellyn

A. On the nature and purpose of law

Karl Llewellyn is another realist jurist in the American realism movement

Holmes and Gray gave the power of making law to the judges of higher courts, but Llewellyn widens it to all officers of the law. In fact, within the decade, Llewellyn subsequently disagreed with himself, and suggested that no definition of law has really proved adequate to the task. Law for Llewellyn was a means for the achievement of social ends and for this reason it should not be backward looking for its development but should be forward looking in terms of moulding the law to fit the current and future needs of society. Furthermore, realists should be concerned with the effects of law on society and he insisted that law should be evaluated principally in terms of its effects.

B. Rule Skepticism

Llewellyn is described as “rule skeptic” in that he distrusts rules as laws. Jerome Frank (another American jurist) called this aspect of realism as ‘rule skepticism’ – skepticism as to whether rules, if they exist, in practice play the part traditionally ascribed to them. For Llewellyn, legal rules do not describe what the courts are purporting to do nor do they describe how individuals concerned with the law behave. Legal rules as found in books and emphasized in judicial decisions do not accord with reality. Rules, as described in books and judicial decisions, have essentially taken on a life of their own, and as such bear little resemblance to the actuality of legal process. Legal rules are not the ‘heavily operative factors’ in producing the decisions of courts although they appear to be on the surface. The realist should be concerned with discovering those factors that really influence judges, and judges in return should be more open about using them.

C. Functions of Law

The requirement that law must be evaluated in terms of its consequences led Llewellyn to developing a sophisticated analysis of the purpose of law in his later works. In one of his works, My Philosophy of Law, Llewellyn described the basic functions of law as ‘law-jobs.’ He lists them in five groups as follows:

1. The disposition of trouble cases (wrong, grievance, dispute), which he likened to garage repair work. The continuous effect was to be the remarking of the order of society.
2. The preventive channeling of conduct and expectations so as to avoid trouble, and together with it, the effective reorientation of conduct and expectations in a similar fashion. This does not mean merely, for instance, new legislation; it is instead, what new legislation is about, and is for.
3. The allocation of authority and the arrangement of procedures which mark action as being authoritative; which includes all of any constitution, and much more.
4. The net organization of society as a whole so as to provide integration, direction and incentive.
5. Juristic method as used in law and the settlement of disputes.
The first three jobs ensure society’s survival and continuation, whilst the latter two increase efficiency and expectations. One may disagree with Llewellyn’s list of the jobs of the law but they do provide a more holistic approach to law making and judicial activity than others. You can also compare the list with Fuller’s inner morality of laws.

D. Characters of Realism

By analyzing the realist movement in America, Llewellyn came up with a list of characteristics of the American legal realism. Hence, the realist concept of law can be better explained in the following ways:

1. The conception of law in flux, of moving law, and of judicial creation of law.
2. The conception of law as a means to social ends not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other.
3. The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs re-examination to determine how far it fits the society it purports to serve.
4. The temporary divorce of Is and Ought for purpose of study. By this Llewellyn means that whereas appeal must always be made to value judgments in order to determine objectives for inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain as largely as possible uncontaminated by what the observer wishes might be or thinks ought (ethically) to be.
5. Distrust of traditional rules and concepts insofar as they purport to describe what either courts or people are actually doing. Here, the emphasis is upon rules as ‘generalized predictions of what courts will do.’
6. Distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions. This involves the tentative adoption of the theory of rationalization for the study of options.
7. The belief in the worthwhile-ness of grouping cases into narrower categories than has been the practice in the past.
8. An insistence on evaluation of any part of the law in terms of its effect, and an insistence on the worthwhile-ness of attempting to ascertain these effects.
9. Insistence on sustained and pragmatic attack on the problems of law along any of these lines.

All of these did not being to Llewellyn, but to all of the preceding realists we discussed. For example, Gray’s theories are readily evident under numbers 1 and 6 above; Holmes’ influence is apparent in all nine, and in particular in 2 and 8; Pound’s ideas are particularly obvious in 1, 2, 3, 5, 6, and 8; James’ influence is manifested in 2 and 8.

6.1.5 Fact Skepticism: Jerome Frank

A. On Rule skepticism

47
An NGO working in the field of Human Rights and Legal Education.
Judge Jerome Frank categorizes the whole realist movement into “rule skepticism” and “fact skepticism.” As shown above, Llewellyn and others grouped under the former class, and Frank himself in the latter. According to rule skepticism, those formal rules found in judicial decisions and in books, were unreliable as guides in the prediction of decisions. The fact that such a multiplicity of rules exists and that some can lead to conflicting results may mean that, in practice, in reaching a decision a judge does not explore the whole corpus of the relevant law, the statutes and the earlier cases, and from these by a process of distillation find the principle that guides him to the correct decision. He may pretend to do this, and his judgment may be written in a way that suggests that he has done this. But it may be that what has happened is that the judge has thought about the matter, decided who he thinks has the best case, and then gone to his law books to work out the chain of reasoning that will lead to his predetermined conclusion.

Dear reader, Can you see to what extent the realists go? Frank is saying that he has a doubt if the judge can do all the research before decision. In the common law a judge has to read a huge amount of case books and maybe also statutes. Jerome Frank, he himself being one of the federal judges, is saying that judges in reality do not go all the way. They decide first based on the arguments and evidences provided by both parties, and then search for statute or case to support his reasoning.

Thus the main thrust of Frank’s attack was directed against the idea that certainty could be achieved through legal rules. This, in his view, was absurd. If it were so, he argued, why would anyone bother to litigate? To strength his argument he gave an example from the US Supreme Court cases. In 1917 the court ruled the validity of a certain statute. But in 1923, by majority vote, the court ruled that the statute was invalid. In between the two years judges were changed. He said that the answer to the validity of the statute turned, not on the certainty of the applicable rule, but on the personnel of the court. He said that this is natural. We want the law to be certain. But this cannot happen. It is only our deep need for security and safety, like children who place their trust in the wisdom of their fathers that we want to rely on the law. We should, he urged, grow up.

B. On Fact Skepticism

But Frank expounded a theory more extreme than the above approach. Judge Frank has persuasively argued that the greatest uncertainties of the judicial process are not in the law-finding but in the fact finding part; or at least, primarily in the witness-jury part. He points out that the assumption that a fat-trial is intended to bring out “the truth” is contradicted by the “fight” theory, that the best way to get the truth out is to have two skilful advocates hammering away at each other’s witnesses. The contradiction comes when in their patrician zeal the advocates distort or cover up the truth.

Hence, the chief reason why legal rules do not more adequately perform the principal tasks they are supposed to do –guide and predict the decisions of trial courts-is, he maintains, because of the uncertainty as to what facts the trier of fact (especially the jury) will find as the ones to which the legal rule or principle is to be applied. A man in possession of real property has a right to use “reasonable” force in repelling willful intruders, but how can he tell, when confronted with an intruder, what a jury will subsequently find to be “reasonable” force? Thus, one of the supposedly securest of legal rights in...
American law, a basic part of the ownership of real property, is rendered insecure by the uncertainty as to what the trier of fact will find.

But why do the others fail to see that? Because the rule skeptics see only the practice of the higher courts, the appellate and supreme courts. Frank underlines that in the lower courts prediction of the outcome litigation was not possible. The major cause of uncertainty is not the legal rule, but the uncertainty of the fact finding process. Much depends on witness, who can be mistaken as to their recollections; and on judges and juries, who bring their own beliefs, prejudices and so on, into their decisions about witness, party etc. It is not unusual for the jury to give a decision (guilty or not-guilty) which is not expected and sometimes surprising.

Further, the uncertainty can also be found in the process by which a judge determines a particular fact to be a material fact. This means whenever the judge decides a case he weighs facts and chooses the material which as very relevant for his decision. Hence, the argument is that different judges may come to different outcomes of same case because of application of different facts.

6.2 SUMMARY

The realist legal movement which originated and dominated in the United States focuses on the role of the court as opposed to the positivist school which emphasizes the sovereign. The role of the judge differs from jurist to jurist as discussed above. But generally all realists opposed any formalism approach to law. For realists the law is unpredicted and highly biased by the thinking of the judge.
UNIT 7

ECONOMIC APPROACH OF LAW

The Marxian concept of law is entirely opposed to the Schools of Jurisprudence hitherto considered. Law, according to Marx, is intimately associated with the nature of the State. He does not accept the view that law is the expression of the will of the people or reflection of the principles of social justice or the result of habits and customs or the social needs it serves.

It is, on the contrary, merely an expression of the will of the State, the expression of the material form of life in that State, and in a class society it is the will of the ruling class. According to Vyshinsky, “Marxism-Leninism gives a clear definition (the only scientific definition) of the essence of law.

It teaches that class relationship (and, consequently, law itself) is rooted in the material conditions of life, and that law is merely the will of the dominant class elevated into stature.”

In a Capitalist State, the law is only the tool of the State to maintain and safeguard the interests of the capitalist class, a dominant group in society. In a Socialist State the workers are the ruling class and, thus, law must be the safeguard of the proletarian State against the enemies of Socialism, and a tool for the construction of a Socialist Society.

There is an element of truth in what Marx says, but it is not the whole truth. The Marxian view of law does not accept other refinements connected with the State and law. Moreover, law for Marx is a vehicle for destroying Capitalism and constructing Socialism.

As soon as it achieves its purpose the State “withers away.” We do not accept this conclusion. For us, the State is the life-breath of human existence and whatever shape a government may take, the State shall ever endure. Its laws hold society together for the promotion and achievement of the all-round happiness of man.

Karl Marx and Friedrich Engels

Both of them are considered to be the founders of the greatest social and political movement which began in 19th century and flourished in 20th century as a political philosophy in Eastern Europe which is the erstwhile Soviet Union and influenced all the decolonized colonies of the world. Tenets of their ideology are practised in China’s Political Philosophy.

Marx’s view of state and law was co-terminus with the understanding of society and social process. Marx’s originality of thought lies in the fact that he synthesized almost entire philosophical thought from Aristotle to Hegel.

The sociological understanding of the society led Marx to pronounce that the desired system should be a Communist Society based on rational planning, co-operative production and equality of distribution and most importantly, liberated from all forms of political and bureaucratic hierarchy.
Marx condemned and rejected the state and money as *Bourgeois* concept. He believed that the proletariat has a historical mission of emancipating the society as a whole. For him, law seemed to be nothing more than a function of economy without any independent existence.

Following is his classification of society into various classes:

1. **The capitalists**

2. **The Wage Labourers**

3. **The land owners**

He said that the conflict between various classes of the society will eventually have to be resolved. The resolution of the conflict will take place in the shape of a Proletarian revolution. Once this revolution takes place, it will seize the power of the state and transform the means of production in the first instance into State property. The earlier state of exploitation and representative of class antagonism will be replaced by a state truly representative of society as a whole which means taking possession of means of production in the name of society. This would be at the same the last independent act of the State.

The interference of the State in social relations becomes superfluous in one’s sphere after a point of time and then ceases off itself. The government of persons is to be replaced by a different administration that would direct the process of production. However, the Proletarian revolution in order to reach the stage of Communism shall have to pass through various stages.

1. Establishment of a Proletarian Dictatorship which is essential to convert the capitalist modes of production into the Proletariat mode of production.
2. Stage of Nationalization of the property and all the capital modes of production.
3. Stage of Socialism as the property is in common ownership, the society at large shall be responsible for the production and distribution of goods.

The production of goods in common ownership, the distribution of commodities will have to follow “*from each according to his ability to each according to his needs*”.

However, inequalities will remain and hence, the need to distribute the goods will become inevitable. The ultimate stage is that of Communism and this state he imagined in his work called “*Critique of the Gotha Program*”.

He said that the Communist society will have to develop and emerge from capitalist society and in respects, it is bound to carry with it some marks of capitalist society.

“*Accordingly the individual producer will receive back what he gives to society, after deductions for government, education, and other social charges. He will give society his individual quota of labour. For example: the social working day consists in the sum total of individual working days; the individual*
labour time of the individual producer is the part of the social working day which he contributes; his share thereof. He will receive from society a certificate that he has performed so much work (after deducting his work for social funds), and with this certificate he will draw from the social provision of articles of consumption as much as a similar quantity of labour costs. The same quantity of labour as he will give to society in one form he will receive back in another.... The right of producers will be proportionate to the work they will perform: the equality will consist in the application of the same measure: labour." Higher Communist State- Concept of power and labour gets vanished. After production force increases, then there will be all round development of individual. This we get from “Communist Manifesto”. In higher form of communist state after enslaving subordination of the individual to the division of labour and anti-thesis between mental and physical labour has vanished after labour has become not only a means of life but life’s prime want, after the productive forces have also increased with the all-round development of individual. And all the springs of the co-operative wealth flows more abundantly”.

He further believed that the concept of state is a super structure in a capitalist state to organize and uphold class oppression. The bureaucracy and the executive in a state are for the managing common class and struggle waged by the society against each other. Law is not based on will but once the bourgeois state is overthrown by a proletariat, the proletariat state would come into existence. This state would be representative of social will of all the classes. The nexus between safeguarding the private property by a capitalist state will be replaced by a proletariat state which has nationalized all the private property. However, it is interesting to note that the state and statecraft remains an important and integral in the proletarian society.

Evgeny Pashukanis

He tried to remove the gloss on law and Marxism as experimented by the Marxist state. He believed that proletariat law practised in erstwhile Soviet Union needed alternative general concepts to reinforce Marxist theory of law. He believed that power is collective will as the ‘rule of law’ realized in the bourgeois society is to the extent that the society is represented by a market.

Karl Renner

He authored “The institutions of private law and their social functions”. This work of his utilized the Marxist theory of sociology to develop a separate theory of law. He believed that the Socialists and Marxists have failed to understand that new society as such societies have pre-formed in the womb of the old and that is equally true for law as well. According to him, the process of change from one given order to another is automatic.

Renner confessed that the concept of property in terms of Marx has not remained the same today. The property whether in socialism and capitalism has not remained an instrument of exploitation rather the natural forces of change have put property into various restrictions be it tenants, employees or consumers. However, he also said that the power of property remains whatsoever the political character of the state may be.