

ANALYTICAL SCHOOL OF JURISPRUDENCE

A step away from a **a priori** approach.

This school follows “**Jo hai so hai**” approach

Studying law ‘as it is’ not ‘what it is ought to be’

The analytical school fulfilled the object of “Clearing the heads and untying the knots” as envisaged by Austin.

Main Proponents of this school:

Bentham, Austin, Sir William Markby, Sheldon Amos, Holland, Salmond and **H.L.A Hart** from **England**,

Gray and **Hohfeld** From **USA**,

Kelsen, Korkunov from the **remaining continent of Europe**

Austin was the main proponent and founder of this school so it is also called “**Austinian school of jurisprudence**”

Analytical school is also called **positive school** because it is based on positivism, positivism comes from the word ‘positum’ which means ‘as it is’.

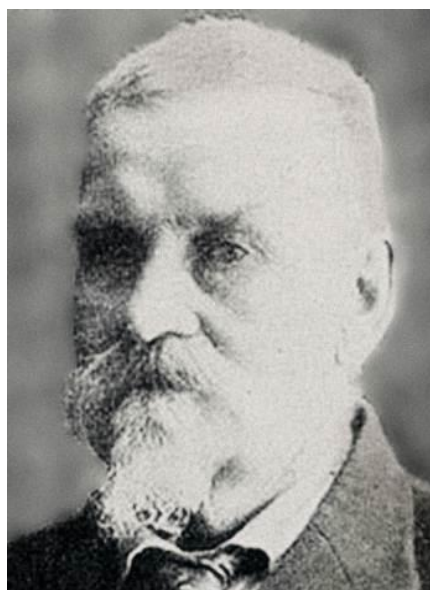
The Term Positivism was coined by ‘Auguste Comte’ in 1830, Auguste Comte was a French thinker who is considered as ‘Father of Sociology’

Positivists work with descriptive jurisprudence and they assert that law should be considered independent of what morality is. Because if we include moral values in law then law will lose its essential characteristic of being objective and it will then be reduced to something that is subjective.

Exponents of this school do not care about neither the past nor the future of law, they care about law as it exists today.

To say in brief what positivism says about law:

- Laws are commands (that is why this school is also called **imperative school** of jurisprudence, imperative means ‘giving an authoritative command’)
- Analysis of legal concepts can be done without involving sociological, historical and moral aspects.
- Law laid down is different from what the law that ought to be.



John Austin

Famous works:

- A plea for Constitution
- The Province of Jurisprudence Determined

Founder of
Analytical
School of
Jurisprudence

Founder of
English
Jurisprudence

Rejected natural law on the grounds that it is ambiguous and misleading. Claimed that there are no natural rights of individuals against state because all rights are created by state only.

Gave command theory of law also called the imperative theory of law which means all laws are commands of the sovereign backed up by sanctions. According to Austin even no Custom is law until given judicial Recognition. Austin really didn't give any importance to what ought to be, Imperative theory only considers what the law is.

His famous way of saying it is: 'the existence of law is one thing, its merit or demerit another'

But it's not like Austin disregards the existence of concepts like morality totally, Austin divides jurisprudence into **particular** and **general** jurisprudence.

General: The proper subject of general or universal jurisprudence is a description of such subjects and ends of law as are common to all systems, and those resemblances between different systems which are related to the common nature of man

Particular: Particular jurisprudence is the study of the legal system of a particular place. According to Austin, particular jurisprudence is the science of any actual system of law and the only practical jurisprudence is particular.

Read the next page together with the table given after the next page

Austin's Analysis of Laws

Austin divided laws into two categories:

- **Laws properly so called**
- **Laws not properly so called**

'Laws properly so called' are rules laid down for the guidance of an intelligent being by an intelligent being having power over him"

- 2 Types, **laws set by God** for human creatures; **laws set by men** for men
- The **laws set by men** can be divided into
 - o **'laws strictly so called'** (laws set by men as political superiors)
 - o **'laws not strictly so called'** (not command by sovereign with a sanction backing up the command)

'Laws not properly so called' are of two kinds:

Laws by analogy- rules of fashion, dictates of honour, rules imposed upon gentlemen by opinions current among gentlemen, and also international law.- These are laws to be followed, they are a species of command, but the repercussions of breaching these laws would be limited to gaining the disapproval of other members of the group. E.g. Must remove hat when entering church. Failure to do so will only be the disapproval of others. Similarly, when a State breaches international law, that State will only gain the disapproval of other States.

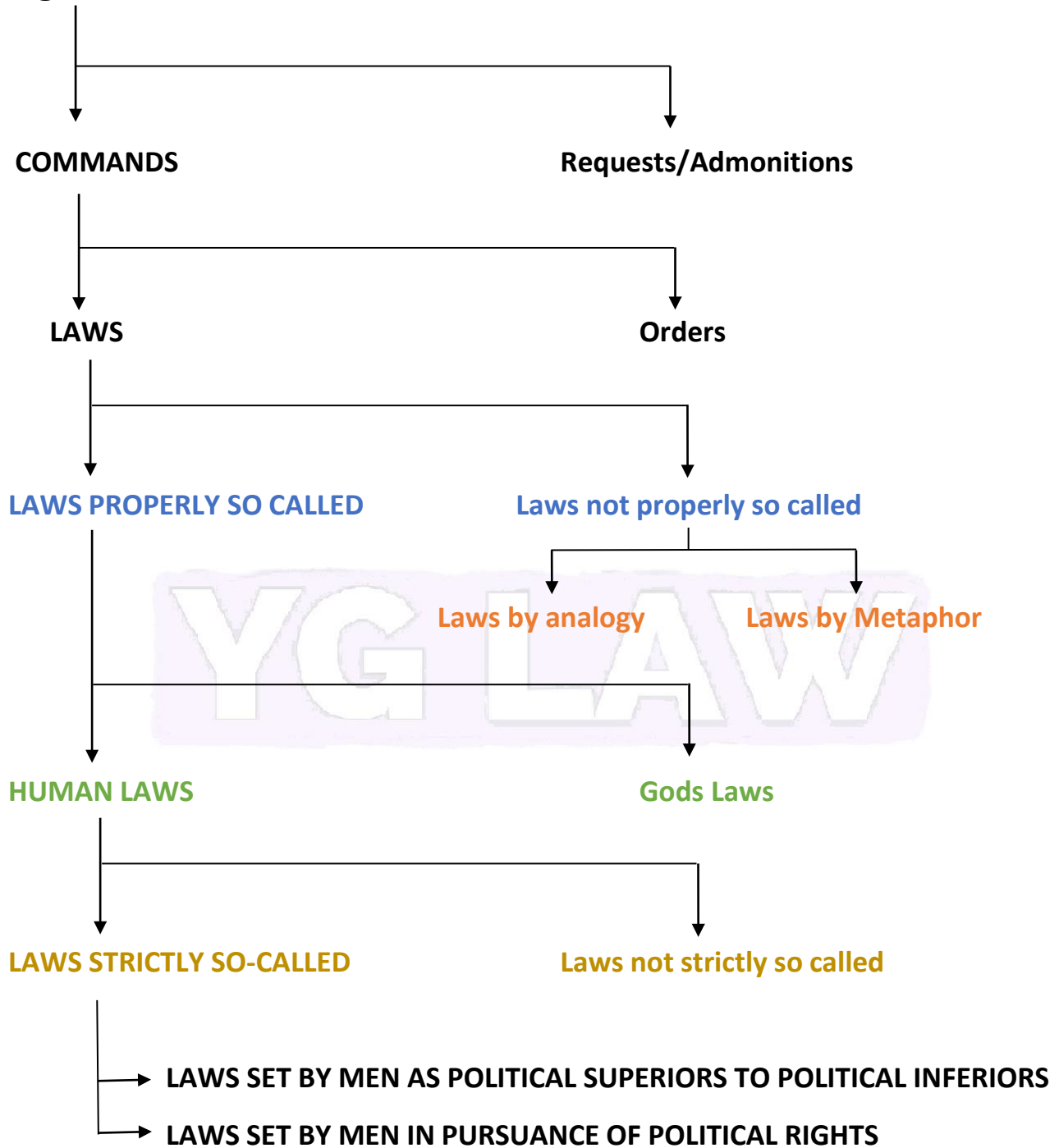
Laws by metaphor- laws that govern the growth and decay of vegetables and animals, or laws that govern the movement of inanimate masses. These laws are not a species of command and it is difficult to imagine how these laws can be broken.

Austin Differentiated law into two more categories across the categorization given above:

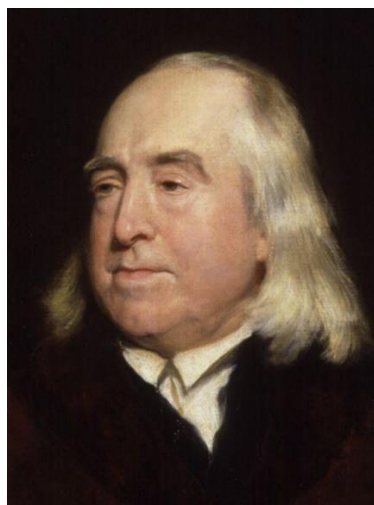
Positive laws which are **Laws strictly so called**

Positive morality which consists of **Laws not strictly so called** and **laws by analogy**

Significance of Desire



Jeremy Bentham



First person to use the term **International law**

Famous works:

- Limits of Jurisprudence Defined
- An introduction to principles of Morals and Legislations
- A Fragment of Government
- Of Laws in General (was later republished under editorship of HLA Hart)

He opposed the idea of natural law and natural rights (both of which are considered "divine" or "God-given" in origin), Called natural law as '**Nonsense upon Stilts**' or 'Anarchical Fallacies'

Divided Jurisprudence into

Censorial (what law ought to be)

Expository (What law is)

- **Authoritative** (Derived from Legislative power)
- **Unauthoritative** (Derived from text books on laws)

Unauthoritative may be local (relating to once country) or universal (without reference to any country) **Founder of Utilitarianism.**

UTILITARIANISM – Maximum pleasure to most.

Austin said that Utilitarianism was the method to judge values of laws, so Positivism and Utilitarianism have walked hand in hand.

A legislator according to Bentham shall measure the pleasure and pain coming out to the people for his acts and has to manage himself to pass the test of utility i.e. more pleasure than pain by his acts.

An Act is good or bad on basis of its consequences. Consequences regarding human pleasure and pain.

Consequentialist Ethics - Category of Ethics as per Bentham because we always look at the effects of an act to judge its merit

Nature has two sovereign masters of human kind, pleasure and pain.

Bentham in his studies elaborately analyses the types of pleasures and pains.

The pleasure and the pain can be quantified by the Utilitarian/Felicific/Hedonistic Calculus, which consist of 7 factors:

1. **Intensity**: How strong is the pleasure?
2. : How long will the pleasure last?
3. **Certainty or uncertainty**: How likely or unlikely is it that the pleasure will occur?
4. **Propinquity or remoteness**: How soon will the pleasure occur?
5. **Fecundity**: The probability that the action will be followed by sensations of the same kind.
6. **Purity**: The probability that it will not be followed by sensations of the opposite kind.
7. **Extent**: How many people will be affected?

Hedonism - Pursuit of pleasure, no matter how ever you get it, is the proper objective for all action.

Rule Utilitarianism (Mill) - The rule is tested which governs the classes of act

Act Utilitarianism (Bentham) - Each individual act is tested.

Preference Utilitarianism (economists) - Pleasure in Bentham's theory changed with any object of desire.

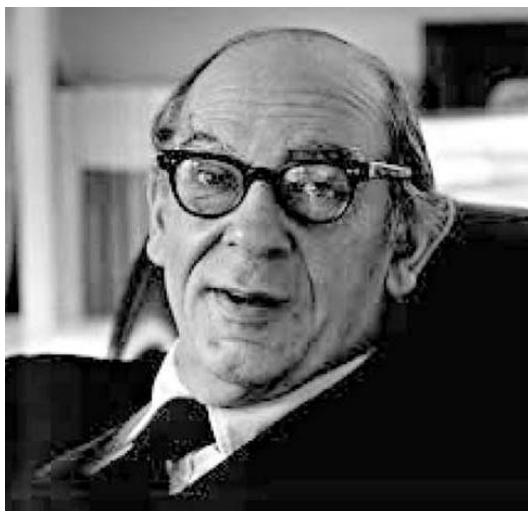
Negative Utilitarianism - more focus on preventing pains than promoting pleasures.

SOVEREIGN

Sovereign - When bulk of a society are in the habit of obedience to a determinate Common Superior and the common superior is not habitually obedient to a determinate human superior.

It is different from sovereign of Bentham, Bentham's Sovereign is not this restrictive in definition

Sovereign (Bentham) – Any Person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience and that in preference to the will of any other person



HLA Hart

Famous works:

The Concept of Law

Causation in Law

“Hart unlike his predecessors did tilt towards morality as being not an integral part of law but at the same time he believed that morality had an influence on law and he called this ‘the minimum content of natural law’”

Hart agrees in his book that Law is an Obligation, law makes certain human conduct non-optional or obligatory.

But he disagrees with law being just a command as per Austin’s theory. Three major reasons given by Hart as to **why Austin's theory is not adequate**.

I. ALL LAWS are NOT orders backed up by threats

- a. Sometimes laws confer powers
- b. Sometimes the result of not following the law is nullity and not sanction.
- c. Customs are laws and still not orders.

II. The notion of continuity of obedience is deficient, No continuity in idea of obedience.

III. Austin’s notion of sovereignty is deficient, unlimited power is not practical

HART’S CLASSIFICATION:

According to Hart, ‘Law consists of rules which are of broad application and non-optional character, but which are at the same time amenable to formalization, legislation and adjudication.’

Hart divided obligations as legal rules and moral obligations.

He further divided Legal Rules in two types:

- **Primary** - lays down duties (don't kill people – ipc, don't breach contract – law of contracts)
- **Secondary** - Provides for introducing new primary rules or altering or removing them.
 - o **Rule of Recognition** (way to know which rules are primary rules)
 - o **Rule of Change** (rule regarding how to change primary rules)
 - o **Rule of Adjudication** (To find out whether a primary rule has been broken or not)
 - o **Sanction imposing rules.**

Hart Fuller Debate (Positivist vs Naturalist)

Hart – Team positivists (there need not be any moral considerations in law, Law is law, whether to obey or not is a moral question but not considering it law just because it is immoral raises philosophical questions)

Fuller - a law is not a law if it doesn't follow a basic code, here the basic code is not based on ethical values but rationality. Hitler enacted immoral laws, should the people following the immoral laws while doing in justice to others shouldn't be punished, because according to Hart's theory, Nazi law fulfils all criteria of being a valid law, so all things done under Nazi regime should be okay?

Hart – Nazi regime is kind of an exception and also what exactly morality is? is not definable, it becomes very problematic to insert a moral element in deciding the validity of law.

Fuller - contends that there cannot be a specific definition of law also. Likewise, even morality cannot be defined accurately. Therefore, Fuller argues that because there is no precise definition for law and morality, it is pointless to argue that both of them are separate.

Conclusion: Fuller gives very convincing arguments about the relationship of law and morality but it raises practical questions also as to who will decide what morality is, because in our pluralistic society we may have dispute on what exactly is moral and what is not.



Hans Kelsen

Famous works:

Pure Theory of Law

Gave pure theory of law to identify the very essence of law, the one thing that makes something law.

Grotius in 1625 also seeking such a theory had written 'With all truthfulness I aver, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact.'

Kelsen interpreted law not like the command to the people as per Austin but as directions to the officials, to the police man to catch someone who is stealing, and to the judge to sentence the thief, and to the authorities to put him in jail and to the jailer to turn the key and lock the door.

Because Kelsen's work is translated from German many words have different interpretations:

- When it is written 'If A does x, B OUGHT to do y' here ought means B is REQUIRED to do y.
- When Kelsen uses the word norm, it means standard which should be followed.

What makes a simple act a legal act? The existence of a legal norm in respect of which the act is carried out.

Validity of every norm is based on another norm; it is an ascending hierarchy.

Above all norms is one basic norm – Grundnorm (fundamental norm)

Harris says '*The grundnorm is the hypothesis which closes up the arch of legal logic*'

Concretisation - The process of norms getting more and more specific moving from grundnorm to all other norms.

Kelsen is known to be doubly pure, because first of all he is a positivist who does not concern himself with content of law, a law for Kelsen is a law because of the reason how it was created, he excludes the moral factor and secondly it is pure of all sociological aspects also

